

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

CASE NO. 2020120698

PARENT ON BEHALF OF STUDENT,

v.

CORONA-NORCO UNIFIED SCHOOL DISTRICT.

DECISION

MAY 20, 2021

On December 18, 2020, the Office of Administrative Hearings, called OAH, received a due process hearing request from Parent on behalf of Student, naming Corona-Norco Unified School District. The hearing in the matter was continued on February 1, 2021. Administrative Law Judge Brian H. Krikorian heard this matter via videoconference on March 23, 24, 25, and 30, and April 1 and 2, 2021.

Attorneys Sheila C. Bayne and Deborah Reisdorph represented Student. Parent attended all hearing days on Student's behalf. Attorneys Summer Dalessandro and

Madisyn Ukraientz represented Corona-Norco. Dawn Rust attended all hearing days on Corona-Norco's behalf.

At the parties' request, the matter was continued to April 26, 2021, for written closing briefs. The record was closed, and the matter was submitted on April 26, 2021.

ISSUES

1. Did Corona-Norco deny Student a free appropriate public education, referred to as a FAPE, from March 2020 until the end of the 2019-2020 school year by assigning Student to distance learning without:
 - a. Continuing to provide in-person services, in-person; and
 - b. Evaluating Student or providing necessary accommodations to ensure Student was able to obtain a FAPE through distance learning?
2. Did Corona-Norco deny Student a FAPE for the 2020-2021 school year, through the date of filing of the due process complaint, by assigning Student to distance learning without:
 - a. Continuing to provide in-person services, in-person; and
 - b. Evaluating Student or providing necessary accommodations to ensure Student was able to obtain a FAPE through distance learning?
3. Did Corona-Norco deny Student a FAPE for the 2020-2021 school year and extended school year in its offer in Student's October 26, 2020 individualized education program, referred to as an IEP, through the date of filing by:

- a. Failing to develop an IEP containing an appropriate services model and enough services reasonably calculated to enable Student to receive educational benefit;
 - b. Failing to address Student's needs with reasonable academic goals in the IEP;
 - c. Failing to offer an appropriate services model and services to address Student's auditory processing sensory deficits;
 - d. Failing to offer intensive individual services in the form of a one-on-one aide;
 - e. Failing to give Student additional adequate goals and additional services not mentioned in the IEP that address his areas of need; and
 - f. Failing to address developing behavioral issues, diminishing academic skills, speech development, and other skills deficiencies displayed by Student?
4. Did Corona-Norco deny Student a FAPE by failing to address Student's regression as a result of being assigned to distance learning from March 2020 until the end of the 2019-20 school year and through the date of the filing of the due process complaint?

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 primary purposes of the Individuals with Disabilities Education Act, referred to as the IDEA, are to ensure:

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

The IDEA affords parents and local educational agencies the procedural protection of an impartial due process hearing concerning 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).) Student had the burden of proof on all issues. The factual statements in this Decision constitute the written findings of fact required by the IDEA and state law. (20 U.S.C. § 1415(h)(4); Ed. Code, § 56505, subd. (e)(5).)

Student was seven years old and in second grade at the time of the hearing. Student resided within Corona-Norco's geographic boundaries at all relevant times.

Student was eligible for special education under the categories of Autism and Speech and Language Impairment.

ISSUE 1: DID CORONA-NORCO DENY STUDENT A FAPE FROM MARCH 2020 UNTIL THE END OF THE 2019-2020 SCHOOL YEAR BY ASSIGNING STUDENT TO DISTANCE LEARNING WITHOUT CONTINUING TO PROVIDE IN-PERSON SERVICES, IN-PERSON, AND FAILING TO EVALUATE STUDENT OR PROVIDING NECESSARY ACCOMMODATIONS TO ENSURE STUDENT WAS ABLE TO OBTAIN A FAPE THROUGH DISTANCE LEARNING?

Student contends that beginning on March 13, 2020, and continuing to the end of the school year on June 3, 2020, Corona-Norco denied Student a FAPE by not providing Student appropriately tailored special education services in-person during the Covid-19 closure of school campuses, or by making accommodations to ensure he was able to obtain a FAPE. Student also argues Corona-Norco denied him a FAPE by not evaluating his ability to distance-learn. Corona-Norco contends it complied with state and federal mandates and provided Student special education using appropriate alternative supports and services given the school campus closure and inability to deliver services in-person.

A FAPE means special education and related services 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.) Parent and school personnel develop an IEP, for an eligible student based upon state law and the IDEA. (20 U.S.C. §§ 1401(14),

1414(d)(1); and see Ed. Code, §§ 56031, 56032, 56341, 56345, subd. (a) and 56363 subd. (a); 34 C.F.R. §§ 300.320, 300.321, and 300.501.)

Where a student alleges the denial of a FAPE based on the failure to implement an IEP, the student must prove that any failure to implement the IEP was “material,” which means that the services provided to a disabled child fall “significantly short of the services required by the child’s IEP.” (*Van Duyn v. Baker School Dist. 5J* (9th Cir. 2007) 502 F.3d 811, 822 (*Van Duyn*)). There is no statutory requirement of perfect adherence to the IEP, nor is there any reason rooted in the statutory text to view minor implementation failures as denials of a FAPE. (*Id.* at p. 821.) “A material failure occurs when there is more than a minor discrepancy between the services a school provides to a disabled child and the services required by the child’s IEP.” (*Id.* at p. 815.)

THE COVID-19 SHUTDOWN

Issues 1 and 2 arise out of the universal 2020 COVID-19 pandemic, during which California’s governor, consistent with the federal government and local governments, ordered a statewide shutdown of businesses and schools. The United States Department of Education initially issued guidance about the school shutdowns in March 2020. The Governor issued an executive order on March 22, 2020, granting local educational agencies the authority to close schools, accompanied by a directive to the California Department of Education, referred to as the CDE, to develop guidance that included “ensuring students with disabilities” receive a FAPE consistent with their IEPs, and local educational agencies meeting other procedural requirements under the IDEA.

A local education agency that offers “distance learning” opportunities for its general education students has a concomitant duty to “make every effort to provide special education and related services to the child in accordance with the child’s

individualized education program." (*U.S. Dept. of Educ., Questions and Answers on Providing Services to Children with Disabilities During the Coronavirus Disease 2019 Outbreak* (March 12, 2020) at p. 2.) School districts must "ensure that students with disabilities also have equal access to the same opportunities [as general education students], including the provision of FAPE," and, "to the greatest extent possible, each student with a disability can be provided the special education and related services identified in the student's IEP developed under IDEA." (*Ibid.*)

In subsequent guidance, the Office of Special Education and Rehabilitative Services, known as OSERS, recognized that educational institutions are "straining to address the challenges of this national emergency." (OSERS, *Supplemental Fact Sheet Addressing the Risk of COVID-19 in Preschool, Elementary and Secondary Schools While Serving Children with Disabilities*, (March 21, 2020) at p. 1.) OSERS assured school districts that "ensuring compliance with the IDEA should not prevent any school from offering educational programs through distance instruction." (*Ibid.*). OSERS noted the provision of FAPE might include, as appropriate, special education and related services provided through distance instruction provided virtually, online, or telephonically." (*Id.* at pp. 1-2.) OSERS reiterated its March 12, 2020 guidance on compensatory education. "Where, due to the global pandemic and resulting closures of schools, there has been an inevitable delay in providing services" IEP teams must make an individualized determination "whether and to what extent compensatory services may be needed when schools resume normal operations." (*Id.* at p. 2.)

The CDE issued similar guidance on March 20, 2020, and April 9, 2020. (*Cal. Dept. of Educ., Special Education Guidance for COVID-19* (March 20, 2020); *Cal. Dept. of Educ., Special Education Guidance for COVID-19, COVID-19 School Closures and Services to Students with Disabilities* (April 9, 2020).). The CDE advised that if a local educational

agency can continue providing special education and related services as outlined in the IEP or an agreed-upon amendment to the existing IEP, it should do so through a distance learning model. (*CDE Guidance* (March 20, 2020), *supra*, at Point 1.) The local educational agency could also consider alternative service delivery options such as in-home service delivery, meeting with individual students at school sites, or other appropriate locations to deliver services. The CDE also encouraged local educational agencies to work collaboratively with nonpublic schools and agencies to ensure continuity of services, including moving to virtual platforms for service delivery to the extent feasible and appropriate. (*Ibid.*)

When a local educational agency offers distance learning for instructional delivery instead of regular classroom instruction during a school site closure for students, it must also provide equitable access to those services for students with disabilities. A local educational agency must create access to the instruction, including “planning for appropriate modifications or accommodations based on the individualized needs of each student and the differences created by the change in modality such as a virtual classroom.” (*CDE Guidance* (April 9, 2020), *supra*, at Point 2). Educational and support services should be commensurate with those identified in the IEP for each student to ensure educational benefit. (*Ibid.*)

Local educational agencies may consider the use of accessible distance technology, instructional phone calls, and other curriculum-based activities that have been “scaffolded” based on student needs. (*CDE Guidance* (April 9, 2020), *supra*, at Point 2.) The local educational agency could also consider alternative service delivery options such as in-home service delivery, meeting with individual students at school sites, or other appropriate locations to deliver services. (*CDE Guidance* (March 20, 2020), *supra*, at Point 1.)

On April 27, 2020, the U.S. Secretary of Education announced through a Department of Education press release that the U.S. Department of Education was “not recommending Congress pass any additional waiver authority” concerning the FAPE and least restrictive environment requirements of the IDEA, noting again that “learning must continue for all students during the COVID-19 national emergency.” (*U.S. Dept. of Educ., Secretary DeVos Reiterates Learning Must Continue for All Students, Declines to Seek Congressional Waivers to FAPE, LRE Requirements of IDEA*, April 27, 2020 Press Release).

NOVEMBER 5, 2019 IEP

On November 5, 2019, the IEP team convened an IEP meeting for Student’s first-grade year. Parent attended. The IEP team provided the procedural safeguards to Parent. Student met three of his goals from the 2018 IEP, partially met his reading and writing goals, and did not meet his math and compliance goals. In addition, Corona-Norco conducted triennial assessments of Student in occupational therapy and speech and language.

Samantha Rowley assessed Student in occupational therapy on October 3, 2019, and November 1, 2019. Rowley had a master’s degree in occupational therapy and was employed by The Stepping Stones, LLC. Since August 2018, she was assigned to work at the school district through a contract between Corona-Norco and Stepping Stones. Rowley participated in the November 5, 2019 IEP team meeting and participated in the preparation of Student’s sensory and behavioral goals. Rowley testified at the hearing.

Marigold Zaide-Valte assessed Student in speech and language on November 5, 2019. Zaide-Valte held a master’s degree in communication disorders and was employed by Corona-Norco as a speech-language pathologist since July of 2010.

Zaide-Valte participated in the November 5, 2019 IEP team meeting and created Student's speech goals. She testified at the hearing.

The November 5, 2019 IEP had ten goals. The first-grade special education teacher, Julie Dunnigan, was responsible for the goals of writing, reading, phonics, math, and behavior. Zaide-Valte was responsible for two language goals. Rowley and Dunnigan were responsible for three visual motor, visual perception, fine motor, and sensory goals.

The IEP team agreed on various aids and accommodations to assist Student, including placement in a special day class 83% of the time consisting of specialized academic services at 1500 minutes weekly, speech and language services at 20 minutes for 30 weeks provided at the service provider's location, and occupational therapy at 20 minutes for 25 weeks, provided directly to the Student in a separate classroom. In addition, the IEP team offered Student 20 days of extended school year services. Parent consented to the IEP at the meeting.

CORONA-NORCO PARTIALLY IMPLEMENTED STUDENT'S NOVEMBER 5, 2019 IEP FROM MARCH 13, 2020 TO JUNE 3, 2020

Student contends Corona-Norco failed to provide appropriate educational services during the school campus closure, including failing to provide direct, in-person services when distance learning commenced. Corona-Norco argues that to fulfill the November 5, 2019 IEP in its entirety was not possible under the circumstances, and it provided services closely approximating what was offered in the IEP.

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]). The relevant inquiry here is whether Corona-Norco materially failed to implement Student's November 5, 2019 IEP from March 13 through June 3, 2020, and from August 11 through December 19, 2020 (Issue 2 below) because of the COVID-19 school campus closure. (*N.D. v. Hawaii Dept. of Educ.* (9th Cir. 2010) 600 F.3d 1104, 1117, citing *Van Duyn, supra*, 502 F.3d at p. 822). In *N.D.*, the Ninth Circuit Court of Appeals explicitly found that school closures related to a fiscal crisis did not constitute a change of placement. However, addressing a claim for "stay put" under title 20 United States Code section 1415(j), the Ninth Circuit held that a school closure caused by furloughs due to a state fiscal crisis could support a claim of "material failure to implement an IEP." (*Id.* at p. 1117.) The COVID-19 situation is analogous. This analysis turns on whether Corona-Norco complied with Student's November 5, 2019 IEP, considering COVID-19 guidance issued by the state and federal governments, and if so, whether Corona-Norco satisfied the IDEA sufficiently to avoid a finding of a material failure to implement the IEP. If it was not possible to implement Student's IEP as written, Corona-Norco was obligated to offer a temporary placement and program that "closely approximated" Student's last educational placement or offer compensatory education. (See *Ms. S. v. Vashon Island School Dist.* (9th Cir. 2003) 337 F.3d 1115, 1131; *Supplemental Fact Sheet, supra*, (OSERS March 21, 2020, p. 2).

On March 13, 2020, Dawn Rust, the Administrative Director of the Corona-Norco Special Education Local Plan Area, referred to as a SELPA, issued a prior written notice to parents of children with disabilities that pursuant to 34 Code of Federal Regulations part

300.503, all Corona-Norco public schools would be closed from March 16, 2020, through April 3, 2020. The closure encompassed two weeks, plus one week of spring break. On April 1, 2020, Rust issued a second prior written notice indicating that school campuses would remain closed "until at least April 30, 2020 or until school resumes." School did not resume in-person until March 2021.

CORONA-NORCO IMPLEMENTED THE NOVEMBER 5, 2019 IEP WITH
REGARD TO ACADEMIC INSTRUCTION AND SPEECH AND LANGUAGE
THERAPY FROM APRIL 13 TO JUNE 3, 2020

Dunnigan, Student's first-grade special education teacher, had a master's degree in special education and teaching and a bachelor's degree in psychobiology. Dunnigan held a multi-subject teaching credential and a mild-to-moderate special education teaching credential. She was a full-time special education teacher for nine years and had worked at Corona-Norco for six years. Dunnigan testified at the hearing.

At the beginning of the 2019-2020 school year, Student's first-grade class had one aide and a dedicated aide for another student needing one-on-one services. By the beginning of March 2020, there were a total of six students with varying learning disabilities. The students ranged from kindergarten to third grade. Dunnigan was familiar with Student. Before the school closures, Student had trouble with behaviors in the areas of attention, completing his assignments, staying in his seat, controlling body movements, hand movements, and other actions. He often touched other people's property, including objects on Dunnigan's desk. He got distracted and looked around the room or talked to other students. This behavior manifested during the entire school day.

Dunnigan worked on accommodations with the help of Rowley, the occupational therapist. Corona-Norco provided Student fidgets and putty, an exercise band to bounce his feet on, and a weighted vest. Corona-Norco also provided Student a full stretchy body sock to provide him sensory feedback. This was described as a stretchy fabric tube that student could put on and push out to get sensory stimulation. Teachers and staff used various reward and token systems to keep Student on task and to provide incentives for him to behave. At the beginning of the school year, Student spent three to five minutes on his work and required multiple prompts from Dunnigan. By the beginning of March 2020, Student spent closer to ten minutes on his assignments and needed less prompting.

In mid-March 2020, Dunnigan was told that Corona-Norco would be completely closed for two weeks, followed by spring break. However, she understood that school would resume the week after spring break, April 6, 2020. Following the March 16, 2020 closure and confirmation that students would not return to school until April 30, 2020, Dunnigan developed a distance learning plan.

Beginning on April 1, 2020, Dunnigan began communicating with the parents of her students by email concerning the various resources they could access. On April 10, 2020, Dunnigan sent an email to the parents of her students, including Student's Parent, indicating that on April 13, 2020, and for the continuous duration of the school closure, Student would receive special education services. Dunnigan outlined several different online learning methods, including Class Dojo, iReady, Google Classroom, Google Voice, and video conference sessions on Zoom. Dunnigan scheduled four sessions on Zoom each week. One was a classroom session on Fridays from 2:00 PM to 3:00 PM for whole group instruction. In addition, Dunnigan provided "office hours" on three other days for one hour each Zoom session.

Dunnigan developed individual distance learning plans for each student based on their needs. Dunnigan considered Student's abilities in developing a plan for him. Once distance learning commenced, Dunnigan monitored Student's progress through the assignments he turned in and during the synchronous classes each Friday. There were times when Student did not remain seated but instead wandered the room. Student was more attentive during sessions when he had an adult in the room with him and then remained seated during the sessions. Dunnigan, however, observed similar difficulties with her other students. On April 14, 2020, Dunnigan provided a status report and a suggested "Daily Schedule" and aid structures for Student. On April 16, 2020, Dunnigan emailed parents and reminded them the district was only suggesting 10 hours of distance learning per week, with only two hours per day of "screen time." Dunnigan continued to monitor Student's progress through the online platforms, Zoom sessions, and direct email correspondence with Parent.

Dunnigan had a meeting with Parent following the implementation of the distance learning plan. Parent complained Student was spending too much time on the computer and was having difficulty following the assignments. Student's assignments were at the middle-level difficulty and Dunnigan offered to drop him to a lower level. Parent declined. In response to the "screen time" issue, Dunnigan offered to provide printable packets for Student to work with offline. She also provided Parent with incentive charts and token systems to encourage Student to participate in his assignments. Student submitted 80 percent of his Google Classroom assignments and the work on them showed he was making progress. However, Student or Parent did not attend any of the separate office hour time slots on Zoom. Dunnigan expected all the parents to aid her students, but she was never told that Parent was completing Student's work for him.

Regarding Student's progress toward and achievement of his November 5, 2019 IEP goals, Dunnigan personally observed Student write his name once during a Zoom session. Goal number three addressed phonics and word recognition. Dunnigan worked on this goal by reading passages online with Student and parental feedback. Each passage had a checkmark at its conclusion, and this is how Dunnigan verified the progress of Student on this goal. Dunnigan did not see substantial progress in behavior, math, and visual or fine motor skills. Regarding the sensory skill goals, Dunnigan did not specifically observe Student using sensory material such as fidgets and putty during the specific time in question. However, Dunnigan opined Student's work product from April 13 to June 3, 2020, showed he was making overall progress compared to the beginning of the school year. She believed the distance learning plan provided services in the least restrictive environment. Student's skills did not regress academically or socially during distance learning compared to his performance before the school closure.

The November 2019 IEP offered Student a total of 600 minutes of speech and language therapy for the year. The IEP specified that services were to be provided in a group setting for 20 minutes each week, with four to five students in the group. Zaide-Valte, the speech therapist, had known Student since he started at the Vicentia Elementary school campus. She had provided him speech and language services through the date of the hearing. Student understood language when he was spoken to and understood what vocabulary he needed to use. Student was making progress on his goals at the time of the school closure. According to her therapy logs, Zaide-Valte provided in-person therapy services from August 28, 2019, to March 12, 2020.

Zaide-Valte did not provide any services from March 16 until April 16, 2020. However, once distance learning was put into place, she provided online instruction and

materials Student could access from home. This included worksheets, online resources, and videos to support Student. Zaide-Valte was also available three hours a week to assist parents. Zaide-Valte opined that these services were consistent with Student's IEP and the type of materials she used when Student was physically on campus. Zaide-Valte tried to choose appropriate exercises tailored for Student's individual needs. She also took into consideration what Parent was capable of doing. Zaide-Valte also began providing weekly group Zoom sessions during the last three weeks of the 2019-2020 school year. Student attended two out of three of these sessions. Based upon Zaide-Valte's observations during these sessions, Student was progressing on his speech and language goals, and he remained highly verbal.

Parent testified at the hearing. Before the March 2020 school closure, Student was doing well at school. He was happy every day and looked forward to going to school. He was making some progress academically and behaviorally before the closures. He had good days and bad days. Up until the closure, Student was in class roughly six hours per day.

Following the school closure of March 16, 2020, Parent opined no education was going on. When distance learning commenced, Parent said Student struggled while online and resisted doing his assignments or attending Zoom sessions. Parent observed Student became excited when he saw school friends on Zoom, and he left the room to find a toy to show his friends. He had difficulty focusing, staying seated, or staying in the room. Parent and Dunnigan often redirected or corrected Student's behavior, and he would pay attention to the lessons. Parent believed that Students' assignments were not academically sufficient and were just "activities" to occupy Student. Parent was also concerned Student had no computer skills, and many of the tasks were

computer-oriented. Parent said the family was forced to buy a second laptop for Student to use so he could complete his work-related tasks on his desktop computer.

Parent acknowledged Dunnigan offered accommodations to avoid Student frustration, but Parent declined them. Parent preferred Student doing the more difficult assignments, even if it took longer for him to complete. Parent struggled to get some online learning programs to work and occasionally had trouble logging onto Zoom meetings. Parent felt frustrated and lost because no one at the school gave them much instruction on assisting or instructing Student. Nevertheless, Parent tried to provide instructions and services in the best manner possible.

Parent observed the two speech sessions Zaide-Valte provided by Zoom. Zaide-Valte started the sessions by playing a song and telling the students to sing along. Student sometimes ran around the room he was in or sat in his chair and rolled around his room. This behavior usually happened at the end of the song, and Zaide-Valte successfully redirected Student when he behaved this way. Parent was concerned with the speech services because she felt Student was speaking, or singing, in gibberish. However, Zaide-Valte credibly testified Student was progressing further in his language skills and was on track to meet his goals. Moreover, unlike the occupational therapy services discussed below, Zaide-Valte provided group services only and had not been individually serving Student before the closure.

Jennifer Sommerness held a doctorate and master's degree in Education Policy and Administration and a bachelor's degree in special education. She had a teacher's certificate for pre-kindergarten to 12th grade and had been licensed in Minnesota, Wisconsin, Illinois, Iowa, and New Mexico. Sommerness reviewed Student's IEPs, evaluations, and work product, as well as emails and the due process complaint.

Sommerness met with Student and Parent via Zoom two weeks before the hearing. Sommerness testified as an expert for Student at the hearing.

Sommerness believed the goals in the November 5, 2019 IEP did not align with first- and second-grade standards and did not change in a substantial degree from kindergarten. Sommerness opined that from March 16 to June 3, 2020, Corona-Norco provided inadequate instruction and services to Student. She believed there was very little time for instruction and that the one-hour synchronous group session did not meet the standard of the IDEA or provide sufficient structure for Student. In her opinion, Student needed more peer interactions and to be directly engaged. Sommerness acknowledged during cross-examination that she had spent only five minutes meeting with Student during the Zoom meeting and did not have a California teaching credential. She also did not directly observe any of the services provided to Student between April 16 and June 3, 2020, and never communicated with any Corona-Norco teachers or staff about Student.

Parent opined that Student was not progressing and that the work provided to him was not challenging. The evidence contradicted this. From April 16 to June 3, 2020, Student turned in a substantial amount of work product to Dunnigan and his service providers, and these showed sufficient progress toward meeting his academic requirements. While not dispositive, Student's grades showed he was achieving satisfactory results. Further, Sommerness's opinion that Corona-Norco provided inadequate and unstructured services to Student was not credible, considering her scant interaction with Student and her limited knowledge of the Corona-Norco staff and services provided.

Corona-Norco established that it attempted to deliver distance learning instruction and speech and language services to Student that “closely approximated” Student’s in-person services to the extent feasible during the COVID-19 school closure from April 13 to June 3, 2020. Corona-Norco sent a prior written notice to all parents in mid-March 2020 and again on April 1, 2020. The notice informed parents of students that the school district was closing effective March 16, 2020 due to COVID-19. Corona-Norco informed all parents of special education students that if the child received IEP services such as speech or occupational therapy, the services providers would be providing resources or practice exercises for the child to work on at home. Corona-Norco invited parents of special education students to email students’ teachers or service providers with questions. The notice included parents’ rights and procedural safeguards. Parent received those general notices. Dunnigan provided four one-hour sessions per week to meet with students and parents, and Zaide-Valte provided services similar to what she provided when instruction was in-person. Zaide-Valte also provided three group Zoom sessions and provided a solo Zoom session for Student when he could not make a scheduled group session.

Corona-Norco provided Student, through Parent, a general Distance Learning Plan packet on April 10, 2020. Parent confirmed receipt of the packet. When Parent reported to Dunnigan Student’s frustrations and inability to follow course lessons online, Dunnigan offered to accommodate Student by lowering the level of work, which Parent declined. Dunnigan also provided hard copy printouts for Parent to access so Student could avoid the online components. She also reminded the parents of all her students to limit the computer time to two hours per day. In addition to the one-hour synchronous group session each week, Dunnigan made herself available by Zoom three more hours each week. Neither Parent nor Student availed themselves of any of those

extra sessions. Considering the overall chaos and uncertainty caused in the first several weeks of the pandemic, Corona-Norco's efforts to materially implement Student's IEP in academic instruction complied with the IDEA.

Student also failed to prove by a preponderance of the evidence that Corona-Norco denied Student a FAPE by not evaluating Student for distance learning after the school closure. A school district is required to evaluate students in all areas of need to determine whether supplemental services may be necessary. (34 C.F.R. §300.304; Ed. Code §56320). There is no evidence Parent or Student requested an assessment from Corona-Norco in any specific area from March 13 to June 3, 2020, or that Student manifested weaknesses in any other areas. There was no evidence that Student was not able to the work under the distance learning plan. Nor did Student prove Corona-Norco was on notice of any specific deficiencies that may have required additional assessments. Student presented no evidence that additional assessments between March 13 and June 3, 2020 were warranted.

Corona-Norco, however, did not materially implement Student's November 5, 2019 IEP concerning academic and speech and language services during three weeks between March 16 and April 16, 2020, when Corona-Norco started distance learning for all students. Student proved Corona-Norco materially violated the IDEA by failing to implement Student's November 5, 2019 IEP in that period due to the COVID-19 school closure. While unavoidable circumstances prevented Corona-Norco from fully implementing Student's November 5, 2019 IEP at school, the IDEA includes no exceptions to implementing IEPs due to physical school closures caused by pandemics or governmental directives to close schools. Thus, Corona-Norco remained responsible under the IDEA for materially implementing the IEP despite the school closure, even if by alternate delivery methods. (*N.D. v. Hawaii Dept. of Education, supra*, 600 F.3d at

p. 1117).) Although it is undisputed that the initial weeks of the school closures were a time of uncertainty, Corona-Norco could have offered Student additional compensatory services or hours to make up the three weeks of no instruction or speech service. It did not do so. Accordingly, Corona-Norco denied Student a FAPE for the weeks of March 16, 2020, March 23, 2020, and April 6, 2020 by not implementing the IEP in academics and speech and language. (*Van Duyn, supra*, 502 F.3d at p. 822.)

CORONA-NORCO DID NOT MATERIALLY IMPLEMENT THE NOVEMBER 5,
2019 IEP WITH REGARD TO OCCUPATIONAL THERAPY FROM MARCH 16
TO JUNE 3, 2020

Student's November 5, 2019 IEP offered Student 20 minutes per week of individual occupational therapy services for 25 weeks, totaling 500 minutes yearly. Rowley began working with Student in November 2019.

Student had difficulty making legible letters. Rowley introduced exercises to make his letters more precise and consistent, including a "quadruped grasp" and "functional grasp." Although Student dropped his pencil occasionally, Rowley did not have to pick it up and place it in his hand. Instead, Student picked up the pencil and restarted on his own, and Rowley did not need to redirect him. Rowley acknowledged that when she was in-person with Student, he had attention issues as well as good days and bad days. However, she only needed to use verbal cues to redirect him.

Before the school closure, Student had access to sensory tools to aid his behavior. These included a TheraBand, weighted vest, and therapeutic putty. He also had access to "tactile fidgets" and the full-body compression sock. Rowley was involved in developing goals number eight, nine, and 10 of the November 2019 IEP. She opined

that as of the end of the 2019-2020 school year, Student was on track to meet goals eight and nine and had already met goal number 10.

From November 2019 until the school campus closure, Rowley provided 14 weeks of services. Following the school closure, Rowley did not provide occupational services to Student until late April 2020. In Dunnigan's April 10, 2020 email, she notified Parent that each week's email would provide occupational therapy materials. In addition, Rowley would be available via text messaging, phone, or emails four hours each week to answer questions. On May 4, 2020, Dunnigan sent a generic email to all parents with instructions that if there was any need to modify the Distance Learning Plan regarding occupational therapy, parents should notify her.

Parent had a phone conversation with Dunnigan about Parent's frustration with Student's inability to receive his occupational therapy services. Parent advised Dunnigan she was having difficulty getting Student to sit down, focus, and do his assignments. In addition to reducing the difficulty level of Student's assignments, Dunnigan suggested Student use his sensory devices such as the weighted vest, the body sock, or the exercise band. When Parent inquired where she would get these devices, Dunnigan told her they were at the school campus. However, due to the campus closures, no one could physically be on campus during the remainder of the school year. As such, Student was denied access to those accommodations.

Beginning April 20, 2020, Rowley provided a packet of exercises to each parent via email. The exercises consisted of worksheets, expectations, and instructions. From April 20, to June 3, 2020, Rowley had no online Zoom sessions with Student. Rowley advised parents to take pictures of Student's work and send them to her for evaluation. She also instructed on sensory practices that parents could use throughout the day.

Student received no direct occupational therapy services after the school closure on March 16, 2020.

Student proved by a preponderance of the evidence that Corona-Norco did not materially implement Student's occupational therapy services in the November 5, 2019 IEP from March 16 to June 3, 2020. Parent testified that no one gave them adequate explanations or instructions on implementing occupational therapy services after March 16, 2020. Parent was not trained in special education or occupational therapy. Student was also supervised by his maternal grandparent and his maternal teenage uncle. Neither of them had any specific training in occupational therapy. Parent testified she had no idea if she should help Student by guiding his hand or spending time with Student on his therapy worksheets.

The November 5, 2019 IEP called for 25 weekly sessions, in-person, for 20 minutes each. However, even after Corona-Norco implemented its distance learning plan, it did not provide Student with direct, one-on-one occupational therapy services after March 16, 2020. While Rowley did send out weekly exercises and worksheets, she did not offer any in-person Zoom sessions, nor did she ever directly observe any efforts Parent, grandparent, or uncle made to support Student doing the exercises or worksheets. Parent and Student's adult family members were not sufficiently trained on implementing those services at home. While Corona-Norco made a good faith attempt to provide these services, that effort did not closely approximate the services called for in the November 2019 IEP. Therefore, Corona-Norco denied Student a FAPE by failing to materially implement the occupational therapy services from March 16 to June 3, 2020.

ISSUE 2: DID CORONA-NORCO DENY STUDENT A FAPE FROM AUGUST 2020 UNTIL THE DATE OF FILING THE COMPLAINT BY ASSIGNING STUDENT TO DISTANCE LEARNING WITHOUT CONTINUING TO PROVIDE IN-PERSON SERVICES, IN-PERSON, AND FAILING TO EVALUATE STUDENT OR PROVIDING NECESSARY ACCOMMODATIONS TO ENSURE STUDENT WAS ABLE TO OBTAIN A FAPE THROUGH DISTANCE LEARNING?

Student contends Corona-Norco denied Student a FAPE by failing to provide in-person academic services and instruction from August 11 to December 19, 2020, the date Student filed the complaint. Corona-Norco argues it provided the services as close as possible under the circumstances based upon the continued school closures. Student did not meet his burden of proof on this issue.

Ilse Blahak was Student's second-grade teacher for the 2020 to 2021 school year. She held a master's degree in special education and education technology. Blahak belonged to a "teacher group" that met to focus on varying technology issues for students. Blahak had been employed by Corona-Norco for 21 years and testified at the hearing. Although not Student's teacher at the time of the March 2020 closure, Blahak also believed the closure would last only two to three weeks.

At the commencement of the 2020-2021 school year, Blahak prepared specific materials and assignments with a "Star Wars" theme for her students. She prepared a "galaxy box" containing scissors, colored pencils, dry erase markers, and sleeve-like folders to place written work in. She also specially included in Student's box manipulative devices, paper copies of every single assignment so he would not be required to do it online, and lined paper with two solid lines and a dotted line if he

needed the assistance. Blahak personally delivered the boxes to the homes of each of her students.

Blahak provided synchronous and asynchronous Zoom instruction throughout the school week, with a one-hour session each morning and an optional one-hour afternoon session. She provided instruction and instructional videos to all her students. All parents requested assignments in paper form, and she spent hours at the copy machine to produce them. In addition, she ensured each parent received the hard copies. Blahak became familiar with Student by directly observing him on Zoom. She described him as a “wonderful kid” who was active, thoughtful, laughed at her jokes, and easily got back on task. Blahak observed Student getting up and leaving during some Zoom sessions. He always returned. She also noticed Student go off task on occasion but shortly thereafter resumed his work. She observed him “daydreaming” occasionally and sometimes there were interruptions such as Student picking up a toy or his younger brother coming into the room. Overall, Blahak observed that Student was active and a hard worker. It was easy to get him back on task, even on Zoom.

Blahak did not expect parents or family members to attend Zoom class with the students. She expected Student could attend the Zoom sessions alone. However, she ultimately left that decision up to each student’s parents. Blahak did notice an adult with Student on occasion and had the impression Student was receiving some help or prompting from a family member. However, Student possessed higher skills than many of her students in that class. From August through October 2020, Student missed one session. Student had eight unverified absences in November 2020 and no absences through December 19, 2020.

Blahak implemented Student's November 2019 IEP goals over Zoom. She monitored his progress on Zoom and in the work that was returned. As discussed in Issue 3, a new IEP was agreed to on October 26, 2020. Blahak began implementing the October 26, 2020 IEP goals in November 2020. To address the reading goals in both the November 2019 and October 2020 IEPs, Blahak listened to Student read online, addressing any gaps in his readings as he read. Student was progressing in his reading goals and making a concerted effort. In writing, Blahak provided Student an instructional video discussing proper writing and letter formation. She reviewed writing samples and evaluated them. Again, Student was progressing. Blahak implemented the behavior goals by providing stickers and other assistive information in binders. She delivered the material directly to Student and provided Parent with instructions on using stickers and other materials to aid in Student's behavior. She also provided feedback directly to Student over Zoom when his behavior was on track, giving him praise and positive reinforcement for desirable behavior.

Student continued to receive occupational therapy services from Rowley beginning in November of 2020. Unlike the time period involved in Issue 1, Rowley provided Zoom services from the outset. Student did not attend the first two sessions provided by Rowley in November of 2020. Rowley scheduled Student for a November 30, 2020 session, and Parent rescheduled to December 1, 2020. Student attended, and Rowley was able to observe him over Zoom. She provided him with visual cues and redirected him over Zoom. Student attended two more Zoom therapy sessions in December 2020. At the start of the school year, Rowley observed that Student improved in letter formation, and she was very pleased with his writing. Rowley

observed Student had continued attention and behavioral issues, although he had access to his sensory/behavioral aids. By December, Student was making good letter formation, sizing, and alignment. Parent provided work samples to Rowley, and she was pleased with the legibility. On December 14, 2020, Rowley observed Student wearing his weighted vest during the first ten minutes of the Zoom occupational therapy session. Rowley received work samples that showed that Student had good legibility and consistency in his writing, and he was making progress since she last saw him in-person in March 2020. Rowley opined there were no signs of regression between March and December 2020.

Beginning on August 19, 2020, Zaide-Valte began providing speech and language therapy to Student via Zoom. Student missed the first three sessions. Student attended sessions from August 27 to December 17, 2020. Student and Zaide-Valte worked on two of his IEP goals. Zaide-Valte opined that Student's speech and language were substantially improved from the November 5, 2019 evaluation. His spoken language was more automatic and voluntary, as evidenced by his ability to tell stories and talk about his feelings freely. Zaide-Valte believed Student was highly verbal and did not need any assistive devices. There was no regression week to week, and Student picked up where he left off in the last session.

Corona-Norco delivered distance learning instruction, speech and language, and occupational therapy services to Student that "closely approximated" Student's in-person services to the extent feasible during the 2020-2021 school year. Unlike the period between March 16 and June 3, 2020, Rowley provided Zoom synchronous

services similar to what she provided in-person before the closure. During the 2020-2021 school year, Student had physical access to his sensory and behavioral aids. Blahak provided both electronic and paper copies of all assignments and personally delivered materials to each of her students. She provided a themed box with supplies and manipulatives. In addition, she had Zoom sessions and provided instructional videos for students to assist them in completing assignments. Zaide-Valte continued to provide online material for Student, as well as Zoom sessions. Student progressed and was on track to meet many of his goals.

Student also did not provide any evidence to establish that from August 11 to December 19, 2020, Corona-Norco was required to assess or evaluate Student for distance learning. Student did not prove Corona-Norco had any reason to believe Student could not access his education through distance learning. The evidence was to the contrary and established that by the 2020-2021 school year, Student was progressing and keeping up with the work. His behavior was improving, as were his speech and motor/sensory processing skills.

Student failed to prove Corona-Norco denied Student a FAPE from August 11 to December 19, 2020, by not materially implementing the November 5, 2019 and October 26, 2020 IEPs "in-person" but through distance learning, or by failing to evaluate Student for receiving distance learning.

ISSUE 3(a)-(f): DID CORONA-NORCO DENY STUDENT A FAPE FOR THE 2020-21 SCHOOL YEAR AND EXTENDED SCHOOL YEAR IN ITS OFFER IN STUDENT'S OCTOBER 26, 2020 IEP, THROUGH THE DATE OF FILING, BY FAILING TO PROVIDE AN APPROPRIATE SERVICES MODEL AND ENOUGH SERVICES, ADDRESS STUDENT'S NEEDS WITH REASONABLE ACADEMIC GOALS, OFFER AN APPROPRIATE SERVICES MODEL AND SERVICES TO ADDRESS STUDENT'S AUDITORY PROCESSING SENSORY DEFICITS, OFFER INTENSIVE INDIVIDUAL SERVICES IN THE FORM OF A ONE-ON-ONE AIDE, GIVE STUDENT ADDITIONAL ADEQUATE GOALS AND ADDITIONAL SERVICES NOT MENTIONED IN THE IEP, AND ADDRESS DEVELOPING BEHAVIORAL ISSUES, DIMINISHING ACADEMIC SKILLS, SPEECH DEVELOPMENT, AND OTHER SKILLS DEFICIENCIES DISPLAYED BY STUDENT?

Student asserts he should have been placed in a general education classroom and that his current special education placement was not the least restrictive environment. Student argues that he could do mainstream schoolwork. Student also contends Corona-Norco did not provide adequate services and accommodations in the October 26, 2020 IEP, should have provided a one-on-one aide in a general education setting, did not provide reasonable and adequate goals, and did not address his behavioral, academic, auditory processing and speech development deficiencies.

Corona-Norco contends Student's school performance required specific accommodations, instruction, and special education services for him to succeed.

Corona-Norco argues Student would have fallen behind in a general education setting and interfered with the other students' learning. Finally, Corona-Norco asserted that Student was progressing in most of his goals. Therefore, his goals were appropriate, and the special day class placement and accommodations offered the necessary services to allow Student to make appropriate progress in light of his circumstances.

Parent 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), & 56363, subd. (a); 34 C.F.R. §§ 300.320, 300.321, & 300.501.) The IEP must include appropriate, objective criteria, evaluation procedures, and schedules for determining, on at least an annual basis, whether the annual goals are being achieved, and a statement of how the student's progress toward the goals will be measured. (*Jessica E. v. Compton Unified School Dist.* (C.D. Cal. 2017, No. CV16-04356-BRO) 2017 WL 2864945; see also Ed. Code, § 56345; 20 U.S.C. § 1414(d)(1)A(i).) An examination of the goals in an IEP is central to determining whether a student received a FAPE. "[W]e look to the [IEP] goals and goal achieving methods at the time the plan was implemented and ask whether these methods were reasonably calculated to confer ... a meaningful benefit." (*Adams v. State of Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149.)

The IEP must include a statement of the program modifications or supports that will be provided to the student, to allow the student to advance appropriately toward attaining the annual goals, to be involved in, and make progress in the general education curriculum, and to participate in extracurricular activities and other nonacademic activities. (34 C.F.R. § 300.320(a)(4)(i)-(ii); Ed. Code, § 56345, subds. (a)(4)(A) & (B).)

The purpose of annual goals is to permit the IEP team to determine whether the pupil is making progress in an area of need. (Ed. Code, § 56345, subd. (a).) For each area in which a special education student has an identified need, the IEP team must develop measurable annual goals that are based upon the child's present levels of academic achievement and functional performance, and which the child has a reasonable chance of attaining within a year. (Ed. Code, § 56345; *Letter to Butler* (OSERS March 25, 1988).) The IEP team need not draft IEP goals in a manner that the parents find optimal, if the goals are objectively measurable. (*Bridges v. Spartanburg County School Dist. Two* (D.S.C. 2011, No. 7:10-cv-01873-JMC) 2011 WL 3882850 [the use of percentages tied to the completion of discrete tasks was an appropriate way to measure student progress].) The IEP must contain a description of how the child's progress toward meeting the annual goals described will be measured and when periodic reports on the progress the child is making toward meeting the annual goals -- such as through the use of quarterly or other periodic reports, concurrent with the issuance of report cards -- will be provided. (20 U.S.C.A. § 1414(d)(1)(A)(iii).)

An IEP team develops an IEP. In developing the IEP, the IEP team must consider the strengths of the child, the concerns of the parents for enhancing the 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); 34 C.F.R. § 300.324 (a).) Whether an IEP offers a student a FAPE is assessed in light of information available when the IEP was developed, not in hindsight. (*Adams v. State of Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149.) An IEP "is a snapshot, not a retrospective;" it must be evaluated in terms of what was objectively reasonable when the IEP was developed. (*Ibid.* quoting *Fuhrmann v. East Hanover Board of Education* (3d Cir. 1993) 993 F.2d 1031, 1036.)

NOVEMBER 5, 2019 TRIENNIAL ASSESSMENTS

Corona-Norco relied upon Student's triennial assessments conducted in October and November 2019. These were the occupational therapy and speech and language assessments. There were no additional assessments presented at hearing.

OCCUPATIONAL THERAPY

Rowley assessed Student's fine motor development and sensory processing/integration on October 3, 2019 and November 1, 2019. She prepared a report dated November 5, 2019. The IEP team considered Rowley's 2019 triennial report at the October 26, 2020 IEP team meetings.

Rowley relied upon Student's written chart history, teacher interviews, parent questionnaire, clinical observations, classroom, and social environment observations in performing her assessment. She administered four clinical tests.

Student scored well below average for fine motor precision and average for fine motor integration on standardized testing. He demonstrated difficulty holding a writing utensil consistently with good stability. Rowley observed Student drop his pencil repeatedly. However, he appropriately grasped and used classroom materials such as scissors, writing tools, and single-hole punch. Student scored above average for his age on standardized testing for visual perceptual skills. However, he demonstrated letter and number reversals when near point copying and had difficulty copying letters with good automaticity, formation, linear alignment, and letter sizing. Student had difficulty with sensory processing that impacted his academic environment, and he could not follow multiple-step tasks. He also had attention deficits, which may have impacted those difficulties. Student used a weighted vest, a sensory cushion, noise-canceling

headphones, and a fidget to relieve sensory-seeking behaviors. Rowley recommended Student would be eligible for occupational therapy services.

SPEECH AND LANGUAGE

Zaide-Valte assessed Student in speech and language on November 5, 2019. Zaide-Valte observed Student in a clinical setting and administered three assessment tools. Student exhibited difficulties in the areas of semantics, morphology, and syntax. Student presented as a child with a language disorder.

At the time of the assessment, Student communicated in sentences to make comments, asked simple questions, and answered questions. Student continued to present with significant deficits in language development. He had difficulty retelling events, formulating sentences, and listening to spoken information without accompanying visual cues. Student showed little motivation in tasks that disinterested him. Student had age-appropriate speech articulation, voice, and fluency but had significant deficits in all areas of language. Zaide-Valte concluded Student would be eligible for special education services under the category of speech and language impairment.

OCTOBER 26, 2020 IEP TEAM MEETING

The IEP team held an annual meeting on October 26, 2020. Parent, a general education teacher, Blahak, Rowley, Zaide-Valte, and an administrative representative attended. The IEP team relied upon the reports of Student's second-grade special education teacher, Rowley, Zaide-Valte, and the 2019 triennial evaluations. Student met seven out of ten of his goals from the November 5, 2019 IEP. Student partially met goals three and seven. Student did not meet goal five.

Parent consented in writing to the IEP except for placement in a special day class. Parent agreed with the offer of FAPE but wanted Student to “get back to normal.” Parent argued Student should be put primarily in general education and indicated that in her written consent. She also thought Student should be pulled from Vicentia Elementary and placed privately to have in-person instruction. Parent testified that her primary concern was the lack of education Student was receiving through distance learning.

GOALS

The October 26, 2020 IEP provided eight goals, numbered one through three, and five through seven, eight, and ten. The goals were reasonably developed based upon the information available to the IEP team at the October 26, 2020 meeting. In addition, the proposed goals directly addressed Student’s areas of need.

Student’s first goal was in reading fluency. Student was reading at a first-grade level. By October 26, 2021, when given a second-grade reading passage, Student was to read aloud with fluency at a rate of at least 70 correct words per minute, with 85 percent accuracy in three out of three trials. The second goal was in writing. Student was to distinguish between complete and incomplete sentences with 85 percent accuracy in three out of three trials. Blahak observed Student read aloud during her Zoom sessions from October 26 through December 19, 2020. Student was reading aloud and trying to meet the goal. Blahak also observed Student writing during the Zoom sessions and looked at his later writing samples. She kept an ongoing record of his mistakes, miscues, and progress. Blahak opined that the primary difference between distance learning and in-person instruction was that she was not physically present with Student when he did his assignment. Otherwise, her methods remained constant. She did not

see Student regularly erasing, nor did the physical work product reflect excessive erasures, which would have signified to her multiple attempts to complete the task.

The third goal addressed calculations. When given 10 one- and two-digit addition or subtraction problems without regrouping, Student was to write sums with 85 percent accuracy in three out of three trials. Blahak provided an instructional video with her reading the math problem and then asking him to pause the video and do the work. After the work was completed, Student turned in the work to Blahak. All the work appeared to be in the handwriting of Student. Student was working towards this goal as of December 19, 2020.

Goal number five addressed behavior. Student was to use a reinforcement chart and have no more than two teacher prompts to remain seated and follow directions in a non-preferred task for 10 minutes, with 80 percent accuracy in three out of four trials. Blahak implemented this goal while working in the online Zoom sessions. She delivered binders to each Student directly to their homes and included stickers. Parent had access to stickers to encourage students both during school sessions and while they completed their homework. Completing the entire chart would result in a student getting rewarded. She also observed Student during class sessions and took notes on his behavior. Blahak opined that this goal was sufficiently challenging for Student, and she kept an ongoing binder of his progress.

Goals number six and seven were speech and language goals. Goal six required Student to retell a story by including the main character's action, motivation, and emotion in four out of five trials with visual prompts. Goal seven required Student to state one similarity and one difference between two familiar objects in eight out of 10 trials with visual prompts. Zaide-Valte worked with Student on these goals and helped

prepare the goal. Student was to show his abilities by retelling a story, sharing information about events in his life or movies he had watched. In addition, he was to work on his vocabulary skills by labeling things, events, and people. Zaide-Valte believed Student made meaningful progress on his 2019 goals, and he was now more verbal and spoke in complex sentences. She saw no regression and opined the 2020 goals were challenging enough for Student to progress.

Goals eight and 10 involved visual motor skills and perception, and sensory processing. Student was to near-point copy one sentence with good sizing and alignment in two out of three trials. In goal 10, student would utilize a sensory tool or strategy and complete a preferred or non-preferred task with five verbal or visual cues in two out of three trials. Blahak and Rowley proposed these two goals and were identified to work with Student to achieve them. Blahak opined that Student made some progress on goal eight by December 19, 2020, although he was still using uppercase letters mixed with lowercase letters. Rowley opined that based upon the samples received from Student, he was working towards this goal. By October 26, 2020, Student had possession of all the sensory tools and manipulatives that he needed to meet the sensory processing goal at home. Blahak provided sensory breaks for Student during Zoom sessions.

While Sommerness opined that the present levels of performance and the teachers' observations documented in the October 2020 IEP were "skimpy" and that the goals lacked structure, Student did not prove that he needed more challenging goals in academics, fine motor skills, sensory processing, and speech and language development. Student provided no credible evidence that the specific goals did not meet the IDEA's requirements or that the IEP team did not tailor the goals to Student's unique needs. Student presented no other evidence that demonstrated he needed

additional goals or that these goals were insufficiently tailored for Student. As of December 19, 2020, Student was working toward meeting his goals but was not efficiently accomplishing the tasks.

Parent's primary objection was the continued placement of Student in a special education classroom and Corona-Norco's continued use of distance learning rather than in-person instruction. Parent raised no specific objections to the goals as proposed. Although Parent expressed concern that Student was struggling in some areas, Parent's perception of Student's performance at home did not prove that the 2020-2021 goals were inappropriate. Likewise, there was no credible evidence that Corona-Norco denied Student a FAPE by failing to design an appropriate educational program in speech and language or occupational therapy, tailored to Student's unique needs for the 2020-2021 school year. The goals in the October 26, 2020 IEP were procedurally compliant and appropriately designed to allow Student to progress.

RELATED SERVICES, ACCOMMODATIONS, AND PLACEMENT

Student did not prove Corona-Norco failed to offer services, accommodations, and placement reasonably calculated to meet Student's needs in the October 26, 2020 IEP.

ACCOMMODATIONS, AIDES AND SERVICES

Related services may be provided to individuals or small groups in a specialized area of educational need and throughout the full continuum of educational settings. (Cal. Code Regs., tit. 5, § 3051, sub. (a)(1).) Related services, when needed, are determined by the IEP team. (Cal. Code Regs., tit. 5, § 3051, subd. (a)(2).)

The October 26, 2020 IEP increased speech services to twice per week, and Student could join a third session if needed. Rowley suggested decreasing occupational therapy services to every other week due to Student's improved writing samples during the meeting. Parent disagreed, stating that Student's writing was still illegible, and he was constantly erasing due to regression of skills. Rowley and the IEP team agreed to keep his services the same and revisit the need for services once in-person instruction resumed. In addition, the IEP provided Student with various other accommodations, including the continued use of manipulatives, sensory breaks, access to sensory tools and devices, use of lined adaptive paper, and shortened or modified school assignments.

Like the November 2019 IEP, the October 26, 2020 IEP offered Student extended school year services to avoid any regression. Parent testified that Student participated in the offered services during the 2020 extended school year. Zaide-Valte and Rowley testified they saw no regression from his abilities at end of the 2019-2020 school year to when classes commenced in August 2020.

Regarding a one-on-one aide, no witness testified that Student needed a regular aid. On the contrary, Blahak, Rowley, and Zaide-Valte all testified that Student was able to do his work with redirection and prompting when needed. Sommerness also opined that even if Student was in a general education setting, he would not need a full-time aide.

Student presented no evidence that he had auditory processing problems beyond what was included in the occupational therapy and speech evaluations. There was no evidence that Corona-Norco was aware of any other auditory processing issue. The evidence established that the services and level of support were sufficient to enable

Student to make progress appropriately, considering Student's circumstances and unique needs. The services provided were neither too restrictive nor too easy. Student was making progress in some goals and was on track to meet other goals. Therefore, Student did not prove Corona-Norco denied him a FAPE by offering inadequate services and accommodations in the October 26, 2020 IEP.

PLACEMENT

Student contends Corona-Norco should have placed Student in an in-person general education environment with supporting services. Corona-Norco argues Student would not be able to make appropriate progress in a general education environment and that placement in a special day class was the least restrictive environment for Student.

In determining the educational placement of a child with a disability, a school district must ensure that:

- The placement decision is made by a group of persons including the parents and other persons knowledgeable about the child, the meaning of the evaluation data, and the placement options, and takes into account the requirement that children be educated in the least restrictive environment;
- Placement is determined annually, is based on the child's IEP, and is as close as possible to the child's home;
- Unless the IEP specifies otherwise, the child attends the school that he or she would if non-disabled;
- In selecting the least restrictive environment, consideration is given to any potential harmful effect on the child or the quality of services that he or she needs; and

- A child with a disability is not removed from education in age-appropriate regular classrooms solely because of needed modifications in the general education curriculum. (34 C.F.R. § 300.116.)

California's implementing regulations define a "specific educational placement" as "that unique combination of facilities, personnel, location or equipment necessary to provide instructional services to an individual with exceptional needs." (Cal. Code Regs., tit. 5, § 3042, subd. (a).)

To conclude whether a special education student could be satisfactorily educated in a regular education environment, the Ninth Circuit has balanced the following factors:

- "The educational benefits of placement full-time in a regular class"
- "The nonacademic benefits of such placement"
- "The effect [the student] had on the teacher and children in the regular class" and,
- "The costs of mainstreaming [the student]" (*Sacramento City Unified School Dist. v. Rachel H.* (9th Cir. 1994) 14 F.3d 1398, 1404.)

If a school district determines that a child cannot be educated in a general education environment, then the least restrictive environment analysis requires determining whether the child has been mainstreamed to the maximum extent that is appropriate in light of the continuum of program options. (*Daniel R.R. v. State Board of Education* (5th Cir. 1989) 874 F.2d 1036, 1050.) The continuum of program options includes but is not limited to regular education; resource specialist programs; designated instruction 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 or instruction in the home, in hospitals, or other institutions. (Ed. Code, § 56361.)

At the October 26, 2020 IEP team meeting, Parent requested that the IEP team place Student in a general education setting. The IEP team discussed and shared that Student would fall behind and likely become lost in a general education class at his current levels of academic and social performance. His academic levels and behavior would also disrupt the other students.

Following the October 26, 2020 meeting, Corona-Norco special education coordinator Kristen Tharpe recommended a follow-up IEP team meeting to address Student's behavioral concerns. A meeting was scheduled for December 14, 2020, but then was rescheduled by Student's advocate. The meeting was eventually held on February 1, 2021. Parent, Student's attorney and an advocate, Corona-Norco's attorney, Blahak, Tharpe, Rowley, Zaide-Valte, and other school representatives attended the February 1, 2021 IEP team meeting. At this meeting, the advocate for Parent stated that Parent wanted all services in the October 2020 IEP to be implemented in-person, whether that be at a nonpublic school or otherwise. The advocate also requested that Student be placed in a general education classroom with a one-on-one aide in-person.

In response to the request, Corona-Norco advised Parent that even if placement in a general education class with an aide occurred, it would be conducted remotely until the pandemic closures ended. The IEP team was willing to discuss general education placement in the future once it reviewed Student's progress toward his goals and discussed appropriate supports and services, including a general education class, based on his needs. Parent stated Student was not making progress and needed help "24/7 to make him do his work." At times Parent held Student down on his seat with a belt to

attend class. In response to Parent's concerns that Student was becoming depressed and acting out due to the distance learning, the IEP team offered further assessments of Student's functional behavior, and of his social-emotional functioning to consider whether he needed emotional counseling. Following this meeting, Rust provided Parent a prior written notice, with procedural safeguards, advising Parent that Corona-Norco would not place Student in either a private school or general education at that time. Rust also offered the two assessments via an assessment plan. Parent did not consent to the two proposed assessments.

Parent raised concerns at the hearing that the distance learning instruction did not sufficiently challenge Student. Parent also believed Student would progress in general education if he was given a full-time aide. Dunnigan opined that during his first-grade year, Student was educated in the least restrictive environment. She believed this based upon her observations and conclusion from them that Student did not regress academically or socially during distance learning following the school closure. Blahak, Student's second-grade teacher, opined that general education would not be the least restrictive environment for Student, even if Student were given a regular aide. She believed that Student needed a special education class structure to catch up and not have gaps in his learning skills. She opined that Student was academically behind his general education peers and that "other kids know it." Student would likely fall behind in a faster-paced general education setting and would disrupt the rest of the class. Sommerness opined Student should have been placed 80 percent of the time in a general education setting and that Parent's request was "valid." She believed that the slower pace of a special education setting was an insufficient reason to deny Student a general education setting. She opined that Student most likely would not need an aide in a general education setting.

Addressing the first two factors of *Rachel H.*, the evidence established that Student was progressing in the special education classroom environment before the school closure in March of 2020. Once school resumed in August of 2020, Student showed very little regression and retained his skills. By December 2020, Student's writing was legible, and he was improving in his fine motor and sensory processing skills. Blahak observed academic progress and skills that were at a second-grade level. Zaide-Valte characterized Student at that time as being "highly verbal." While Sommerness claimed Student would progress in general education, Parent's testimony that Student was often off-task, required redirection, and even needed to be strapped into his chair to avoid wandering around the room contradicted this claim. The evidence established that Student would likely struggle in a less restrictive general education environment because he still required continued prompting and behavioral support. Concerning the third factor of *Rachel H.*, the overwhelming evidence established that a full-time move to general education would have created behavioral and learning difficulties for Student and would disrupt the general education teacher and the other students. There was no persuasive evidence that a less restrictive environment could adequately meet Student's needs and allow him to progress. The evidence showed that Student was progressing, and he continued to need the structure of a special education class.

At the February 1, 2021 amendment IEP team meeting, the IEP team attempted to address Parent's concerns regarding placement. Parent's primary objections focused on distance learning. Parent wanted to have Student placed in a private school, at public expense, to guarantee in-person instruction. However, Student presented no credible evidence that such a placement would have improved his skills or learning structure. Moreover, the distance learning component was being employed by

Corona-Norco on an “emergency basis” due to the school closures and Covid-19 precautions. Distance learning was not intended to be permanent, as evidenced by the fact that Corona-Norco had returned to in-person instruction at the time of the hearing. Finally, neither Corona-Norco nor Student provided evidence as to the cost of either placement.

The teachers and staff at Corona-Norco were attentive to Student’s unique educational needs, addressed those needs, and implemented his October 26, 2020 IEP. Corona-Norco offered an appropriate placement in the least restrictive environment for Student in the October 26, 2020 IEP. The IEP met the requirements of title 20 United States Code section 1415(b)(1)(C).

ISSUE 4: DID CORONA-NORCO DENY STUDENT A FAPE BY FAILING TO ADDRESS STUDENT’S REGRESSION AS A RESULT OF BEING ASSIGNED TO DISTANCE LEARNING FROM MARCH 2020 THROUGH THE DATE OF THE FILING OF THE DUE PROCESS COMPLAINT?

Student contends Corona-Norco denied him a FAPE by providing his academic instruction and services through distance learning from March 20 through December 19, 2020. Student argues that he regressed and that to progress, he requires compensatory, in-person education. Corona-Norco denies Student regressed and argues it provided Student sufficient, appropriate services based upon the school closures. Student did not prove Corona-Norco failed to address any regression by Student.

At the beginning of the 2020-2021 school year, Rowley observed Student using his sensory tools and employing other practices consistent with her in-person

instruction before March of 2020. Student's work samples had good legibility and consistency, and Student was making progress since March 2020. She opined there were no signs of regression since that time.

Zaide-Valte opined that Student's speech and language were substantially improved from the November 5, 2019 evaluation and IEP. His spoken language was more automatic, and he freely talked about his feelings and observations. Zaide-Valte believed Student was highly verbal. She observed no regression at the commencement of the 2020-2021 school year.

At the October 26, 2020 IEP meeting, Parent believed Student's writing was still illegible, and said he was constantly erasing due to regression of skills. Parent also testified that when she observed Student in Zoom classes, he was inattentive, distracted, and need prompting. Parent also felt Student was being given simple "activities," and when he participated in the speech services, he was reciting gibberish. Although Student was not a pupil of Blahak in the previous school year, Blahak observed that Student was active, thoughtful, and hardworking. She opined it was easy to get him back on task, even on Zoom.

Student argues that he did regress, as evidenced by the fact that Dunnigan testified Student eventually was attentive for 10-minute periods during first grade. In contrast, Blahak testified that in the 2020-2021 school year, he was attentive only eight minutes at a time. However, no persuasive evidence presented that Student had substantially regressed at the commencement of the 2020-2021 school year or that Corona-Norco did not provide services to avoid regression. Corona-Norco offered Student extended school year services in the November 2019 IEP and the October 26, 2020 IEP to address any potential regression between the regular school years. Parent

testified that Student participated in the offered services during the summer of 2020. Zaide-Valte and Rowley testified they saw no regression from the 2019 to 2020 school year, when classes commenced in August 2020, and that by December 19, 2020, Student was progressing well. Thus, Corona-Norco did not deny Student a FAPE by failing to address any possible regression of Student because of the school closures.

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(a): Corona-Norco did not deny Student a FAPE in implementing in person academic instruction and speech and language services from April 16 to June 3, 2020, in person. Corona-Norco denied Student a FAPE by failing to implement the November 5, 2019 IEP for three weeks in the areas of in person academic instruction and speech and language, and from March 16 to June 3, 2020, in the area of in person occupational therapy services. Student partially prevailed on Issue 1(a). Corona-Norco also partially prevailed on Issue 1(a).

Issue 1(b): Corona-Norco did not deny Student a FAPE for the 2019-2020 school year, through the date of filing of the due process complaint, by failing to evaluate Student or providing necessary accommodations to ensure Student was able to obtain a FAPE through distance learning. Corona-Norco prevailed on Issue 1(b).

Issue 2(a): Corona-Norco did not deny Student a FAPE for the 2020-2021 school year, through the date of filing of the due process complaint, by failing to provide in-

person special education and related services, in-person. Corona-Norco prevailed on Issue 2(a).

Issue 2(b): Corona-Norco did not deny Student a FAPE for the 2020-2021 school year, through the date of filing of the due process complaint, by failing to evaluate Student or providing necessary accommodations to ensure Student was able to obtain a FAPE through distance learning. Corona-Norco prevailed on Issue 2(b).

Issue 3(a): Corona-Norco did not deny Student a FAPE for the 2020-2021 school year and extended school year in its offer in Student's October 26, 2020 IEP by failing to develop an IEP containing an appropriate services model and enough services reasonably calculated to enable Student to receive educational benefit. Corona-Norco prevailed on Issue 3(a).

Issue 3(b): Corona-Norco did not deny Student a FAPE for the 2020-2021 school year and extended school year in its offer in Student's October 26, 2020 IEP by failing to address Student's needs with reasonable academic goals in the IEP. Corona-Norco prevailed on Issue 3(b).

Issue 3(c): Corona-Norco did not deny Student a FAPE for the 2020-2021 school year and extended school year in its offer in Student's October 26, 2020 IEP by failing to offer an appropriate services model and services to address Student's auditory processing sensory deficits. Corona-Norco prevailed on Issue 3(c).

Issue 3(d): Corona-Norco did not deny Student a FAPE for the 2020-2021 school year and extended school year in its offer in Student's October 26, 2020 IEP by failing to offer intensive individual services in the form of a one-on-one aide. Corona-Norco prevailed on Issue 3(d).

Issue 3(e): Corona-Norco did not deny Student a FAPE for the 2020-2021 school year and extended school year in its offer in Student's October 26, 2020 IEP by failing to give Student additional adequate goals and additional services not mentioned in the IEP, that address his areas of need. Corona-Norco prevailed on Issue 3(e).

Issue 3(f): Corona-Norco did not deny Student a FAPE for the 2020-2021 school year and extended school year in its offer in Student's October 26, 2020 IEP by failing to address developing behavioral issues, diminishing academic skills, speech development, and other skills deficiencies displayed by Student. Corona-Norco prevailed on Issue 3(f).

Issue 4: Corona-Norco did not deny Student a FAPE by failing to address Student's regression because of being assigned to distance learning from March 2020 until the end of the 2019-2020 school year and through the date of the filing of the Due Process complaint. Corona-Norco prevailed on Issue 4.

REMEDIES

Student partially prevailed on Issue 1(a). Student is entitled to a remedy for the denial of a FAPE.

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

Compensatory education is an equitable remedy that depends upon a fact-specific and individualized assessment of a student's current needs. (*Puyallup, supra*, 31 F.3d at p. 1496; *Reid v. District of Columbia* (D.C.Cir. 2005) 401 F.3d 516, 524 (*Reid*)). The award must be "reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place" (*Reid, supra*, 401 F.3d at p. 524; *R.P. ex rel. C.P. v. Prescott Unified Sch. Dist.*, 631 F.3d 1117, 1125 (9th Cir. 2011)). However, hour-for-hour relief for a denial of FAPE is not required by law. (*Puyallup, supra*, 31 F.3d at p. 1497.) "[E]quitable considerations are relevant in fashioning relief." (*Burlington, supra*, 471 U.S. at p. 374.)

In his closing brief, Student argues he should receive 23,040 minutes of academic instruction, 640 minutes of speech and language therapy, 200 minutes of occupational therapy, and 3600 minutes of extended school year services. Student justifies the 23,040 minutes of academic instruction by arguing that Dunnigan only provided 1 hour of instruction per week by Zoom. Therefore, Student did not receive 1440 minutes per week from March 13, 2020 through the end of the 2019-2020 school year. However, the evidence demonstrated that while Dunnigan held one synchronous session per week, she also made herself available for an additional three hours per week. Neither Parent nor Student accessed that time. The evidence also showed that beginning on April 13, 2020, Student was able to access asynchronous instruction through iReady, EPIC library, and Google Classroom. Dunnigan credibly testified that the assignments she prepared on those platforms were based upon the same material she assigned in-person.

Corona-Norco argues and credibly established that it was required to do its best to implement the Student's IEP remotely and did not have to match one-on-one services in-person. On the other hand, Corona-Norco's argument that the failure to

provide services during the initial shut down was “de minimis” is not persuasive. While the failure to provide those services during the initial weeks of the school closure is understandable, Corona-Norco presented no evidence that it tried to make up those services to Student to fully implement the 2019 IEP.

To calculate remedies, the ALJ relied on the school calendars for the 2019-2020 regular school year. The 2019-2020 school year consisted of approximately 37 ½ school weeks. Corona-Norco failed to provide academic and speech services, outlined in the November 5, 2019 IEP, for the weeks of March 16, March 23, and April 6, 2020. Student’s IEP provided that he would receive 1500 minutes of specialized academic instruction per week and 20 minutes of speech services per week. This totals 4500 minutes or 75 hours of academic instruction and 60 minutes or one hour of speech services for three weeks.

Corona-Norco failed to provide occupational therapy services that closely approximated those outlined in the November 2019 IEP from March 16 to June 3, 2020, or a total of 11 weeks. Student’s IEP required Corona-Norco to provide 20 minutes of occupational therapy services per week. This totals 220 minutes, or 3.6 hours for 11 weeks.

The parties stipulated to the admissibility of the rates from Professional Tutors of America, referred to as PTA. According to their rate sheet, PTA charged \$55 per hour for kindergarten through twelfth-grade academic instruction and offered a discounted rate for specific quantities of hours. Student offered no evidence of the cost of speech and occupational therapy services through a non-public agency other than PTA’s instruction rates. Therefore, Student is entitled to 76 hours of academic instruction at the rate of \$55 an hour. Student is entitled to four hours of speech and occupational therapy at a rate not to exceed PTA’s standard rate charged to school districts for those services, but

in any case, not more than \$55 an hour. Corona-Norco shall fund services for Student from PTA, if it is a certified nonpublic agency, up to a total of 4800 minutes, or 80 hours of instruction, at \$55 per hour. If PTA is not a certified nonpublic agency, then Corona-Norco shall reimburse Parent at an hourly rate not to exceed \$55 per hour and any administrative fees, based upon proof of attendance and payment at an agency of Parent's choosing, including PTA, up to 80 hours of total instruction.

Compensatory services shall be available to Student until June 30, 2023 and shall not exceed a total of 80 hours.

ORDER

1. Corona-Norco shall make available to Student compensatory education to compensate for its denial of FAPE from March 13 to June 3, 2020, as set forth above. This compensatory education shall take the form of 76 hours of individual sessions of academic and four hours of speech and language and occupational therapy, not to exceed \$55 per hour.
2. Corona-Norco shall directly fund Professional Tutors of America if it is a certified nonpublic agency. These services shall be available to Student until June 30, 2023.
3. If Professional Tutors of America is not a certified nonpublic agency, Corona-Norco shall reimburse Parent at an hourly rate not to exceed \$55 per hour, based upon proof of attendance and payment to an agency of Parent's choosing. These services shall be available to Student until June 30, 2023, up to a total of 80 hours.
4. A written agreement between the parties may alter the terms of this Order. An IEP can constitute such an agreement.

5. Student's other requests for relief are denied.

RIGHT TO APPEAL THIS DECISION

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

Brian Krikorian
Administrative Law Judge
Office of Administrative Hearings