

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

CASE NO. 2021010304
CASE NO. 2020050609

THE CONSOLIDATED MATTERS INVOLVING

PARENTS ON BEHALF OF STUDENT, AND

GLENDALE UNIFIED SCHOOL DISTRICT.

DECISION

MAY 20, 2021

On May 20, 2020, the Office of Administrative Hearings, called OAH, received a due process hearing request from Parents on behalf of Student, naming Glendale Unified School District. The matter was continued for good cause on June 25, 2020. On October 14, 2020, OAH granted Student's motion to amend her due process hearing request. The matter was again continued for good cause on November 24, 2020.

On January 8, 2021, Parents on behalf of Student filed a second due process hearing request, naming Glendale Unified. OAH consolidated Student's first and second due process hearing requests on January 13, 2021.

Administrative Law Judge Rommel P. Cruz heard this matter by videoconference in California on March 2, 4, 9, 10, 11, 12, 16, 17, 18, and 30, 2021, and April 1, 2021.

Attorneys Jenny Chau and Diana Maltz represented Student. Mother attended the hearing on all days except March 9 and 12, 2021, on Student's behalf. Mother was assisted by an Armenian interpreter when she attended.

Attorney Sundee Johnson represented Glendale Unified. Director of Special Education, Beatriz Bautista, and Coordinator William Gifford attended the hearing on behalf of Glendale Unified.

At the parties' request the matter was continued to May 10, 2021, for written closing briefs. The record was closed, and the matter was submitted on May 10, 2021.

ISSUES

At the start of the hearing, Student withdrew issues 1, 11, and 15 as outlined in the February 22, 2021 Order Following Prehearing Conference for Hearing by Videoconference. The issues were renumbered accordingly. A free appropriate public education is referred to as a FAPE. An individualized education program is called an IEP.

1. Did Glendale Unified's November 13, 2018 triennial multidisciplinary assessment deny Student a FAPE?
2. Did Glendale Unified deny Student a FAPE in the November 13, 2018 IEP by:
 - a. Failing to appropriately address Student's behavior needs;
 - b. Failing to appropriately address Student's social-emotional needs;
 - c. Failing to offer appropriate goals in the areas of:
 - i. Academics,

- ii. Social-emotional functioning, and
 - iii. Behavior?
- 3. Did Glendale Unified deny Student a FAPE in the February 7, 2019 IEP by failing to appropriately address Student's behavior needs?
- 4. Did Glendale Unified deny Student a FAPE in the April 8, 2019 IEP by failing to offer a program in the least restrictive environment that appropriately addressed Student's behaviors?
- 5. Did Glendale Unified deny Student a FAPE, both substantively and procedurally, by implementing an inappropriate second behavior aide without parental consent and without including the service in Student's IEP?
- 6. Did Glendale Unified deny Student a FAPE in the June 6, 2019 IEP by failing to offer a program in the least restrictive environment that appropriately addressed Student's behaviors?
- 7. Did Glendale Unified's October 23, 2019 functional behavior assessment deny Student a FAPE?
- 8. Did Glendale Unified deny Student a FAPE in the October 23, 2019 IEP by failing to offer a program in the least restrictive environment that appropriately addressed Student's behaviors?
- 9. Did Glendale Unified deny Student a FAPE in the November 5, 2019 IEP by failing to offer a program in the least restrictive environment that appropriately addressed Student's behaviors?
- 10. Did Glendale Unified deny Student a FAPE in the September 15, 2020 IEP by:
 - a. Failing to appropriately address Student's behavior needs; and
 - b. Failing to appropriately address Student's social skills needs?
- 11. Did Glendale Unified deny Student a FAPE by failing to offer a distance learning plan as part of Student's IEP?

12. Did Glendale Unified deny Student a FAPE by materially failing to implement Student's IEP from March 2020, to December 2020?

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).) Here, Student requested the hearings in the consolidated matters and had the burden of proof as to all the 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 10 years old and in fifth grade at the time of hearing. She resided within the Glendale Unified's geographic boundaries at all relevant times. Student was eligible for special education under the category of autism.

ISSUE 1: DID THE NOVEMBER 13, 2018 TRIENNIAL MULTIDISCIPLINARY ASSESSMENT DENY STUDENT A FAPE?

Student contends Glendale Unified's November 13, 2018 triennial multidisciplinary assessment failed to thoroughly assess her mental health and social emotional functioning to fully understand her behavioral and social emotional needs. Student claims the assessment relied on inaccurate data and used unreliable methods. Glendale Unified's contends its November 13, 2018 triennial multidisciplinary assessment properly assessed Student in all areas of suspected disabilities.

In assessing a child with a disability, the assessment must be sufficiently comprehensive to identify all of the child's special education and related services needs, whether or not commonly linked to the disability category in which the child has been classified. (34 C.F.R. § 300.304(c)(6).) Tests must be selected and administered to produce results that accurately reflect the student's aptitude, achievement level, or any other factors the test purports to measure. (Ed. Code, § 56320, subd. (d).) School districts are required to use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information, including information provided by the parent, that would assist in determining the educational needs of a child. (20 U.S.C. § 1414(b)(2)(A); 34 C.F.R. § 300.304(b)(1).)

A failure to properly assess is a procedural violation of the IDEA. (*Department of Educ., State of Hawaii v. Cari Rae S.* (D. Hawaii 2001) 158 F.Supp. 2d 1190, 1196; *Park v. Anaheim Union High School Dist.* (9th Cir. 2006) 464 F.3d 1025, 1032 (*Park*).) A procedural violation results in a denial of FAPE only if it impedes the child's right to a FAPE, significantly impedes the parent's opportunity to participate in the decision-making process regarding the provision of a FAPE to the parent's child, or causes a deprivation of educational benefits. (20 U.S.C. § 1415(f)(3)(E)(ii); Ed. Code, § 56505, subd. (f)(2).); see *W.G. v. Board of Trustees of Target Range School Dist. No. 23* (9th Cir. 1992) 960 F.2d 1479, 1484 (*Target Range*).)

Among the most important procedural safeguards are those that protect the parent's right to be involved in the development of their child's educational plan. (*Doug C. v. Hawaii Dept. of Educ.* (9th Cir. 2013) 720 F.3d 1038, 1043-1044.) The parents of a child with a disability must be afforded an opportunity to participate in meetings with respect to the identification, evaluation, and educational placement of the child, and the provision of a FAPE. (34 C.F.R. § 300.501(b); Ed. Code, § 56304, subd. (a).) The IEP team shall consider the concerns of the parent for enhancing the student's education and information on the student's needs provided to or by the parent. (20 U.S.C. § 1414(d)(3)(A) & (d)(4)(A)(ii); 34 C.F.R. § 300.324(a)(1)(ii) & (b)(1)(ii)(C); Ed. Code, § 56341.1, subds. (a)(2), (d)(3) & (f).)

Glendale Unified conducted a multidisciplinary assessment of Student in the Fall of 2018. The team of assessors included credentialed school psychologist and board certified behavior analyst Sharareh Atneyel, special education teacher Wendy Maynard, a school nurse, an occupational therapist, and a speech and language pathologist. The assessors' findings, conclusions, and recommendations were contained in a written report authored by Atneyel dated November 13, 2018.

Atneyel assessed Student's cognitive, social emotional, and behavioral functioning. She had a master's degree in school psychology and was board certified as a behavior analyst in 2017.

Atneyel reviewed Student's cumulative educational records as part of her assessment, and interviewed Student's teacher, Wendy Maynard. From kindergarten through third grade, Student was placed in Maynard's special day class.

During her time as Student's teacher, Maynard observed Student's behaviors to worsen. In kindergarten, Student required small group and individualized instruction, with maximum adult support to succeed behaviorally and academically. In first grade, Student became more aggressive. She hit others and destroyed items when she did not get what she wanted. However, her IEP at that time did not yet reflect that her behaviors impeded her learning or the learning of her peers, nor include behavior goals nor a behavior intervention plan.

Student's behavior improved in second grade. Although Student had difficulty participating in group activities, was easily distracted, and needed significant support from the teacher to share materials and to take turns with peers, she responded positively when given clear expectations and praised by adults. The IEP developed in second grade added a behavior goal to address sharing and turn-taking, but did not include a behavior intervention plan.

At the start of the 2018-2019 school year, when Atneyel was conducting the assessment, Student was in third grade and her behaviors had deteriorated considerably. Student no longer wanted to do her classwork. She was uncooperative, and no longer responded to praise or recognition.

Maynard reported that Student did not follow rules or accept responsibility for her misbehaviors. Student smiled and laughed while she hit, kicked, or swiped at others. Maynard opined that Student's mood and behaviors changed suddenly for no apparent reason. She also reported that Student spoke to imaginary people each day in class, recess, or at lunch, which she had done since the previous school year.

Maynard was a special education teacher for 19 years with Glendale Unified with experience teaching students with autism. She possessed a mild to moderate and moderate to severe special education credential, with a certificate in autism.

According to Maynard, Student's imaginary conversations were unlike echolalia she experienced in other children with autism. Echolalia is the repetition of a phrase or noise that the person has heard. It can occur immediately following the phrase or noise, or be delayed. The delayed echolalia can occur hours or even days after the person heard the phrase or noise. Maynard described Student's conversations as intense and involved. It was as if an imaginary person tapped Student's shoulder, and Student would stop her actual conversation to speak to a person who was not there.

Student argues that a mental health assessment or a more thorough evaluation of her autism would have revealed that her conversations with imaginary people at school were vocal stereotypy to satisfy her sensory needs. Student claims her self-talking as Glendale Unified described it, was not her speaking to imaginary people, but rather episodes of echolalia.

Student relies on the testimony of Casey Mapp, and the testimony and written findings of Agnesa Papazyan, Psy.D. Mapp was the assistant clinical director of Behavioral Learning Network, a nonpublic agency that provided Student approximately 14 hours of in-home applied behavior analysis services each week from 2016. Mapp

became the assistant clinical director in December 2019. Prior to December 2019, Mapp was a behavior analyst with Behavior Learning Network. As a behavior analyst, he supervised Student's in-home services in 2016 through June 2017. He was not assigned to work directly with Student from June 2017.

Dr. Papazyan was a licensed clinical psychologist who conducted an independent psychoeducational evaluation of Student in 2020. Dr. Papazyan conducted a comprehensive assessment of Student's cognitive, behavioral, social, and emotional functioning, along with her academic achievement. Her in-person observations of Student was limited to testing sessions conducted during restrictions imposed by the COVID-19 pandemic when Glendale Unified was providing only virtual classes. Her findings, conclusions, and recommendations were presented in written report dated August 22, 2020.

Mapp and Dr. Papazyan's testimony were not persuasive to support Student's claim that her imaginary conversations were vocal stereotypy as described by Behavior Learning Network. Behavioral Learning Network defined Student's vocal stereotypy as vocalizations consisting of topics unrelated to the current topic, repeating to talk about the topics, and repeating words or phrases which serve no function. What Maynard observed as to Student's conversations with absent persons was very different from Behavior Learning Network's definition. Mapp did not observe Student at school or interview any staff members from Glendale Unified. He offered no opinion as to whether what was seen and heard by Glendale Unified with respect to Student's imaginary conversations at school were vocal stereotypy or not.

Similarly, Dr. Papazyan did not observe Student at school, at home, or in the community. Her in-person interactions with Student was limited to the office setting for

testing. She did not interview any staff members from Glendale Unified or its behavioral intervention providers. Therefore, neither Mapp or Dr. Papazyan could persuasively rule out that Student displayed both vocal stereotypy as defined by Behavior Learning Network, and imaginary conversations at school as described by Maynard. As a result, the evidence did not support Student's claim that an assessment of Student's mental health or a thorough assessment of her autism would have likely revealed that Student's imaginary conversations at school were in fact episodes of vocal stereotypy or echolalia.

In addition, Student's argument that the November 13, 2018 multidisciplinary assessment lacked an educationally related mental health services assessment or a thorough evaluation of Student's autism deprived her of an educational benefit or significantly impeded Parents' ability to meaningfully participating the development of Student's IEP fails for multiple reasons. First, Student failed to allege in either of her due process hearing requests a violation on the part of Glendale Unified for failing to conduct an educationally related mental health services assessment. Student's due process hearing requests allege that Glendale Unified's assessors failed to observe Student during unstructured time, did not compare new test results with old test results, failed to report the impact of Student's behaviors on test validity, and failed to identify educational impacts or make program recommendations. The issues in a due process hearing are limited to those identified in the written due process complaint. (20 U.S.C. § 1415(f)(3)(B); Ed. Code, § 56502, subd. (i); *A.W. v. Tehachapi Unified School District* (9th Cir. 2020) 810 Fed.Appx. 588, affirming (E.D. Cal., March 8, 2019) 2019 WL 1092574.) To the extent Student raises a new issue in written closing argument, that a mental health assessment should have been conducted, that issue is beyond the scope of the hearing and not addressed in this Decision.

Second, Student does not point to any evidence that supports her claim that the absence of an educationally related mental health services assessment deprived the IEP team of information necessary in developing her IEP. Dr. Papazyan opined that based on Student's expressive and receptive delays, Student could not benefit from school-based counseling. Further, neither Dr. Papazyan nor any other witness recommended IEP goals, supports, or services that would have stemmed from an educationally related mental health assessment.

Further, Atneyel administered the short-form version of the Autism Spectrum Rating Scale and the Behavior Assessment System for Children, Third Edition. The Autism Spectrum Rating Scale short-form was designed to differentiate youth with autism from those in the general population. The Behavior Assessment System was completed by Mother and Maynard, and the answers used to rate Student's behaviors and emotions, which involved analyzing symptoms of autism such as impaired emotional and social reciprocity, difficulty developing peer relationships, and rigidity to routines. Atneyel explained the results to the November 13, 2018 IEP team, and as discussed at Issue 2, the IEP team used that information to identify Student's social emotional needs and drafted goals to address those needs. The evidence did not demonstrate that the lack of additional testing tools and strategies to assess Student's mental health or autism deprived the IEP team of information necessary in developing an appropriate IEP.

Atneyel was competent and used tools and strategies that gathered relevant information as to Student's social emotional functioning. The November 13, 2018 multidisciplinary assessment report provided the IEP team sufficient information to identify Student's social emotional needs, to develop an educational program designed to meet those needs.

However, in the area of behavior, Student did prove the November 13, 2018 multidisciplinary assessment failed to gather relevant information as to Student's behavioral functioning to assist in determining her educational needs. Student's maladaptive behaviors were significant and troubling. However, the tools and strategies Glendale Unified used to assess Student's behaviors failed to gather reliable information to identify her behavioral needs.

Jeffery Hayden, Ph.D., testified on behalf of Student. Dr. Hayden possessed a doctorate degree in education with an emphasis in special education, disability, and risk. He was a doctorate level behavioral analyst, board certified in 2004. In private practice, he provided consultation services for behavior intervention services. In addition, he trained, oversaw, and supervised behavior aides who worked with individuals with disabilities, including children with behavioral challenges. In school settings, Dr. Hayden observed and supervised behavior intervention services involving one-to-one behavior supports provided by a behavior aide. He occasionally worked directly with students.

Dr. Hayden conducted roughly 15 functional behavior assessments in his career. However, he had conducted hundreds of less comprehensive behavior assessments for his clients. He had extensive experience developing behavior intervention plans. He attended IEP team meetings and helped develop IEP behavior goals.

Dr. Hayden was hired by Student in January 2021, to review her behavioral history, including the supports and services she received at Glendale Unified. His review of records included IEPs, school incident reports, behavioral intervention plans, assessments, data from Student's school behavior aides, nursing notes, and evaluation and progress notes from Student's psychiatrist. Dr. Hayden also interviewed Mother, Student's psychiatrist Deena Hassan, M.D., and Student's in-home applied behavioral

analysis services supervisor Jennifer Charles. Dr. Hayden did not interview any staff members of Glendale Unified, and did not observe Student in any setting. His opinions were limited to assessment methodology, accurate reporting of testing results, and insufficiencies and inconsistencies in the Glendale Unified's assessment reports. He authored a report entitled Expert Witness Report dated February 23, 2021.

Dr. Hayden had a high level of education, training, and experience in assessing and analyzing behavior, formulating a hypothesis of the function of a behavior, and developing well-designed behavior intervention plans that were clear, well-defined, and specific. His testimony was measured and confident. His testimony and written opinions were persuasive and given substantial weight in determining the proper methods of assessing behavior functions and developing an appropriate behavior intervention plan.

Dr. Hayden explained that an individual's behavior essentially functions to serve four purposes: to help them escape or avoid, to gain attention, to access an item or activity, or to satisfy their sensory needs. He explained that the purpose of assessing the function of a student's behavior is to understand why the behavior is occurring at school, to develop strategies to address the behavior, and incorporate the strategies in a behavior intervention plan. Dr. Hayden opined that to create an effective behavior intervention plan it was important to examine the history of the behavior, to understand the circumstances surrounding the behavior, how it was addressed, and the impact of strategies used.

Dr. Hayden opined that a specific and accurate description, referred to as an operational definition, of a targeted behavior was important so those involved could correctly recognize the problem behavior. That was crucial to allow for accurate

tracking of the behavior and proper implementation of behavior intervention strategies. To develop a reliable hypothesis of the function of a behavior it was important to specifically define the behavior and to note in detail what happened before the behavior, also known as the antecedent, to describe the observed behavior, and to note in detail what happened after the behavior, also known as the consequence.

The November 13, 2018 multidisciplinary assessment report failed to propose a reliable hypothesis of the functions of Student's problem behaviors. Atneyel relied on an Antecedent Behavior Consequence chart, also known as an ABC chart. The purpose of an ABC chart is to record observations of the events that precede and follow a behavior to identify the function of the behavior. The ABC chart tracked five behaviors, listed as attention seeking, escape, aggression, non-compliance, and talking to absent people. The November 13, 2018 multidisciplinary assessment report did not define the behaviors being tracked.

The assessment's failure to define Student's aggressive and non-compliant behaviors was problematic. Student presented with a number of maladaptive behaviors that could be characterized as both aggressive and non-compliant, such as hitting others and destroying property. However, she also yelled, and threw tantrums, which at times involved her throwing herself to the floor. The ABC chart failed to distinguish between these behaviors or explain how these maladaptive behaviors were tracked and analyzed for functions. Combining multiple different behaviors into one behavior category may result in confusing and conflicting information concerning the antecedents and consequences of the category of behavior. Hence, the ABC chart could not be relied upon with confidence.

In addition, Atneyel administered the Motivation Assessment Scale, referred to as the MAS, to ascertain the function of Student's behaviors. Its results were also unreliable. The MAS assessed the functions or motivations of behavior problems. The items were organized in four categories of behavior outcomes: to gain attention, to access tangible objects or activities, to avoid a situation or activity, and for sensory input to calm and soothe. Sensory input behavior included attempts to focus by tuning out commotion or noise, or seeking input or pressure within the body. Maynard completed the MAS questionnaire.

The tabulation of the MAS questionnaire identified sensory seeking as the most prevalent function of Student's behaviors. However, according to Atneyel, it was not. Atneyel noted in the report that sensory options were presented to Student and none showed success in changing Student's behaviors. Thus, Atneyel concluded that Student's behaviors were not occurring to seek sensory input, despite conflicting results from the MAS. However, Atneyel did not explain in the assessment report the discrepancy between the results of the MAS and Atneyel's notation that Student's behaviors were not to satisfy Student's sensory needs.

Nonetheless, in concluding the functions of Student's behaviors, Atneyel still wrote that sensory seeking was the dominant function of Student's behaviors. Atneyel's testimony that she was merely summarizing the result of the MAS, and did not conclude that the function of Student's behavior was seeking sensory input, was inconsistent with the assessment report, and thus, her testimony was unpersuasive. The assessment report clearly stated that "[o]verall, and based on a variety of factors including observations, parent and teacher interviews and classroom performance, it appears that the function of Student's behaviors was significant in the following order: Sensory, Attention, Tangible, and Escape." Atneyel's further reported conclusion that Student

misbehaved primarily to obtain an item or to do something else, rather than follow a direction that she did not want follow, was inconsistent. According to the MAS, that conclusion would support Tangible as the dominate function of Student's behaviors, not Sensory.

Moreover, Atneyel failed to explain the inconsistencies in her written report at the November 13, 2018 IEP team meeting to review her findings. There she maintained that based on the MAS, Student's behaviors were motivated primarily to fulfill sensory and attention needs related to her autism, contrary to what was written in the report.

The November 13, 2018 multidisciplinary assessment fell short of appropriately assessing Student's behaviors. The ABC chart failed to accurately identify, define, and track the problem behaviors. It could not be relied upon. The results of the MAS were inconsistent with other aspects of the behavior assessment, and no explanation of the inconsistency was included in the report or offered to the IEP team by Atneyel. The assessment's conclusions as to the functions of Student's behaviors were internally inconsistent. They failed to identify the functions of Student's behavior or to guide the IEP team in addressing the behaviors that interfered with Student's learning and the learning of others.

The November 13, 2018 multidisciplinary assessment's failure to gather relevant and reliable information as to the functions of Student's behaviors was a procedural violation of the IDEA. The violation significantly denied Parents of necessary information about their child's needs to assist them in meaningfully participating in the development of an appropriate educational program that could address Student's behaviors and ensure access to an education. Accordingly, Student met her burden of proving by a

preponderance of the evidence that Glendale Unified's November 13, 2018 multidisciplinary assessment denied her a FAPE.

ISSUES 2(b), 2(c)(i), and 2(c)(ii): DID THE NOVEMBER 13, 2018 IEP FAIL TO ADDRESS STUDENT'S SOCIAL EMOTIONAL NEEDS AND OFFER APPROPRIATE ACADEMIC AND SOCIAL EMOTIONAL FUNCTIONING GOALS?

Student contends the November 13, 2018 IEP failed to offer social skills services and supports, appropriate social emotional goals, as well appropriate academic goals in the areas of reading, writing, and math. Glendale Unified contends the IEP appropriately addressed Student's social emotional and academic needs.

The IEP is the "centerpiece of the [IDEA's] education delivery system for disabled children" and consists of a detailed written statement that must be developed, reviewed, and revised for each child with a disability. (*Honig v. Doe* (1988) 484 U.S. 305, 311 [108 S.Ct. 592, 98 L.Ed.2d 686]; 20 U.S.C. §§ 1401 (14), 1414 (d)(1)(A); Ed. Code, §§ 56032, 56345.) It is the "modus operandi" of the IDEA, "a comprehensive statement of the educational needs of a handicapped child and the specially designed instruction and related services to be employed to meet those needs." (*School Comm. of Town of Burlington, Mass. v. Department of Educ. of Mass.* (1985) 471 U.S. 359, 368 [105 S.Ct. 1996].)

An IEP is a written document for each child with a disability that includes a statement of the child's present levels of academic achievement and functional performance, including how the child's disability affects the child's involvement and progress in the general education curriculum. (20 U.S.C. § 1414(d)(1)(A)(i)(I); 34 C.F.R. § 300.320(a)(1); Ed. Code, § 56345, subd. (a)(1).) The IEP must also include a statement

of measurable annual goals, including academic and functional goals, designed to meet the child's needs that result from the child's disability to enable the child to be involved in and make progress in the general education curriculum, and meet each of the child's other educational needs that result from the child's disability. (20 U.S.C. § 1414(d)(1)(A)(i)(II); 34 C.F.R. § 300.320(a)(2); Ed. Code, § 56345, subd. (a)(2).)

Additionally, the IEP must contain statements of how the child's goals will be measured and the special education and related services, based on peer-reviewed research to the extent practicable, that will be provided to the student. (20 U.S.C. § 1414(d)(1)(A)(i)(III), (IV); 34 C.F.R. § 300.320(a)(3), (4); Ed. Code, § 56345, subd. (a)(3), (4).) The IEP shall show a direct relationship between the present levels of performance, the goals and objectives, and the specific educational services to be provided. (Cal. Code Regs., tit. 5, § 3040.)

In California, related services are called designated instruction and services, and must be provided as required to assist an individual with exceptional needs to benefit from special education. (Ed. Code, § 56363, subd. (a).) The educational benefit provided to a child requiring special education is not limited to addressing the child's academic needs, but also social and emotional needs that affect academic progress, school behavior, and socialization. (*County of San Diego v. California Special Educ. Hearing Office* (9th Cir. 1996) 93 F.3d 1458, 1467.) A child's unique needs are to be broadly construed to include the child's academic, social, health, emotional, communicative, physical and vocational needs. (*Seattle School Dist. No. 1 v. B.S.* (9th Cir. 1996) 82 F.3d 1493, 1500, abrogated in part on other grounds by *Schaffer, supra*, 546 U.S. 49.)

The IEP must also contain an explanation of the extent, if any, to which the child will not participate with nondisabled children in the regular class and activities.

(20 U.S.C. § 1414(d)(1)(A)(i)(V), (VI); 34 C.F.R. § 300.320(a)(5), (6); Ed. Code, § 56345, subd. (a)(5), (6).)

In resolving the question of whether a school district has offered a FAPE, the focus is on the adequacy of the school district's proposed program. (*Gregory K. v. Longview School Dist.* (9th Cir. 1987) 811 F.2d 1307, 1314.) It must be assessed in terms of what was objectively reasonable when the IEP was developed. (*Fuhrmann v. East Hanover Bd. Of Educ.* (3rd Cir. 1993) 993 F.2d 1031 (*Fuhrmann*).) An IEP is evaluated in light of information available at the time it was developed, and is not to be evaluated in hindsight. (*Adams v. State of Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149.)

The IEP team convened on November 13, 2018, and December 14, 2018, to review the November 13, 2018 multidisciplinary assessment report and Student's IEP. The November 13, 2018 IEP listed the following areas of need: writing, math, reading, speech and language, fine motor skills, social emotional functioning, adaptive behavior, and vocational skills. The IEP offered a pragmatics/social skills goal, a visual motor/writing goal, a reading goal, 1,740 minutes a week of specialized academic instruction, and 60 minutes a week of group speech and language services. The IEP did not offer a math goal. The IEP team found her eligible for special education under the categories of autism and emotional disturbance.

SOCIAL EMOTIONAL FUNCTIONING

The evidence did not support Student's claim that she was denied a FAPE based on the November 13, 2018 IEP's failure to offer social skills services and supports to address her social emotional needs. The IEP team was informed that Student did not interact well with her peers. She had significant deficits in the areas of expressive and

receptive language, social pragmatic language, and expressive vocabulary. She lacked skills to initiate and maintain social interactions.

The IEP team developed a goal in the area of pragmatics and social skills to improve Student's social interactions with adults and peers. The goal called for Student to use complete sentences to request, question, answer, and comment during a structured language activity to maintain appropriate social interactions with adults and peers with 80 percent accuracy with no more than 2 prompts. A speech-language pathologist was responsible for the implementation of the social skills goal.

Furthermore, the November 13, 2018 IEP offered 60 minutes each week of group speech and language services to improve her expressive and receptive language and social skills deficits. The group speech and language sessions provided Student opportunities to improve her adult and peer interactions.

Student does not contend the IEP's pragmatics/social skills goal to be inappropriate, rather Student argues she required additional goals to improve her social skills. At hearing, Dr. Papazyan opined the November 13, 2018 IEP lacked goals to help Student recognize and understand social expressions and gestural cues. However, Dr. Papazyan did not opine how those skills could not be addressed through the group speech and language sessions or why Student required IEP goals in those areas to meaningfully benefit from her education. Dr. Papazyan also did not point to any information available to the November and December 2018 IEP teams to support her opinion. Therefore, Dr. Papazyan's opinion was not persuasive in determining the adequacy of the IEP's social emotional goals and services. Further, Student failed to prove how the absence of Dr. Papazyan's proposed goals in the November 13, 2018 IEP significantly impeded Parent's opportunity to participate in the decision-making process

regarding the provision of a FAPE to Student, or deprived Student of an educational benefit.

The evidence did not establish that the pragmatics and social skills goal, coupled with the weekly group speech and language services were inadequate to address her social skills deficits. Accordingly, Student failed to meet her burden of proving the November 13, 2018 IEP denied her a FAPE by failing to provide appropriate goals in the area social emotional functioning or failed to address her social emotional needs.

ACADEMIC GOALS

Maynard assessed Student's academic skills as part of the November 13, 2018 multidisciplinary assessment. Student's scores across the board in reading, writing and math fell in the very low range.

As to applied problems, Student struggled to analyze and work out word problems. Student struggled to solve single digit addition and subtraction problems rapidly and accurately. Student did not read the problems and answered with random numbers.

Student could independently write individual letters and copied one to three words from a model. Student could copy, but could not spell on her own. She consistently read five words. The IEP offered one writing goal and one reading goal, but no math goal.

READING AND WRITING

The evidence did not support Student's claim that the November 13, 2018 IEP failed to offer appropriate goals in the areas of reading and writing. Dr. Papayzan

opined that the IEP failed to offer goals in written expression and spelling. However, Dr. Papazyan did not offer an opinion as to whether a spelling goal or written expression goal was appropriate for Student at the time of the November 13, 2018 IEP's development. According to Behavioral Learning Network's progress report dated November 25, 2018, Student did not know how to spell and had difficulty writing without repeated practice. This was consistent with Maynard's assessment of Student writing skills. Maynard persuasively testified that Student had minimal, basic writing skills. Student could copy, but could not spell on her own. Therefore, the IEP's writing goal was tailored to Student's skill level as it asked Student to verbally create a sentence and copy a three-to-five-word sentence from a model. Accordingly, Student failed to prove that she had the writing skills to benefit from any other type of writing goal.

Similarly, Student's reading skills were foundational. Dr. Papazyan opined that the IEP failed to address reading comprehension, reading fluency, or decoding. However, Dr. Papazyan did not explain how those reading goals were appropriate in light of Student's limited reading skills. At the time of the November 13, 2018 IEP team meeting, Student could only read five words. Therefore, the IEP's reading goal was appropriately tailored to Students' reading skills. It required Student to successfully read 20 out of 25 basic kindergarten to first grade level sight and high frequency words. Accordingly, Student failed to prove that she required a different or an additional reading goal based on her level of reading skills.

MATH

Student proved that she required a math goal in her IEP. She had previously met her prior two math goals, but continued to have significant deficits in math. The November 13, 2018 IEP identified math as an area of need, but failed to include a

measurable goal to address Student's math deficits. Maynard testified the IEP should have offered a goal in math. Accordingly, Student proved by a preponderance of the evidence that Glendale Unified denied her a FAPE by failing to offer appropriate goals in all areas of academic need, specifically in the area of math, in the November 13, 2018 IEP.

ISSUES 2(a), 2(c)(iii), 3, 4, AND 6: DID THE IEPs DATED NOVEMBER 13, 2018, FEBRUARY 7, 2019, APRIL 8, 2019, AND JUNE 6, 2019, FAIL TO ADDRESS STUDENT'S BEHAVIORAL NEEDS?

Student contends the IEPs dated November 13, 2018, through June 6, 2019, failed to offer appropriate behavior goals, a behavior intervention plan, and behavior intervention development services to address her behavioral needs. Glendale Unified contends the IEPs appropriately addressed Student's behavioral needs.

Whenever a child's behavior impedes his 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); 34 C.F.R. § 300.324(a)(2)(i); Ed. Code, § 56341.1, subd. (b)(1).) The IEP team must consider the use of positive behavioral interventions and supports, and other strategies, but the implementing regulations of the IDEA do not require the team to use any particular method, strategy, or technique. (71 Fed. Reg. 46,683 (Aug. 14, 2006).) If the IEP team finds that a behavior intervention plan is appropriate for a child with a disability whose behaviors impede the child's learning, then the child's IEP must include a behavior intervention plan. (*Questions and Answers on Discipline Procedures* (Office of Special Education and Rehabilitative Services, June 1, 2009), Q. E-2 (OSERS Q & A).)

The November 13, 2018 multidisciplinary assessment found Student to display sudden and frequent mood changes, and periods of emotional instability. Student had difficulty maintaining self-control and regulating her impulsive behaviors. Maynard and Mother reported that Student did not interact well with other children. The assessment also noted that Student displayed a high level of aggressive behaviors, was argumentative, defiant, and threatening to others. She frequently disobeyed rules, which involved cheating, deception, and stealing.

Student's unmanageable, disruptive, and aggressive behaviors were noted in the November 13, 2018 IEP. Student did not comply with adult directions and engaged in behaviors such as screaming, throwing herself to the floor, taking and throwing objects, kicking, hitting, pulling hair, and eloping to avoid a task, gain attention, or to get something she wanted. The IEP acknowledged that her behaviors impeded her learning, and the learning of others. The IEP offered two goals targeting her behaviors, a behavior intervention plan, and 1800 minutes weekly of individual behavior intervention services in the form of a one-to-one behavior aide. The IEP did not offer behavior intervention development services to supervise the behavior aide, or the aide's implementation of the behavior plan.

NOVEMBER 13, 2018 IEP

BEHAVIOR INTERVENTION PLAN

The November 13, 2018 IEP failed to provide Student with a behavior intervention plan that properly addressed her identified behavioral challenges, or supported Student's goals. As Student established in Issue 1, the November 13, 2018 multidisciplinary assessment failed to identify the functions of Student's behaviors and could not be relied on to guide the IEP team in the development of Student's behavior

intervention plan. The multidisciplinary assessment failed to describe Student's problem behaviors and offered inconsistent findings as to the functions of her behaviors. As a result, the November 13, 2018 IEP's behavior intervention plan was vague and failed to specify the problem behaviors it intended to remedy. It was unclear as to how the behavior plan was related to the goals developed to help Student access the curriculum and make progress.

Student's behaviors were extensive and significant barriers to her education. However, the November 13, 2018 behavior intervention plan identified non-compliance as the only problem behavior that impeded Student's learning. Instead of acknowledging and addressing the aggressive behaviors, such as throwing objects, screaming, kicking, and hitting, the plan merely mentioned in passing that her aggressive behavior was maintained by attention and escape from nonpreferred tasks and activities.

The plan's lack of clarity also undermined its proposed strategies. The behavior intervention plan sought to teach and reinforce Student's use of functional communication to express her wants and needs, and to use coping strategies to replace the problem behaviors. As a strategy to reinforce her use of functional communication, the plan called for ignoring Student's problematic behaviors when she wanted attention. However, the plan did not describe the target non-compliant or aggressive behaviors, and anyone implementing the plan would not know which behaviors to ignore and which to reinforce as attempts at functional communication. The plan's lack of specificity and clarity made it unworkable.

In addition, the November 13, 2018 IEP failed to offer services to oversee the behavior aide and implementation of the behavior intervention plan, to the extent

possible without a clear plan. Such services are commonly referred to as behavior intervention development services. Dr. Hayden persuasively opined that despite the training behavior aides typically receive, they still required regular oversight by trained and experienced behavioral analysts. This was necessary to ensure proper implementation of a behavior intervention plan, collection of accurate and reliable data, and ongoing analysis of the data to assess the efficacy of the plan and propose modification if necessary.

Glendale Unified did provide Student with behavior intervention development services outside of the IEP. However, the amount and frequency of services was not discussed or decided by the November 13, 2018 IEP team, and were insufficient. Glendale Unified contracted with two nonpublic agencies to provide Student behavior aide support and behavior intervention supervision. Those contracts provided Student with four hours per month of behavior intervention development services, which was the typical amount offered by Glendale Unified.

Dr. Hayden opined that a minimum of five percent, or three minutes, for every hour of behavior aide services provided was required to be supervised. This supervision recommendation was established by the Behavior Analyst Certification Board.

Student was provided 30 hours a week, or 120 hours per month, of behavior aide support to implement the behavior intervention plan. Five percent of 120 hours is six hours a month. That amount of intervention development services was required to properly supervise the behavior aide, to oversee proper implementation of the behavior plan, to ensure accurate and reliable data was collected, and to assess the effectiveness of the plan. Glendale Unified provided no more than four hours a month to Student.

Following the November 13, 2018 IEP team meeting, Student's behavior problems escalated despite the support of a behavior aide. On December 5, 2018, Student got upset, threw herself to the ground, and kicked Maynard several times. Student was sent home with Parent.

On January 30, 2019, Student hit a classmate several times. When Maynard blocked Student from hitting the classmate, Student proceeded to hit Maynard. The other student suffered bruising on his back. Maynard had several bruises on her arm and leg.

On February 1, 2019, Student hit a visually impaired student. When Maynard shielded the other student, Student kicked and hit Maynard. Student was removed from the classroom by an administrator. Student hit, kicked, spat, and attempted to bite the administrator. Student was placed on in-school suspension outside of Maynard's classroom.

At the hearing, Maynard opined that the behavior intervention plan was not working. This opinion supports the logical inference that the behavior intervention plan failed in significant part because it was poorly designed and there was an inadequate amount of supervision to ensure fidelity in implementing the plan, or to recommend modifications of the plan as necessary. The lack of an effective behavior intervention plan, or the behavior intervention development services to oversee the plan, in the IEP or otherwise, deprived Student of the related services she required to oversee and develop her behavior intervention program to assist her in benefitting from special education.

The evidence established that the November 13, 2018 IEP failed to offer Student an appropriate behavior intervention plan and the necessary behavior intervention

development services to meet her behavioral needs. Accordingly, Student proved by a preponderance of the evidence that Glendale Unified denied her a FAPE by failing to appropriately address her behavioral needs in the November 13, 2018 IEP.

BEHAVIOR GOALS

The evidence established that the behavior goals in the November 13, 2018 IEP were inadequate to meet Student's behavioral needs. The first behavior goal focused on Student's failure to follow directions. As a baseline, Student had difficulty complying with adult directions and displayed escape/task avoidance behavior such as taking and throwing objects, screaming, kicking, hitting, and eloping. The goal called for Student to follow verbal directions. To meet the goal, Student had to look at the person and comply within 20 seconds of receiving the direction in four out of five opportunities.

The second behavior goal addressed Student's noncompliance to gain adult attention or escape during nonpreferred activities. The baseline described her behavior during nonpreferred activities as outbursts including screaming, hitting, kicking, requesting to use the bathroom, eloping, and ripping papers to gain adult attention or to escape an activity. The goal called for Student during nonpreferred activities to use self-control strategies such as self-talk or belly breathing to gain self-control within 30 seconds of becoming agitated, to communicate her thoughts respectfully, and to refrain from the negative behavior and successfully rejoin the activity in three out of four opportunities.

However, the November 13, 2018 IEPs' two behavior goals were limited to increasing Student's compliance with adult directions, and failed to offer a goal to help Student improve her use of functional communication to replace her problem behaviors

as called for in the IEP's behavior intervention plan. Student could use functional communication, but she did not do so consistently. Instead, she resorted to aggression and defiance by hitting, kicking, screaming, eloping, and throwing objects to communicate her wants and needs. The IEP lacked a crucial goal specifically designed for Student to acquire the skills to consistently use functional communication with words, gestures, or visuals to express what she wanted or needed, instead of engaging in aggressive and defiant behaviors.

The evidence established that the November 13, 2018 IEP's behavior goals were inadequate to address Student's problem behaviors. The IEP's goals were limited to increasing Student's compliance with adult direction and the IEP failed to offer a goal to improve Student's use of functional communication to reduce her aggressive and defiant behaviors. The absence of a functional communication goal deprived Student of the opportunity to acquire the skill she needed to appropriately communicate her wants and needs to enable to participate and benefit from her education. Accordingly, Student met her burden of proving by a preponderance of the evidence that Glendale Unified denied her a FAPE by failing to offer appropriate goals in the area of behavior in the November 13, 2018 IEP.

FEBRUARY 7, 2019 IEP

Maynard testified that following the December 14, 2018 IEP team meeting and throughout the Spring 2019 semester, Student had to be removed from the classroom several times a week, sometimes several times a day, due to her problem behaviors. She was aggressive and disruptive. She eloped at least once every two weeks, running out of the classroom and throughout the campus. Several times a week Student ruined property such as books or classmate belongings.

On February 7, 2019 the IEP team reconvened. At the meeting, a school administrator opined that Student did not know how to properly get someone's attention, or share the attention of adults with her peers, without being aggressive. Parents were concerned about the behavior aide's qualifications and Student's worsening behaviors at school. The IEP team made no changes to the IEP or the behavior intervention plan. Instead, Glendale Unified proposed the IEP team reconvene in six weeks to allow a new behavior aide to build rapport with Student and assess Student's response.

Board certified behavior analyst Magaly Zetino Reyes was employed by Maxim Healthcare Services, one of the nonpublic agencies that provided behavior intervention services to Glendale Unified. She was assigned to supervise Student's behavior intervention development services, despite the absence of such services in the November 13, 2018 IEP. At the hearing, she opined that a change to a behavior intervention plan was required if a behavior got worse or if a new problem behavior of significance occurred consistently over time. She opined that if a student's behavior worsened for a period of six weeks, the student's behavior intervention plan needed to be amended. Glendale Unified school psychologist and board certified behavioral analyst Nina Kazanjian offered the same opinion at the hearing.

Nearly six weeks of school passed from the time Parents consented to the November 13, 2018 IEP on December 17, 2018, to the February 7, 2019 IEP team meeting. However, Glendale Unified made no changes to Student's behavior intervention plan. During that period, Student's aggression towards adults and peers escalated. She was frequently removed from the classroom due to her disruptive behaviors. She could not consistently participate in class.

The February 7, 2019 IEP made no amendments to Student's November 13, 2018 IEP. No functional communication goal was added to Student's IEP, and the behavior intervention plan was not revised. However, it was evident by February 7, 2019, that Student's behavior intervention plan was not working and required a revision. In addition, the November 13, 2018 IEP did not offer behavior intervention development services. Glendale Unified continued to provide an insufficient amount of behavior intervention development. Glendale Unified's failure to add a functional communication goal, revise Student's behavior intervention plan, and offer behavior intervention development denied Student the positive behavioral interventions and supports she needed to meaningfully benefit from her education. Accordingly, Student met her burden of proving by a preponderance of the evidence that Glendale Unified denied her a FAPE by failing to address her behavior needs in the February 7, 2019 IEP.

APRIL 8, 2019 IEP

The April 8, 2019 IEP also failed to appropriately address Student's behaviors. Student's behaviors did not improve following the February 7, 2019 IEP team meeting and the assignment of a new aide. Her aggression escalated. In response, Glendale Unified added a second behavior aide to serve Student starting March 8, 2019. The second behavior aide protected other students from Student. However, Student continued to injure the adults shielding the other students. Student still did not participate in class and made no progress towards her IEP goals. She continued to talk to imaginary people. Her attempts to elope from the classroom continued.

On April 8, 2019, the IEP team reconvened. Parents shared their concern about having two behavior aides assigned to Student. Glendale Unified did not amend Student's behavior intervention plan, add a second behavior aide, or include behavior

intervention development services in the IEP. Two behavior aides required a minimum amount of 12 hours of behavior intervention development services each month. Instead, Glendale Unified amended Student's IEP to offer placement in a nonpublic school, without a revised behavior intervention plan or adding a functional communication goal. Parents did not consent to the April 8, 2019 IEP.

Jacqueline Nelson attended the April 8, 2019 IEP team meeting. At the time of the meeting, she was a teacher specialist for Glendale Unified who oversaw the educational programs of student's placed in alternative placements such as nonpublic schools and residential treatment programs. She testified at the hearing that Glendale Unified recommended placement at Villa Esperanza. Nelson opined that Villa Esperanza could meet Student's needs based on the nonpublic school's strong behavioral program. Villa Esperanza had behavior aides embedded in the classroom, supervised by board certified behavioral analysts daily.

Regardless of whether a nonpublic school placement offered by Glendale Unified would have provided a strong behavioral program, the nonpublic school would have been required to implement Student's IEP as written. Placement at a nonpublic school would not have remedied the behavior intervention plan's inadequacies. A nonpublic school, regardless of qualified personnel, would have implemented an ineffective behavior intervention plan.

The April 8, 2019 IEP continued Glendale Unified's failure to offer Student a functional communication goal or a behavior intervention plan that was properly designed to address her worsening behaviors. Thus, Student was denied the positive behavioral interventions she needed to meaningfully benefit from her education.

Accordingly, Student met her burden of proving Glendale Unified denied her a FAPE by failing to address her behavior needs in the April 8, 2019 IEP.

JUNE 6, 2019 IEP

Glendale Unified's failure to support Student's behavioral needs continued through the June 6, 2019, when the IEP team reconvened. At the meeting, Glendale Unified staff reported that Student was still aggressive towards her two behavior aides. She continued to avoid academic tasks and group activities. School staff had also observed Student hitting herself.

Glendale Unified did not modify the behavior intervention plan, offer behavior intervention development services, or offer a functional communication goal. Instead, the June 6, 2019 IEP reaffirmed its offer of FAPE with placement at Villa Esperanza. Parents did not consent to June 6, 2019 IEP.

The June 6, 2019 IEP continued Glendale Unified's failed efforts to address Student's behaviors. The IEP did not incorporate a well-developed, effective behavior intervention plan, offer behavior intervention development services, or offer a functional communication goal. Glendale Unified continued to implement an ineffective behavior intervention plan, with insufficient supervision. Thus, the June 6, 2019 IEP denied Student the positive behavioral interventions she needed to meaningfully benefit from her education. Accordingly, Student met her burden in proving Glendale Unified denied her a FAPE by failing to address her behavior needs in the June 6, 2019 IEP. Furthermore, having determined the April 8, 2019, and June 6, 2019 IEPs denied Student a FAPE by failing to offer an appropriate behavior intervention plan and behavior goals, an analysis as to whether the IEPs offered a program in the least restrictive environment is not necessary.

ISSUE 5: DID THE IMPLEMENTATION OF A SECOND BEHAVIOR AIDE WITHOUT PARENTAL CONSENT DENY STUDENT A FAPE?

School districts must obtain informed consent from the parent of the child before providing special education and related services to the child. (20 U.S.C. § 1414(a)(1)(D)(i)(II); 34 C.F.R. § 300.300(b)(1) (2006), (2); Ed. Code, § 56346, subd. (a).) Informed consent requires that the parent has been fully informed of all the information relevant to the activity for which consent is sought, and that the parent understands and agrees in writing to the carrying out of the activity for which the parent's consent is sought. (34 C.F.R. § 300.9(a), (b) (2006).

Student contends Glendale Unified implemented a second behavior aide for Student without the consent of Parents. Therefore, Student argues Glendale Unified deprived Parents of the opportunity to participate in the provision of special education and related services to Student. Student also claims the second behavior aide caused Student's negative behaviors to increase. Glendale Unified contends the second behavior aide was not dedicated to Student, but instead was an aide embedded into the classroom to support the Student's dedicated behavior aide and the teacher. Therefore, Glendale Unified argues that Student's IEP did not require an amendment and parental consent was not required.

Student's claim that her worsening behaviors were attributable to the assignment of a second behavior aide was unsupported by the evidence. Student proffered only independent assessor Dr. Papazyan's opinion that the second behavior aide restricted Student's social opportunities. This opinion was unpersuasive as Dr. Papazyan did not observe Student in school, in the classroom or on the playground, nor did she interview

anyone from Glendale Unified or the nonpublic agency providing behavior intervention services at school. Thus, no persuasive evidence supported Student's claim.

However, Glendale Unified significantly impeded Parents' opportunity to participate in the development and implementation of Student's IEP by assigning a second behavior aide to support Student without Parents' consent. Glendale Unified's claim that the second behavior aide was not dedicated to Student, but rather embedded into the classroom to support the class as a whole was not supported by the evidence. Maynard testified that Student was supported by two behavior aides throughout the school day. Ashley Villagran, Student's fourth grade special education teacher testified the same. The second behavior aide assigned to Student from August 2019 to November 2019, testified that she was assigned solely to support Student and that Student had two behavior aides throughout the school day. The second aide assisted Student throughout the school day, shared responsibilities with the first aide, implemented the behavior implementation plan, and did more than just attend the classroom and provide protection against Student's aggression towards classmates.

A second behavior aide was assigned to Student and began working with her on or about March 8, 2019. No IEP team meeting was held to discuss adding a second behavior aide to Student's IEP. The November 13, 2018 IEP was not amended to include two behavior aides. Glendale Unified failed to inform Parents that a second behavior aide would be added to Student's educational program. Glendale Unified failed to obtain parental consent to implement this additional service intended to support Student's access to her education.

Glendale Unified committed a procedural violation of the IDEA by implementing a second behavior aide without Parents' consent. Parents had no opportunity to discuss

the assignment of a second behavior aide with the IEP team or voice their objections. Therefore, the procedural violation significantly impeded Parents' opportunity to meaningfully participate in the development of Student's IEP by depriving Parents an opportunity to participate in the decision-making process regarding the provision of a FAPE to Student, resulting in a denial of a FAPE. (20 U.S.C. § 1415(f)(3)(E)(ii); Ed. Code, § 56505, subd. (f)(2).); see *Target Range, supra*, 960 F.2d 1479, 1484.) Accordingly, Student met her burden of proving by a preponderance of the evidence that Glendale Unified denied Student a FAPE by changing Student's educational program and implementing a second behavior aide without discussing the change at an IEP team meeting, adding the service to Student's IEP, or obtaining parental consent.

ISSUE 7: DID GLENDALE UNIFIED'S OCTOBER 23, 2019 FUNCTIONAL BEHAVIOR ASSESSMENT DENY STUDENT A FAPE?

Student Contends Glendale Unified's October 23, 2019 functional behavior assessment offered an inaccurate and incomplete analysis of her behaviors, and failed to accurately identify her behavioral needs. Glendale Unified contends the October 23, 2019 functional behavior assessment appropriately assessed Student's behavior.

A functional behavior assessment, referred to as an FBA, focuses on identifying the function or purpose behind a child's behavior. (OSERS Q & A, at Q. E-2.) The process typically involves looking closely at a wide range of child-specific factors such as social, affective, and environmental. (*Ibid.*) The FBA assists the IEP team in determining the extent of the special education and related services that the child needs, including a behavior intervention plan to help reduce or eliminate the problem behavior. (*Id.* at Q. E-4)

Federal and California laws do not establish procedural or substantive requirements specific to an assessment of a pupil's functional behavior. Under such circumstances, a review of other states' regulations as to what a functional behavior assessment should entail, though not binding, is informative. A functional behavior assessment should involve a systematic observation of the targeted behavior to obtain a clear, accurate definition and a clear, measurable description of the frequency, duration, and intensity, and severity of the behavior. (See Nev. Admin. Code, § 388.386; see also Mont. Admin. Rules, § 37.34.2411.) The communicative intent of the targeted behavior should be identified in terms of what the pupil is either requesting or protesting through the display of the behavior. (Nev. Admin. Code, § 388.386.)

Glendale Unified's school psychologist and board certified behavior analyst Nina Kazanjian conducted a functional behavior assessment of Student in the Fall of 2019, when Student was supported by two behavior aides. Her findings, conclusions and recommendations were presented in a written report dated October 23, 2019. Kazanjian reviewed Student's educational record, data collected by Maxim Healthcare's behavior aides, observed Student in the classroom on four occasions totaling over five and half hours, and interviewed Mother and Villagran.

Despite having two adults supporting her, Student's behaviors were unmanageable roughly 80 percent of the time. Student refused to do her assignments, which made it difficult for Villagran to track her academic progress. She broke crayons and pencils, crumbled assignments, destroyed items, hit the table, and yelled. Student's disruptive behaviors often led to her removal from the classroom. She often left her area, and at times eloped from the classroom.

Student was involved in an incident on September 23, 2019, resulting in her removal from school. She eloped from class, spit on the floor and licked it, then removed trash from a trash bin. She then kicked another student on the head as he was reading, which lead to Villagran clearing other students from the classroom. Parents were called and Student was taken home. Villagran testified Student's aggressive behaviors were difficult to anticipate.

Student continued to hit her teacher, her behavior aides, and her classmates. Her aggressive and disruptive behaviors occurred daily, multiple times a day. Student's behavior aide from Fall 2019 testified that she and the other behavior aide used crisis prevention intervention on Student each day. The behavior aides would often sit on each side of Student and each would place a hand on each of Student's arms to hold them down to the table or lap.

The October 23, 2019 functional behavior assessment identified five problem behaviors in which Student engaged throughout her school day. The five problem behaviors included physical aggression, non-compliance, elopement, self-talk/mouthing, and being off-task. The assessment expressly defined each of those behaviors. For example, the assessment defined non-compliance as any instance in which Student was unable to comply with an adult demand or request, by verbally refusing with phrases such as, "No", "I don't want to", or "No thank you", shaking her head back and forth to indicate no, frowning, crossing her arms, and looking away from adults, and attempting to bargain with adults by repeatedly stating her preference.

Kazanjian recommended strategies to reduce the problem behaviors. One skill acquisition strategy recommended was functional communication training. The training involved school personnel reviewing and practicing with Student how to appropriately

indicate or request a break, activities, items, as well as how to appropriately get the attention of adults and peers. In addition, the assessment proposed methods to reinforce appropriate behavior and instances when Student did not engage in inappropriate behaviors for a pre-arranged time.

Dr. Hayden criticized the assessment process and conclusions. At the hearing, Dr. Hayden persuasively opined that statements such as "No", "I don't want to", or "No thank you", were appropriate forms of functional communication, and should not have been identified as problem behaviors. In Student's case, her verbal refusals were appropriate functionally equivalent replacement behaviors for her to escape, get something to want, or to gain attention, which the assessment hypothesized were functions of her physical aggression. In other words, Student saying "No, thank you," instead of hitting, should have been reinforced to teach her appropriate ways to escape, get what she wanted, or to gain attention. Dr. Hayden opined, that once Student learned how to properly and safely communicate her wants and needs, then the behavior intervention plan could be refocused to target compliance and to motivate her to engage in tasks.

The assessment's operational definition of non-compliance was incompatible with the assessment's proposed strategies to teach and reinforce Student's use of functional communication. Kazanjian's characterization of functional communication phrases as problem behaviors, and strategies for reducing Student's use of words instead of actions, would discourage Student's use of functional communication and likely lead to increased non-compliance. The improper definition of non-compliance, and its incompatibility with the recommended strategies, rendered the assessment's findings, conclusions, and strategies unreliable and inappropriate.

The October 23, 2019 functional behavior assessment failed in its objective to accurately define Student's non-compliant behaviors to target for reduction, and to offer appropriate strategies to reduce or eliminate these behaviors at school. This failure was a procedural violation that denied Parents of critical information regarding Student's behavioral needs that significantly impeded their ability to meaningfully participate in the development of Student's behavior intervention plan an IEP. (20 U.S.C. § 1415(f)(3)(E)(ii); Ed. Code, § 56505, subd. (f)(2).); see *Target Range, supra*, 960 F.2d 1479, 1484.) Therefore, Student met her burden of proving by a preponderance of the evidence that the October 23, 2019 functional behavior assessment was inappropriate, and Glendale Unified denied Student a FAPE as a result of that assessment.

ISSUES 8 AND 9: DID THE IEPS DATED OCTOBER 23, 2019, AND NOVEMBER 5, 2019, FAIL TO ADDRESS STUDENT'S BEHAVIORS?

Student contends the October 23, 2019 IEP and November 5, 2019 IEP failed to offer an appropriate behavior intervention plan and behavior support services to meet her needs. Glendale Unified contends the October 23, 2019 behavior intervention plan and the offer of FAPE through the November 5, 2019 IEP was appropriately tailored to address her behaviors in the least restrictive environment.

OCTOBER 23, 2019 IEP

The IEP team reconvened on October 23, 2019 to review Glendale Unified's functional behavior assessment. Glendale Unified amended Student's IEP to offer a revised behavior intervention plan incorporating the recommendations of the functional behavior assessment. Glendale Unified's offer of FAPE continued to be placement at a nonpublic school.

Despite its revision, the October 23, 2019 IEP incorporated a faulty behavior intervention plan that continued Glendale Unified's failure to meet Student's behavioral needs. The plan erroneously defined Student's non-complaint behavior to include appropriate functional communication phrases. In an inherent conflict, it also sought to teach and reinforce the use functional communication by Student to express her wants and needs. The non-compliant behavior as defined, and the strategies called for in the plan, were incompatible. The same inconsistency that rendered the October 23, 2019 functional assessment plan unreliable, rendered the behavior intervention plan incorporating that inconsistency impracticable.

Accordingly, the October 23, 2019 IEP failed to provide Student with an appropriate behavior intervention plan to support her behavioral needs to access her education, thereby depriving her of an educational benefit. Therefore, Student met her burden of proving by a preponderance of the evidence that the October 23, 2019 IEP did not offer her a FAPE by failing to offer a behavior intervention plan that appropriately addressed her behavioral needs. Accordingly, having determined the October 23, 2019 IEP denied Student a FAPE by failing to offer an appropriate behavior intervention plan, an analysis as to whether the IEP failed to offer a program in the least restrictive environment is not necessary.

NOVEMBER 5, 2019 IEP

Following the October 23, 2019 IEP team meeting, Student had serious behavioral incidents. On October 24, 2018, Student attempted to unbutton her behavior aide's pants and pulled the shirt of her other behavior aide. Student asked to touch the buttocks of one of the behavior aides and asked if she could shower with her teacher

and the behavior aides. It was previously reported that Student had touched her vagina with no panties and licked her hand. She also touched the teacher's buttocks.

On October 28, 2019, Student experienced another significant behavioral episode. She was taken to the nurse's office to change into clean clothes after urinating on herself. In the nurse's bathroom, she became upset. She pulled toilet paper, paper towels, sheet protectors and wet wipes and sat on the floor. She removed her clothes and used soap and water to wash herself. She splashed water from the sink and toilet on herself and her two behavior aides. She screamed intermittently. She licked paper, the walls, and doors. She then began to converse with herself in the mirror regarding touching the buttocks and taking showers. She engaged in what Glendale Unified staff described as sexualized behavior, by the way she was touching herself and moaning. The entire episode lasted for more than one hour. Glendale Unified contacted Glendale Police Department. A psychologist with the police department helped calm Student. Student was taken into custody and placed on a hospital hold.

The IEP team convened on November 5, 2019 to review Student's IEP. The notes of the resulting November 5, 2019 IEP indicated that Student still exhibited rage reactions, low frustration tolerance, emotional overreactions, impulsivity, and rapid changes in mood and behavior.

Glendale Unified offered a minor revision to Student's behavior intervention plan, which had clearly been ineffective. The November 5, 2019 behavior intervention plan was identical to the plan offered on October 23, 2019, with the exception of an additional problem behavior, labeled as "sexual" behaviors. The plan described "sexual" behaviors as attempting to unbutton or touch others' pants, pulling down the shirt of others to expose their chests, asking to touch people's buttocks, asking to take a shower

with others, touching her own private parts and licking her hands, and making moaning sounds. The plan identified the October 24 and 28, 2019 incidents as instances of Student engaging in inappropriate sexual language and behavior. The plan hypothesized that the function of those behaviors was to gain attention. However, no formal or informal behavior assessment was conducted by qualified personnel, and no data was collected on antecedents or consequences of this behavior on those days. Without such information, the behavior plan's hypothesis that Student was engaging in sexual conduct to gain attention was unreliable.

Furthermore, only two incidents involving "sexual" behaviors occurred over a span of just five days. Zetino Reyes testified that a change in a behavior intervention plan is warranted if the behavior is serious and occurred over an extended period of time, but only after data was collected to understand the behavior. The evidence did not establish that the behavior Glendale Unified characterized as sexual was prevalent, nor was there data collected over an extended period of time, to warrant inclusion in a behavior intervention plan.

More importantly, the November 5, 2019 IEP's revised behavior intervention plan failed to cure the problems of the October 23, 2019 behavior intervention plan with respect to the inconsistency between the targeted behaviors and the strategies to reduce or eliminate the behaviors. As a result, the November 5, 2019 IEP failed to offer Student an appropriate behavior intervention plan tailored to her unique behavior needs, and Glendale Unified denied Student the related services and supports she required to benefit from special education. Accordingly, Student met her burden of proving by a preponderance of the evidence that Glendale Unified denied her a FAPE in the November 5, 2019 IEP by failing to offer a behavior intervention plan that appropriately addressed her behavioral needs. Furthermore, having determined the

October 23, 2019, and November 5, 2019 IEPs denied Student a FAPE by failing to offer an appropriate behavior intervention plan, an analysis as to whether the IEPs failed to offer a program in the least restrictive environment is not necessary.

ISSUES 10(a) AND 10(b): DID THE SEPTEMBER 15, 2020 IEP FAIL TO ADDRESS STUDENT'S BEHAVIORAL AND SOCIAL SKILLS NEEDS?

Student contends the September 15, 2020 IEP failed to offer her social skills development opportunities and a program to address her behavior needs in distance learning. Glendale Unified contends the September 25, 2020 IEP appropriately addressed Student's behavioral and social skills needs.

The November 5, 2019 IEP, as amended on December 20, 2019, offered placement at the Bridgeport School, with individual behavior intervention services to implement the behavior intervention plan. Bridgeport was a nonpublic school within the Help Group school system. Parent partially consented to the November 5, 2019 IEP, as amended on December 20, 2019, agreeing only to the "implementation of the offer of placement at the Help Group" with embedded one-to-one behavior support. Parent noted that she did not agree the IEP offered a FAPE.

Student began attending Bridgeport in January 2020. However, Bridgeport closed its campus for in-person instruction in March 2020, due to the COVID-19 pandemic. Since April 2020, through the time of the hearing, Student received instruction remotely through Bridgeport's distance learning program. Bridgeport provided behavior support virtually during distance learning.

On April 8, 2020, Parents provided Glendale Unified a written request for publicly funded independent educational evaluations in the areas of psychoeducation and

functional behavior. On April 23, 2020, Glendale Unified agreed to fund the requested independent educational evaluations. The independent psychoeducational evaluation was completed by Dr. Papazyan.

BEHAVIOR

The IEP team reconvened on September 15, 2020, to review Dr. Papazyan's evaluation. Among those present were Parents, Dr. Papazyan, Student's attorney, Student's Bridgeport teacher Dafna Kent, and a Bridgeport administrator.

Dr. Papazyan headed the autism assessment department at St. John's Well Child and Family Center. She also had a private practice. Her work at St. John's involved providing comprehensive psychological and neurodevelopmental evaluations for children, adolescents, and adults suspected of having symptoms of autism, attention deficit hyperactivity disorder, intellectual disability, and other related social emotional and behavioral difficulties. In private practice, she provided assessments and intervention services which included neurodevelopmental and psychological assessments and psychotherapy. She offered parent training and special education advocacy.

At the IEP team meeting, Parent reported that Student's attention had decreased, and behaviors had increased, during remote instruction at home. Student had difficulty focusing, and Parents had difficulty redirecting her to her lessons following breaks. However, Kent reported to the team that Student was focused about 75 percent of the time during distance learning. Dr. Papazyan recommended Student receive in-person behavioral support to help her access distance learning. The IEP team amended Student's IEP to find her eligible for special education under the category of autism, and removed her eligibility under emotional disturbance.

At hearing, Kent shared that Student had a difficult time participating in distance learning. Student was easily distracted by items around her. She at times refused to do work and screamed in protest. Mother was present to help redirect Student during online instruction, but was not always successful. Student would at times push or hit Mother. Mother testified that she struggled to supervise Student, as Student did not want Mother sitting next to her. Kent testified that Student accomplished classwork roughly 50 percent of the time.

The evidence did not support a finding that the September 15, 2020 IEP failed to offer a program to address Student's behaviors during distance learning. At the September 15, 2020 IEP team meeting, Glendale Unified IEP team members suggested that Bridgeport use the behavior aide to suggest and implement interventions to support Student's attention during distance learning.

By the December 7, 2020 IEP team meeting, Student no longer required a behavior intervention plan as she did not display physical aggression, non-compliance, elopement, self-talking, or sexual behaviors at home during distance learning. Mother shared with the December 7, 2020 IEP team members that she gave Student more space to work independently. Though Student still struggled to stay on task and to remain focused without in-person adult support, Student continued to participate 75 percent of the time during distance learning with online behavior intervention. This was a considerable improvement from her in-person classroom performance.

The evidence did not establish that delivery of behavior supports remotely impeded Student's ability to access her distance learning. Student was accessing the curriculum and making behavioral progress. Accordingly, Student failed to prove

Glendale Unified denied her a FAPE by failing to address her behavior needs in the September 15, 2020 IEP.

SOCIAL SKILLS

The evidence did not support Student's contention that the September 15, 2020 IEP failed to address her social skills needs. At the September 15, 2020 IEP team meeting, social skills groups that had taken place on campus were not available, but students were given opportunities to interact with one another during distance learning. Student still required prompting to listen and respond to her peers, but with prompts from the virtual behavior aide, Student interacted with her classmates and made progress on her social skills goals.

Parents only consented to the implementation of the November 5, 2019 IEP's offer, as amended on December 20, 2019, of placement at Bridgeport and one-to-one aide support. However, the November 13, 2018 IEP, fully consented to by Parents, offered a similar goal to improve her social interactions, supported by weekly speech and language services. Those IEPs offered a social/pragmatics goal to increase Student's social interactions with adults and peers by requiring her to ask and answer questions on topic. A speech and language pathologist was responsible for implementing that goal. The IEP also offered small group speech and language services 30 minutes, twice a week. The September 15, 2020 IEP did not amend the goals and services in Student's 2018 and 2019 IEPs.

The evidence failed to show that the speech and language services were not successfully delivered virtually. Since Bridgeport's closures in March 2020, Student was provided weekly speech and language services remotely. By December 2020, Student had met the first two short term objectives of her social/pragmatics goal, by maintaining

two social exchanges with an adult or peer, staying on-topic, and asking and answering questions successfully with no more than two prompts. When attentive, Student easily made comments and shared information about preferred topics. She also engaged in small group games and activities of her liking.

Student failed to establish that the social interaction opportunities during distance learning, coupled with the social interaction goal and speech and language services offered in the November 5, 2019 IEP were inadequate to address Student's difficulty with peer interactions. To the contrary, Student's social communication increased during online instruction with online supports.

No persuasive evidence was offered to support Student's claim that she required additional goals, services, or supports in the area of social skills for Student to benefit from special education. (Ed. Code, § 56363, subd. (a).) Accordingly, Student failed to prove that she was denied a FAPE because the September 15, 2020 IEP failed to address her social skills needs.

ISSUE 11: DID GLENDALE UNIFIED FAIL TO PROVIDE STUDENT WITH A DISTANCE LEARNING PLAN AS PART OF HER IEP?

Student contends Glendale Unified's failure to include an express distance learning plan in the September 15, 2020 and December 7, 2020 IEPs denied Parents the opportunity to develop and consent to a distance learning plan. Student further argues the lack of a distance learning plan denied her the supports she needed to access distance learning.

Glendale Unified contends that Parents participated in the discussions at the September 15, 2020 and December 7, 2020 IEP team meetings regarding Student's

distance learning program, and that all special education and related services called for in the IEPs was provided via distance learning. Therefore, Glendale Unified argues Parents were afforded the opportunity to develop and consent to a distance learning plan and that the plan appropriately addressed Student's needs to access distance learning.

California Education Code section 56345, subdivision (a)(9)(A), requires IEPs to include a description of the means by which the IEP will be provided under emergency conditions, such as an epidemic, in which instruction or services, or both, cannot be provided to the pupil either at the school or in person for more than 10 days. (Stats. 2020, ch. 24, § 66, eff. June 29, 2020.) The description shall include special education and related services, supplementary aids and services, transitions services, and extended school year services. (Ed. Code, § 56345, subd. (a)(9)(A)(i)-(iv).) The IEP requirements under section 56345, subdivision (a)(9)(A) apply on or after the operative date of June 29, 2020, to the development of the initial IEP or the next regularly scheduled revision of an IEP that has not met the requirements. (*California Department of Education Special Education Guidance for Covid-19*, September 30, 2020.)

The evidence did not establish that Glendale Unified denied Student a FAPE by failing to include a distance learning plan in Student's IEP. Glendale Unified closed its campuses for in-person instruction on March 23, 2020, due to COVID-19 pandemic. Instruction resumed in mid-April 2020, via distance learning.

Nonpublic school placements for Glendale Unified students continued to be funded by Glendale Unified during the COVID-19 closures. At the time of the hearing, Glendale Unified had not yet reopened its campuses for in-person instruction for grades kindergarten and above.

Student's next regularly scheduled IEP revision meeting after the emergency condition documentation law went into effect was held on September 15, 2020. Parents attend the meeting. The September 15, 2020 IEP did not contain a description of the means by which the IEP will be provided through distance learning. However, Parents discussed with the IEP team the delivery of services and supports for distance learning. No testimony or evidence was offered to demonstrate that Parents were unaware as to how the IEP's services and supports would be delivered via distance learning.

The next IEP team meeting occurred on December 7, 2020, for Student's annual IEP review. Parents attended that meeting. The December 7, 2020 IEP offered 1800 minutes weekly of specialized academic instruction at Bridgeport, 60 minutes a week of group language and speech services, 60 minutes a week of occupational therapy services, and 1800 minutes a week of intensive individual services, referred to as an additional adult assistant. The specialized academic instruction, speech and language services, and additional adult assistant would be provided at the nonpublic school. The occupational therapy services would be provided at the service provider's location. The IEP meeting notes stated that due to the COVID-19 pandemic, Student would receive specialized academic instruction and related services remotely in her home, via distance learning delivered within the guidelines of the nonpublic school schedule of instruction.

Student was not provided with instruction and services for more than 10 days following Bridgeport's closure in March 2020. Hence, Glendale Unified was required to include in Student's IEP a description of the means by which special education instruction and related services would be delivered at the first regularly scheduled IEP team meeting after June 29, 2020.

Glendale Unified was not required to provide a description for the delivery of Student's IEP pursuant to California Education Code section 56345, subdivision (a)(9)(A), until the next regularly scheduled IEP review, which occurred on September 15, 2020. Though the September 15, 2020 IEP did not contain a description of the means by which the IEP will be provided through distance learning, Student did not prove the procedural defect significantly impeded Parents' opportunity to meaningfully participate in the development of Student's IEP or deprive Student of an educational benefit as how Bridgeport would provide distance learning was discussed at the IEP team meeting, and Student provided no evidence that Bridgeport has not provided this distance learning.

A parent has meaningfully participated in the development of an IEP when he or she is informed of the child's problems, attends the IEP meeting, expresses disagreement regarding the IEP team's conclusions, and requests revisions in the IEP. (*N.L. v. Knox County Schools* (6th Cir. 2003) 315 F.3d 688, 693; *Fuhrmann, supra*, 993 F.2d at p. 1036 [parent who has an opportunity to discuss an IEP and whose concerns are considered by the IEP team has participated in the IEP process in a meaningful way].) Here, Parents attended the September 15, 2020 IEP team meeting, presented an independent psychoeducational evaluation, expressed their concerns about Student's attention and focus during distance learning, and lack of social skills opportunities. Glendale Unified's IEP team members considered Parents' concerns and proposed changes to the delivery of Bridgeport's virtual behavior support. Therefore, Parents meaningfully participated in the development of the September 15, 2020 IEP, including the delivery of the supports and services through distance learning.

In addition, as discussed in Issues 10(a) and 10(b), Student failed to prove the September 15, 2020 IEP did not appropriately address her behavioral and social skills needs. Accordingly, the evidence does not prove that the absence of a description for the delivery of Student's September 15, 2020 IEP pursuant to California Education Code section 56345, subdivision (a)(9)(A), deprived Student of an educational benefit.

Further, the evidence did not demonstrate that the December 7, 2020 IEP failed to meet the requirements of subdivision (a)(9)(A). The IEP indicated that special education and related services would be provided via distance learning pursuant to the nonpublic school schedule of instruction. Student failed to prove that a more detailed description was required to satisfy subdivision (a)(9)(A).

Even assuming a more detailed description of a distance learning plan was required in the December 7, 2020 IEP, Student failed to establish how the inadequacy denied her a FAPE. Parents meaningfully participated in the December 7, 2020 IEP team meeting and discussed with the IEP team the delivery of support and services through distance learning. Student received educational benefit and made progress on her behavior and social skills goals with increased functional and social communication. Student did not challenge the appropriateness of the goals, supports, and services offered in the December 7, 2020 IEP. Accordingly, Student failed to meet her burden of proving Glendale Unified denied her a FAPE by failing to offer a distance learning plan in her IEP. (See, *J.L.N. v. Grossmont Union High School District* (S.D. Cal., Sept. 30, 2019, Case No.: 17-cv-2097-L-MDD) 2019 WL 4849172, *7.)

ISSUE 12: DID GLENDALE UNIFIED MATERIALLY FAIL TO IMPLEMENT STUDENT'S IEP FROM MARCH 2020, TO DECEMBER 2020?

Student contends Glendale Unified materially failed to implement her IEP by failing to provide in-person behavior intervention services and a behavior intervention plan during distance learning. Glendale Unified contends that Student's IEP was implemented during distance learning to the fullest extent possible and that any deviation from the IEP was not material.

To provide a student a FAPE, a school district must deliver special education and related services "in conformity with" the student's IEP. (20 U.S.C. § 1401(9)(D).) "IEPs are clearly binding under the IDEA, and the proper course for a school that wishes to make material changes to an IEP is to reconvene the IEP team pursuant to the statute – not to decide on its own no longer to implement part or all of the IEP." (*Van Duyn v. Baker School Dist.* 5J (9th Cir. 2007) 502 F.3d 811, 821 (*Van Duyn*) (citing 20 U.S.C. §§ 1414(d)(3)(F), 1415(b)(3)).)

A school district that fails to implement an IEP exactly does not violate the IDEA "unless it is shown to have materially failed to implement the child's IEP." (*Van Duyn*, 502 F.3d at p. 815.) "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." (*Ibid.*) In *Van Duyn*, the court noted that a child's educational progress, or lack of it, might be one indicator of whether a discrepancy in services was material. (502 F.3d at p. 822.) If the child performed at or above the anticipated level, that would tend to show that the shortfall in instruction was not material." (*Ibid.*)

On March 4, 2020, California Governor Gavin Newsom declared a State of Emergency in California due to the threat of COVID-19. On March 21, 2020, the United States Department of Education Office of Special Education and Rehabilitative Services, referred to as OSERS, published guidance to states for educating students with disabilities during the COVID-19 pandemic. (OSERS, *Supplemental Fact Sheet Addressing the Risk of COVID-19 in Preschool, Elementary and Secondary Schools While Serving Children with Disabilities*, (March 21, 2020) (OSERS Supplemental Fact Sheet).) OSERS advised that “the provision of FAPE may include, as appropriate, special education and related services provided through distance instruction provided virtually, online, or telephonically.” (*Id.* at pp. 1-2.)

OSERS acknowledged that during the state of emergency, “schools might not be able to provide all services in the same manner they are typically provided.” (OSERS Supplemental Fact Sheet, *supra*, at p. 2.) “The determination of how FAPE was to be provided might look different in this time of unprecedented national emergency.” (*Ibid.*)

Student did not prove that Glendale Unified failed to implement the special education and related services called for in Student’s IEPs, specifically appropriate behavior supports, during the COVID-19 state of emergency. Parents partially consented to the November 5, 2019 IEP, as amended on December 20, 2019, limiting their agreement to Student’s placement at the Help Group. Glendale Unified and Bridgeport closed their campuses in March 2020. As a result, Bridgeport provided behavior support virtually during distance learning.

Parents did not convey to Bridgeport or Glendale Unified that they objected to the virtual delivery of behavior support at any point from March 2020, through December 2020. At the September 15, 2020 IEP team meeting, Parents shared their

concerns regarding Student's attention and behaviors during distance learning and Dr. Papazyan recommended Student remain at Bridgeport and receive in-person support to help Student access distance learning. At the meeting, Parents sought recommendations to help Student access distance learning, but did not explicitly request that Glendale Unified provide Student with in-person behavior support in the home.

Furthermore, at the December 7, 2020 IEP team meeting, Parents did not raise concerns regarding the delivery of behavior support during distance learning. Mother reported that Student was no longer engaging in many of her former problematic behaviors with distance learning, which gave Student the space she needed to regulate her behaviors. Further, there was no persuasive evidence that Parents requested Glendale Unified provide in-person behavior support at home at any time from March 2020, through December 2020.

Glendale Unified implemented Student's behavior intervention program to the extent practicable in light of the COVID-19 state of emergency. During the emergency, Student's IEP could not be delivered at school as written. Thus, it was appropriate to adapt Student's IEP to deliver the behavior support virtually, as part of Bridgeport's distance learning program. (OSERS Supplemental Fact Sheet, *supra*, at p. 2 [schools may not be able to provide all services in the same manner they are typically provided])

The evidence did not establish that the remote delivery of behavior support was substantially ineffective in addressing Student's behavioral needs. Student was focused for 75 percent of distance learning, which exceeded her level of participation during in-person instruction. Her physical aggression and non-compliance were not displayed at home during distance learning, resulting in the removal of the behavior intervention

plan in the December 7, 2020 IEP. Overall, her behaviors improved during distance learning. Therefore, the evidence does not support a conclusion that the virtual delivery of behavior support in Student's case was a material deviation of either the November 13, 2018 IEP or the November 5, 2019 IEP, as amended on December 20, 2019. Accordingly, Student failed to prove Glendale Unified denied her a FAPE by failing to implement her IEP from March 2020, to December 2020.

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: Glendale Unified's November 13, 2018 triennial multidisciplinary assessment denied Student a FAPE. Student prevailed on Issue 1.

Issue 2, subsection (a): Glendale Unified denied Student a FAPE in the November 13, 2018 IEP by failing to appropriately address Student's behavior needs. Student prevailed on Issue 2, subsection (a).

Issue 2, subsection (b): Glendale Unified did not deny Student a FAPE in the November 13, 2018 IEP by failing to address Student's social-emotional needs. Glendale Unified prevailed on Issue 2, subsection (b).

Issue 2, subsection (c)(i): Glendale Unified denied Student a FAPE in the November 13, 2018 IEP by failing to offer appropriate goals in the area of academics. Student prevailed on Issue 2, subsection (b)(i).

Issue 2, subsection (c)(ii): Glendale Unified did not deny Student a FAPE in the November 13, 2018 IEP by failing to offer appropriate goals in the area of social emotional functioning. Glendale Unified prevailed on Issue 2, subsection (b)(ii).

Issue 2, subsection (c)(iii): Glendale Unified denied Student a FAPE in the November 13, 2018 IEP by failing to offer appropriate goals in the area of behavior. Student prevailed on Issue 2, subsection (c)(iii).

Issue 3: Glendale Unified denied Student a FAPE in the February 7, 2019 IEP by failing to appropriately address Student's behavior needs. Student prevailed on Issue 3.

Issue 4: Glendale Unified denied Student a FAPE in the April 8, 2019 IEP by failing to offer a program that appropriately addressed Student's behaviors. Student prevailed on Issue 4.

Issue 5: Glendale Unified denied Student a FAPE by implementing a second behavior aide without parental consent and without including the service in Student's IEP. Student prevailed on Issue 5.

Issue 6: Glendale Unified denied Student a FAPE in the June 6, 2019 IEP by failing to offer a program that appropriately addressed Student's behaviors. Student prevailed on Issue 6.

Issue 7: Glendale Unified's October 23, 2019 functional behavior assessment denied Student a FAPE. Student prevailed on Issue 7.

Issue 8: Glendale Unified denied Student a FAPE in the October 23, 2019 IEP by failing to offer a program that appropriately addressed Student's behaviors. Student prevailed on Issue 8.

Issue 9: Glendale Unified denied Student a FAPE in the November 5, 2019 IEP by failing to offer a program that appropriately addressed Student's behaviors. Student prevailed on Issue 9.

Issue 10(a): Glendale Unified did not deny Student a FAPE in the September 15, 2020 IEP by failing to appropriately address Student's behavior needs. Glendale Unified prevailed on Issue 10(a).

Issue 10(b): Glendale Unified did not deny Student a FAPE in the September 13, 2020 IEP by failing to appropriately address Student's social skills needs. Glendale Unified prevailed on Issue 10(b).

Issue 11: Glendale Unified did not deny Student a FAPE by failing to offer a distance learning plan as part of Student's IEP. Glendale Unified prevailed on Issue 11.

Issue 12: Glendale Unified did not deny Student a FAPE by materially failing to implement Student's IEP from March 2020, to December 2020. Glendale Unified prevailed on Issue 12.

REMEDIES

Student proved by a preponderance of the evidence that Glendale Unified denied her a FAPE by failing to provide her with an IEP math goal, appropriate behavior goals, and positive behavior intervention services and supports. As remedies, Student seeks 71 hours of compensatory academic services, 71 hours of social skills services, and 40 hours of behavior services in the form of consultations for Parents to address Student's behavioral and social emotional needs. Glendale Unified contends Student is not entitled to any relief.

Under federal and state law, courts have broad equitable powers to remedy the failure of a school district to provide a FAPE to a disabled child. (20 U.S.C. §1415(i); see *School Committee of Town of Burlington, Mass. v. Department of Educ. of Mass.* (1985) 471 U.S. 359, 369 [105 S.Ct. 1996, 85 L.Ed.2d 385] (*Burlington*).) This broad equitable authority extends to an administrative law judge who hears and decides a special education administrative due process matter. (*Forest Grove School Dist. v. T.A.* (2009) 557 U.S. 230, 243-244, n. 11 [129 S.Ct. 2484, 174 L.Ed.2d 168].) When a school district fails to provide a FAPE to a student with a disability, the student is entitled to relief that is appropriate" in light of the purposes of the IDEA. (*Burlington, supra*, 471 U.S. 359, 369-370.) Remedies under the IDEA are based on equitable considerations and the evidence established at the hearing. (*Id.* at p. 374.)

An ALJ can award compensatory education as a form of equitable relief. (*Park, supra*, 464 F.3d at p. 1033.) Compensatory education is a prospective award of educational services designed to catch up the student to where he should have been absent the denial of a FAPE. (*Brennan v. Regional School Dist. No. Bd. of Educ.* (D.Conn. 2008) 531 F.Supp.2d 245, 265.) The award must be fact-specific and be reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place. (*Reid v. District of Columbia* (D.C. Cir. 2005) 401 F.3d 516, 524.) Compensatory education awards depend upon the needs of the disabled child, and can take different forms. (*R.P. v. Prescott Unified School Dist.* (9th Cir. 2011) 631 F.3d 1117, 1126.) Typically, an award of compensatory education involves extra schooling. (*Parents of Student W. v. Puyallup School Dist.* (9th Cir. 1994) 31 F.3d 1489, 1497.) There is no obligation to provide a day-for-day compensation for time missed. Appropriate relief is

designed to ensure that the student is appropriately educated within the meaning of the IDEA. (*Ibid.*)

BEHAVIOR SERVICES

Student contends the behavior services in the form of consultations for Parents are warranted to address Glendale Unified's failure to provide an appropriate behavior program and behavioral support during distance learning. Student failed to prove that Glendale Unified failed to address her behaviors during distance learning. Furthermore, the evidence did not establish that Parents required any form of training or consultation for Student to receive a FAPE during distance learning. Accordingly, Student is not entitled to compensatory behavior services in the form of training and consultations for Parents.

However, Student proved that Glendale Unified denied her a FAPE by failing to provide her with appropriate behavior goals, a behavior intervention plan and behavior intervention development services. A behavior intervention plan will likely be needed for Student when in-person instruction resumes at school. An appropriate remedy is for Glendale Unified to fund an expert of Parent's choice to observe Student at school and to offer recommendations for Student's behavioral program. Four hours of observation time for Student's expert, to be used for up to four sessions, is reasonable as Glendale Unified observed Student on four opportunities in each of the behavior assessments it had conducted of Student in 2018 and 2019. Glendale Unified shall pay the expert the expert's customary fee, up to a maximum of \$200 an hour, for the expert's observations, and up to two hours of travel time to and from school. Furthermore, Glendale Unified shall fund up to two hours of the expert's time to attend one of Student's IEP team meetings, if requested by Parents. Therefore, the total award is payment of up to eight

hours of the expert's time, at a maximum of \$200 an hour. Parents shall have one year from the date Glendale Unified resumes in-person instruction for Student's grade to request the observations. Glendale Unified shall provide payment to Student's expert within 45 calendar days of receiving the expert's invoice or billing statement. This service is in addition to any independent functional behavior assessment requested by Student and funded by Glendale Unified.

ACADEMIC SERVICES

Glendale Unified denied Student a FAPE by failing to offer Student a math goal in the November 13, 2018 IEP. A math goal was not offered in Student's IEP until the November 5, 2019 IEP. Student did not challenge the appropriateness of the November 5, 2019 IEP's offer of academic goals or specialized academic instruction. For a period of approximately 26 weeks during the 2018-2019 school year, four weeks of extended school year in 2019, and about 11 weeks of the 2019-2020 school year, totaling 41 weeks of school, Glendale Unified failed to offer an IEP math goal to support Student's math deficits. Accordingly, 41 hours of compensatory academic instruction is a fair estimation to compensate Student for Glendale Unified's failure to address her math deficits.

SOCIAL SKILLS SERVICES

Student failed to prove that Glendale Unified denied her social skills services. The evidence did not establish that the social skills goals and the hour a week of group speech and language services provided by the November 13, 2018 IEP and November 5, 2019 IEP, as amended on December 20, 2019, during in-person instruction and distance learning were inadequate to meet Student's social deficits. Accordingly, Student is not entitled to compensatory social skills services.

ORDER

1. Glendale Unified shall contract directly with a nonpublic agency or credentialed special education teacher of Parent's choice to provide Student 41 hours of individual academic instruction.
2. Within 10 days of Parent providing Glendale Unified of the academic instruction provider's contact information, Glendale Unified shall contact the selected provider to initiate a service contract. The provider and Parent shall determine the appropriate schedule and location of service delivery. Student shall be allowed to access these services hours through June 1, 2023. Cancellations by the academic instruction provider shall be made up. Scheduled absences by Student with at least 24-hour notice or verified medical absence shall be credited to Student and also made up.
3. Glendale Unified shall permit an observation of Student at school for up to four hours, for a maximum of four sessions, by an expert of Parent's choice, at mutually agreeable dates and times. Glendale Unified shall fund up to eight hours of the expert's time, at a rate up to \$200 an hour. This shall include up to four hours of observation time; up to two hours of travel time; and up to two hours of attendance at an IEP team meeting convened for Student. Parents shall have one year from the date Glendale Unified resumes in-person instruction for Student's grade to request the observations. Glendale Unified shall pay the expert's fees within 45 days of receipt of the expert's invoice or billing statement.
4. All other claims for relief by Student are denied.

RIGHT TO APPEAL THIS DECISION

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

/s/

Rommel P. Cruz

Administrative Law Judge

Office of Administrative Hearings