BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

CASE NO. 2021040393
CASE NO. 2021020664

THE CONSOLIDATED MATTERS INVOLVING

PARENTS ON BEHALF OF STUDENT, AND

ENTERPRISE ELEMENTARY SCHOOL DISTRICT.

DECISION

JANUARY 31, 2022

On February 18, 2021, Enterprise Elementary School District filed with the Office of Administrative Hearings, referred to as OAH, a due process hearing request in OAH case number 2021020664, naming Parents on behalf of Student. On March 22, 2021, OAH granted Enterprise's motion for leave to amend its due process hearing request.

On April 9, 2021, Student filed a due process hearing request in OAH case number 2021040393, naming Enterprise. On April 15, 2021, OAH granted Student's

motion to consolidate OAH case numbers 2021020664 and 2021040393, and set the due process hearing in the consolidated matters to the dates set in OAH case number 2021040393.

On May 19, 2021, OAH granted Student's motion for leave to amend its due process hearing request. On July 2, 2021, OAH granted the parties' motion to continue the due process hearing.

Administrative Law Judge Cynthia Fritz, called ALJ, heard this matter by videoconference on November 16, 17, 18, and 19, and December 2, 3, and 7, 2021.

Attorneys Tania Whiteleather and Jennifer Chang represented Student. Parent attended all hearing days. Attorney Kyle Raney represented Enterprise and Attorney Kaitlyn Tucker observed the hearing on November 16 and 17, 2021. Enterprise Special Education Director Annie Payne attended all hearing days.

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

ISSUES

On November 3, 2021, Enterprise withdrew its Issue 1, as defined in the August 27, 2021 prehearing conference order. At hearing, Student withdrew Issues 1(a) and 2(a) as defined in the order. The remaining issues were clarified and rephrased

following discussion with the parties and reorganized and renumbered for clarity. The administrative law judge has authority to renumber and redefine a party's issues, so long as no substantive changes are made. (*J.W. v. Fresno Unified Sch. Dist.* (9th Cir. 2010) 626 F.3d 431, 442-443.)

STUDENT'S ISSUES:

1. Did Enterprise deny Student a free appropriate public education, called a FAPE, from the time it was responsible for a FAPE through the end of the 2019-2020 school year, by failing to offer an appropriate initial placement, specifically by offering to provide services virtually?
2. Did Enterprise deny Student a FAPE during the 2020-2021 school year through the time of filing, May 19, 2021, by failing to:
    a) offer an appropriate placement, specifically by offering to provide services virtually; and
    b) timely complete the medical assessment consented to on March 1, 2021?

ENTERPRISE'S ISSUE:

3. May Enterprise conduct its health/medical assessment of Student by a licensed physician without conditional releases to communicate with doctors Kelly Carter, Frances Paola Velez-Bartolomei, and Nilika Singhal, regarding Student's educationally related health needs?

JURISDICTION

This hearing was held under the Individuals with Disabilities Education Act, called IDEA, 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 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 (2006); Ed. Code, §§ 56501, 56502, and 56505; Cal. Code Regs., tit. 5, § 3082.) The party requesting the hearing is limited to the issues alleged in the complaint, unless the other party consents, and has the burden of proof by a preponderance of the evidence. (20 U.S.C. § 1415(f)(3)(B); Ed. Code, § 56502, subd. (i); *Schaffer v. Weast* (2005) 546 U.S. 49, 57-58, 62 [126 S.Ct. 528, 163 L.Ed2d 387]; and see 20 U.S.C. § 1415(i)(2)(C)(iii).) In this consolidated matter, Student bore the burden of proof on Student's issues, and Enterprise bore the burden of proof on its 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 four years old at the time of hearing and resided with Parents within Enterprise's geographic boundaries. On May 11, 2020, Enterprise found Student eligible for special education under the primary category of intellectual disability and the secondary category of orthopedic impairment.

Student suffers from Wolf-Hirschhorn Syndrome which includes delayed growth and development, seizures, cleft palette, and heart abnormalities. Student is also non-verbal and requires a gastronomy tube for feeding and medications.

STUDENT'S REQUEST FOR THREE REBUTTAL WITNESSES

On the last day of hearing, after both parties concluded their presentation of evidence, Student sought leave to introduce rebuttal evidence of two undisclosed expert witnesses and Parent. Student's counsel represented that Dr. Christine Davidson and Janine Leech, former California special education school administers, would testify regarding:

(1) Student's special education eligibility in February 2020;

(2) Student's needs in February 2020 and May 2020;

(3) the ability for Student to access virtual services through the statutory time period;

(4) whether a school district could contradict a physicians' medical recommendations to be placed at home for school;

(5) ignoring healthcare protocols by a treating physician;

(6) if parent is required to give services to a Student who is educationally placed at home;

(7) issues related to a licensed vocation nurse providing health services and feeding in the home;

(8) what information Enterprise would need regarding Student's allergies and feeding; and

(9) appropriate services for Student.

Student asserted that these witnesses should be permitted to testify as rebuttal witnesses in these areas because their disclosure was precipitated by unforeseen circumstances, namely, the unanticipated testimony of Payne, Kelly Pagan, Enterprise school nurse, and "several" other unspecified Enterprise employees in the nine subject areas during Student and Enterprise's cases. Student also requested that Parent be recalled for rebuttal to refute information regarding Parent's ability to aide Student during distance learning, if Enterprise requested Parent to perform distance learning assistance, and if Parent agreed to do it.

Enterprise objected to all rebuttal testimony stating that Student did not disclose any expert witnesses for hearing, experts should have been called in Student's case-in-chief, and no notice was provided. Additionally, Parent had already testified to the issues requested for rebuttal.

In IDEA due process proceedings, any party is accorded the right to "present evidence and confront, cross-examine, and compel the attendance of witnesses." (20 U.S.C. § 1415(h)(2); 34 C.F.R. § 300.512(a)(2) (2008); Ed. Code, § 56505, subds. (e)(2) and (3).) Due process hearings are conducted in accordance with regulations adopted by the California Department of Education under Education Code section 56505, subdivision a, and those regulations provide that a hearing, "shall not be conducted according to the technical rules of evidence and those related to witnesses. Any relevant evidence shall be admitted if it is the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs, regardless of the

existence of any common law or statutory rule which might make improper the admissions of such evidence over objection in civil actions." (Cal. Code Regs., tit. 5 § 3082, subd. (b); see also Gov. Code, § 11513, subd. (c).) Hearsay evidence may be used to supplement or explain other evidence, although it is insufficient in itself to support a factual finding. (Cal. Code Regs., tit. 5 § 3082, subd. (b).) The administrative law judge, "has discretion to exclude evidence if its probative value is substantially outweighed by the probability that its admission will necessitate undue consumption of time." (Gov. Code, § 11513, subd. (f).)

An administrative law judge has the right to prohibit witnesses that have not been disclosed to the opposing party at least five business days before the hearing. (Ed. Code, § 56505, subd. (e)(8); 34 C.F.R. § 300.512(a)(3) .) Here, Student first disclosed experts Dr. Christine Davidson and Janine Leech on the last day of hearing after the parties rested their cases. Student failed to disclose these experts on Student's witness list and did not proffer any expert testimony related to the nine areas requested for rebuttal in Student's case-in-chief. Thus, the ALJ may disallow these witnesses.

In the absence of any statutory, regulatory, or judicial guidance as the meaning of expert testimony, recourse is taken to the somewhat analogous use of expert testimony in civil cases under Code of Civil Procedure section 2034.310. California Code of Civil Procedure § 2034.310 provides in part, that a party may call as a witness at trial an expert not previously designated to impeach the testimony of an expert witness offered by any other party at the trial. This impeachment may include testimony to the falsity or nonexistence of any fact used as the foundation for any opinion by any other party's expert witness but may not include testimony that contradicts the opinion. (Code of Civ. Proc. § 2034.310.)

Student's request for rebuttal testimony of two undisclosed expert witnesses was improper. Student chose not to disclose these witnesses on Student's witness list and did not call either of them in Student's case-in-chief. Student represented that the two experts, Janine Leech and Dr. Christine Davidson, were former special education administers but did not state that they had any personal knowledge of Student or of facts in this matter. Student generally stated the rebuttal testimony related to witnesses Pagan, Payne, and "several" other Enterprise employees involving the nine rebuttal categories but did not point to specific underlying facts that were incorrect or non-existent. Instead, Student highlighted some of Enterprise witnesses' opinion on some but not all of the requested rebuttal areas in support of Student's position that these witnesses qualified as rebuttal witnesses. However, this demonstrated that these witnesses would offer their contrary opinions, based upon their experience as former special education school administrators, to rebut Enterprise witnesses and effectively proffer affirmative testimony in support of Student's case-in-chief, and not merely to rebut factual assertions. Since Student did not prove that Student offered the expert witnesses for the purposes of contradicting foundational facts that Enterprise employees based their opinions, the request to allow rebuttal testimony of Dr. Christine Davidson and Janine Leech was improper.

Further, rebuttal evidence is subject to limitations on admissibility. The decision to permit rebuttal evidence and the scope of rebuttal evidence lies within the trial court's discretion. (United States v. Pheaster (9th Cir. 1976) 544 F.2d 353, 383.) The function of rebuttal testimony is to explain, repel, counteract or disprove evidence of the adverse party." (Marmo v. Tyson Fresh Meats, Inc., (8th Cir. 2006.) 457 F.3d 749, 759; United States v. Schneiderman (S.D. Cal 1952) 104 F.Supp. 405, 410.)

The proffered testimony must rebut evidence presented in defendant's case and may not be offered to establish the plaintiff's case. (Gossett v. Weyerhaeuser Co., 856 F.2d 1154, 1156–57 (8th Cir. 1988) (affirming exclusion of proffered "rebuttal" from expert that "should have been presented during the [plaintiffs'] case in chief"); Braun v. Lorillard, Inc., (7th Cir. 1996) 84 F.3d 230,237 (The plaintiff who knows that the defendant means to contest an issue that is germane to the prima facie case must put the evidence in its case-in-chief).) Further, if the rebuttal expert's testimony is offered to contradict an expected and anticipated portion of the other party's case-in-chief, then the witness is not a rebuttal witness. (In re Apex Oil Co., (8th Cir. 1992) 958 F.2d 243, 245; see also Yeti by Molly, Ltd. v. Deckers Outdoor Corp., (9th Cir. 2001) 259 F.3d 1101, 1105 06 (affirming the trial court's exclusion of an expert who was improperly disclosed as a rebuttal expert).)

Opinions and facts related to Student's needs in February and May 2020, the ability to access virtual services, what were appropriate services, and issues related healthcare protocols, should have been solicited in Student's case-in-chief to support Student's FAPE violations and remedies related to the issues in this matter. Student had ample opportunity to develop testimony in these areas. Student knew or should have known during Student's case-in-chief that Enterprise witnesses could give testimony unsupportive of Student's case. Student should have and could have anticipated the opinions of Enterprise's employees based on the information it had at the time Student presented Student's case-in-chief. In fact, much of Enterprise employee's testimony mirrored the documentation exchanged between the parties between December 2019 through the time of filing and was consistent with Enterprise's responses to Student's first amended complaint in these areas. Student, therefore, can make no reasonable claim of ignorance as to Enterprise's theory regarding these rebuttal areas.

Other rebuttal areas that Student requested including eligibility, what services were provided by a licensed vocation nurse, and feeding and allergy information. These rebuttal areas were either outside the scope of the issues in this case or of no consequence to the ALJ's determination of the issues in this matter as described below. The rebuttal area regarding whether a school district can contradict a physician's medical recommendations is irrelevant to the issues in this matter as Student's physicians requested a home placement and Enterprise offered a home placement. Additionally, the issue regarding if a parent is required to assist Student in a home placement is a legal question.

Thus, if Student wanted the opportunity to elicit evidence regarding the relevant areas that it requested in rebuttal, Student should have disclosed the use of expert witnesses in a timely manner. This failure deprived Enterprise of the opportunity to prepare a cross examination, surrebuttal, and to subpoena documents. By withholding undisclosed expert witnesses for rebuttal to opine on broad subject areas that it should have foreseen would be at issue in this case as a way to bolster its case, discredit Enterprise's case, and have the last word, is prejudicial to respondent under these facts. Thus, Student's requests to allow the rebuttal testimony of Janine Leech and Dr. Christine Davidson was denied.

Student also requested to recall Parent for rebuttal to refute information regarding Parent's ability to aide Student during virtual services, if Enterprise requested Parent to perform assistance, and if Parent agreed to it. Student's request was granted for the limited purpose to garner evidence regarding Parent's ability to assist in virtual learning.

ISSUES 1 AND 2(a): DID ENTERPRISE DENY STUDENT A FAPE FROM THE TIME IT WAS RESPONSIBLE FOR FAPE THROUGH MAY 19, 2021, BY FAILING TO OFFER AN APPROPRIATE INITIAL PLACEMENT, SPECIFICALLY BY OFFERING SERVICES VIRTUALLY?

Student asserts Enterprise's offer of virtual services instead of in-person services was inappropriate because Student could not independently access the technology and attend to school without assistance. Student maintains Enterprise should have offered in-person services or an in-person assistant to help Student access distance learning.

Enterprise contends it did not have enough medical information to safely offer in-person services to Student due to Parent's failure to sign medical releases. Additionally, Student needed minimal assistance to access distance learning and Student's Parent, or another adult could have done it. In fact, Parent offered to assist Student. Thus, Enterprise was not required to offer an in-person assistant.

A FAPE means special education and related services that are available to an eligible child that meets state educational standards at no charge to the parent or guardian. (20 U.S.C. § 1401(9); 34 C.F.R. § 300.17 (2006).) Parents and school personnel develop an IEP for an eligible student based upon state law and the IDEA. (20 U.S.C. §§ 1401(14), 1414(d)(1); and see Ed. Code, §§ 56031,56032, 56341, 56345, subd. (a), and 56363 subd. (a); 34 C.F.R. §§ 300.320 (2007), 300.321 (2006), and 300.501 (2006.)

In general, a child eligible for special education must be provided access to specialized instruction and related services which are individually designed to provide educational benefit through an IEP reasonably calculated to enable a child to make

progress appropriate in light of the child's circumstances. (*Board of Education of the Hendrick Hudson Central School Dist. v. Rowley* (1982) 458 U.S. 176, 201-204; *Endrew F. v. Douglas County School Dist. RE-1* (2017) 580 U.S. ____ [137 S.Ct. 988, 1000].)

By law, regional centers are responsible for early intervention services for infants, toddlers and their families until the child is three years old. (20 U.S.C. §§ 1431-1444.) Once the child turns three, the local educational agency becomes responsible for providing preschool special education and related services if that child is eligible for special education. (20 U.S.C. § 1412(a)(9); 34 C.F.R. § 303.209(c)(1) (2011); Cal. Code Regs., tit. 17, § 52112(a).) Under the IDEA, a local education agency is charged with "providing for the education of children with disabilities within its jurisdiction." (20 U.S.C. § 1413(a)(1).) California law requires public school students to attend a school in the school district "in which the residency of either the parent or legal guardian is located," unless exceptions apply. (Ed. Code, § 48200; *Katz v. Los Gatos-Saratoga Joint Union High Sch. Dist*. (2004) 117 Cal.App.4th 47, 57.) That school district usually becomes the local education agency responsible for providing an eligible student a FAPE. (20 U.S.C. § 1401(19); 34 C.F.R. § 300.28(a); Ed. Code, § 56026.3.)

Far Northern Regional Center provided services to Student before Student turned three years old on December 10, 2019, while residing with Parents within Enterprise's boundaries. Thus, Enterprise became the local educational agency responsible for providing Student a FAPE on December 10, 2019. Student's issue regarding placement does not commence on that day. Despite Enterprise becoming responsible for providing a FAPE on December 10, 2019, Student narrowed the issue's time frame by alleging Enterprise failed to offer an appropriate initial placement, specifically by

offering services virtually. Enterprise's initial IEP placement offer, which specifically offered services virtually, occurred on May 21, 2021. Accordingly, no determination is reached regarding placement before that date.

The GREAT Partnership, a partnership between Gateway, Redding, and Enterprise school districts, requested to assess Student for special education on September 20, 2019, in preparation for Student's entry into the school district. On December 3, Parent signed the proposed assessment plan, received by Enterprise on December 9, 2019. Enterprise then began initial evaluations to determine Student's eligibility for special education and related services.

In December 2019 and January 2020, Enterprise requested authorization to exchange medical information with Student's physicians. Parent refused to sign them but offered to gather any medical information requested by Enterprise. Parent explained in the past Enterprise had inundated Student's sibling's physicians with document requests and questions to a point where two providers complained to Parent. Thus, Parent insisted on gathering the medical information for Enterprise.

Student's initial IEP team meeting convened on February 24, 2020 and was held over five dates. On May 11, 2020, Enterprise found Student eligible for special education under the categories of intellectual disability and orthopedic impairment. On May 21, 2020, Enterprise made its initial FAPE offer to Student.

Enterprise offered Student placement at home with two 30 minute sessions per week of direct, individual, specialized academic instruction sessions provided by Enterprise; two 30 minute sessions per week of direct, individual, speech and language services provided by Enterprise; one 30 minute session per week of direct, individual

occupational therapy provided by a nonpublic agency; 240 minutes yearly of individual, consultation services in physical therapy provided by a nonpublic agency; and 5 to 10 minutes monthly of consultation between the Student's teacher, the occupational therapist, physical therapist, and speech therapist. Enterprise's offer included extended school year services for specialized academic instruction, speech and language, and occupational therapy with the same frequency as the regular school year. All services would be delivered remotely through distance learning.

Enterprise also offered Student remote accommodations to reduce distractions and stay on task. Enterprise provided Student a touchscreen laptop computer to facilitate distance learning, which was not included in the FAPE offer. Parent disputes that providing Student's services through virtual learning offered Student a FAPE.

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.) For a school district's offer of special education services to a disabled pupil to constitute a FAPE under the IDEA, a school district's offer must be designed to meet the student's unique needs, comport with the student's IEP, and be reasonably calculated to provide the student with some educational benefit in the least restrictive environment. (*Ibid*.)

Whether a student was offered or denied a FAPE is determined by looking to what was reasonable at the time the IEP was developed, not in hindsight. (*Adams v. State of Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149, citing *Fuhrmann v. East Hanover Bd. of Education* (3rd Cir. 1993) 993 F.2d 1031, 1041.)

Before May 21, 2020, Enterprise received documents spanning from 2017 through May 2020 demonstrating that Student had ongoing educational and medical needs that would preclude Student from accessing an education through distance learning without direct supports and services. Such documents ranged from educational assessments to medical records, health protocols to safely enter Student's home, and letters from treating physicians. The January 2020 letters and subsequent follow-up letters received from three of Student's treating physicians all recommended home hospital instruction for Student until the end of the 2020-2021 school year but did not opine either way if Student's services should be in-person or virtual.

The evidence showed by the time of the May 21, 2020 IEP offer, Enterprise knew Student had been diagnosed with

- Wolf-Hirschhorn Syndrome,
- a heart atrial septal defect,
- epilepsy,
- status epilepticus,
- cleft palette,
- reflux, microcephaly,
- immune-compromised,
- medically fragile, and
- required a gastrostomy tube for feeding and medication.

Student was susceptible to common viral illnesses, such as a common cold, that could trigger seizures and in the past caused medical flight transport to hospitals with intubation and respiratory support. Enterprise knew Student had profound deficits in cognition, receptive and expressive language, fine and gross motor, and adaptive behavior. Student was non-verbal, required prompting and redirection to maintain

attention, required some hand over hand assistance, could not sit up independently, and required prompting to grasp objects. The evidence demonstrated that, at the time Enterprise proposed Student's program in the May 21, 2020 IEP, distance learning, without a form of in-person service to facilitate it, would neither meet Student's needs nor be reasonably calculated to provide Student with some educational benefit.

By February 19, 2020, Enterprise completed its occupational therapy and physical therapy assessments and reports, and its transdisciplinary assessments and reports, which included evaluations in cognition, adaptive behavior, social-emotional, speech and language, and health. Enterprise's assessments established that Student continued to have significant medical issues and severe educational deficits.

Susanne Cresswell, an independent licensed occupational and physical therapist, with over 30 years of experience, conducted Student's occupational therapy and physical therapy assessments at Student's home. Cresswell established that it would be challenging for Student to access virtual services independently and Student would need someone in the home to facilitate it, such as Parent. Student had significant fine and gross motor delays. For example, Student demonstrated grasp and release skills at a four-month developmental level. Cresswell recommended 30 minutes per week of occupational therapy services to develop Student's motor function. Student was at the crawling stage and was below 12-month developmental level in balance, rolling, and locomotion. Cresswell recommended an activity chair that would provide additional support for Student to engage in academic activities. The evidence established that Enterprise failed to offer a chair to Student and Student was using some type of device for a chair that belonged to an older sibling. Cresswell also recommended four hours of physical therapy per year on a consultation basis to provide training to adults and caregivers to promote Student's skills. Cresswell demonstrated extensive qualifications

and experience, testified in a detailed and knowledgeable manner, consistent with the documentary evidence. Thus, Cresswell's testimony was found credible and accorded significant weight.

Paloma Vance, a Redding School District credentialed school psychologist with 15 years of experience, conducted the cognitive, adaptive behavior, and social-emotional portions of Enterprise's transdisciplinary assessment. The evidence established that Student had cognitive abilities in the 11-month range, adaptive skills in the six-to-seven-month level, and global and comprehensive delays. Vance opined that Student may require one-to-one aide support if enrolled in a classroom environment and recommended a needs assessment for one-to-one health support. If Student was placed outside of a classroom setting, it was recommended that Student receive individual specialized academic instruction 60 minutes per week. Based on Vance's assessments, the transdisciplinary assessment report included a recommendation that the IEP team consider Student's qualification for special education under the category of intellectual disability.

Parent did not agree with the amount of specialized academic instruction recommended by Vance. Parent testified at hearing, reiterating this objection. The amount of specialized academic instruction was not at issue in this case. Accordingly, no determination is reached regarding Parent's contention.

Vance was a May 21, 2020 IEP team member. The evidence established that Vance knew at the time of the IEP offer, virtual services would not meet Student's needs because Student was in the very low range in gross motor skills and had not mastered grasp. Student, for example, would not be able to turn on the computer, navigate to the proper settings to access synchroynous instruction, complete assignments, and turn

them in. Student needed facilitation to set up a computer and also needed assistance keeping attention. Vance believed Parent could facilitate this in the home and no special skills were needed to assist Student. Vance was a qualified, knowledgeable, and credible witness and had insight into Student's needs and abilities. However, Vance did not understand Enterprise's legal obligation regarding the extent to which Parent is required to supplement Student's education for it to still be deemed a FAPE.

Tracy Jones, a Gateway Unified School District employee and licensed speech and language pathologist with 32 years of experience, reviewed the speech and language assessment completed by speech and language pathologist Joni Branstetter and discussed the contents at hearing. The evidence established that Student would need a person to facilitate virtual services in the home to assist with the computer, sign on, and help Student sustain attention. Jones, like Vance, assumed this would be Parent. The evidence showed that Student was functioning at a 11-month level in receptive and expressive language, had pragmatic language and oral motor skill delays, only able to produce some vowel sounds and a couple of consonant sounds, and used a picture exchange communication system with assistance. It was recommended that the IEP team consider Student's qualification under speech and language impairment for special education and receive individual speech and language services in the amount of 60 minutes per week. Jones offered credible and trustworthy testimony that was consistent with the documentary evidence regarding Student's communication needs. Jones, like Vance, did not understand Enterprise's legal obligation regarding the extent to which Parent is required to supplement Student's education for it to still be deemed a FAPE.

Enterprise's credentialed school nurse with a master's degree in nursing, Kelly Pagan, reviewed the health assessment completed by registered nurse Susan Feamster and reported the findings. The evidence demonstrated that Student required total care

for all daily living activities, suggested that the IEP team consider a needs assessment to determine if Student required a personal health aide, and recommended orthopedic impairment and other health impairment as Student's qualifications for special education. Pagan's testimony regarding the contents of the health assessment was consistent with the documentary evidence and was credible.

Four other May 21, 2020 IEP team members testified at hearing. The evidence established that all of these witnesses knew that Student could not access virtual learning independently. Payne knew at the time of the IEP offer that Student could not manipulate the technology independently to access virtual learning, knew Student struggled with grasp, but believed Parents, siblings, or Student's nurse could assist Student at home because Enterprise could not offer in-person services with the medical information it had at that time. However, Payne conceded that it was Enterprise's responsibility to provide these services to Student and it failed to offer them.

Lynn Maxwell, Enterprise's special education preschool teacher, admitted virtual services were not appropriate but believed it was better than no services at all. Maxwell opined that Student could make progress on goals with the adult person to facilitate the virtual services but believed Parent would assist because Enterprise could not safely offer in-person services. Anne Petrie, the GREAT Partnership director of special education, agreed that parents act as the teacher's hands during distance learning, and did not have protocols to provide in-person services to Student.

Parent established that Student needed some type of assistance to help Student log on to distance learning, provide some hand over hand assistance, and sustain attention throughout school. Parent described Student's communication level as minimal. Parent knew that Student could not open up a laptop computer, turn it on, set

it up, maneuver the device, maintain focus, and facilitate learning independently. Although Parent's assistance was discussed at the IEP meeting, Enterprise never explained it or specifically asked Parent to provide that assistance. Parent maintained at hearing that with five children, two with Wolf-Hirschhorn Syndrome, it was impracticable for Parent to be the responsible person to assist Student at all times. Parent's testimony was persuasive because it was supported by other corroborating documentary evidence including Enterprise's own assessments, the previous assessment data, and the medical information shared with Enterprise before the May 21, 2020 IEP team meeting. The evidence was unequivocal that Student needed consistent assistance with distance learning. Parent also had in-depth and personal knowledge of Student's skills, unlike many of the other witnesses, as Student had not yet started attending Enterprise. Thus, the weight of the evidence established that Student needed not only support to access the technology for virtual learning but significant support throughout school to facilitate distance learning and maintain attention.

A 2021 assistive technology report corroborated the finding Student required significant support to access distance learning. After-acquired evidence may shed light on the objective reasonableness of a school district's actions at the time the school district rendered its decision. (*E.M. v. Pajaro Valley Unified Sch. Dist.* (9th Cir. 2011) 652 F.3d. 999,1006.) Geoffrey Barley, assistive technology manager for Connecting to Care, completed an assistive technology assessment of Student in May 2021. Barley recommended a tablet computer as a communication device for Student but believed Student would need continuous in-person support with a partner to access the assistive technology. Student also fatigued easily and would need an assistant to help with this issue. Barley had more expertise and knowledge in the assistive technology field than

any other witness. Barley's testimony was thorough, impartial, and persuasive, and corroborated by much of the testimonial and documentary evidence, and was thus, persuasive.

Dr. Carter, Student's treating physician, and the most knowledgeable witness at hearing regarding Student's medical needs, believed Student would be limited in accessing virtual services, would need someone in the home to assist Student, and it would be a lot to ask Parent to be Student's assistant. Dr. Carter had personal knowledge of Student, medical expertise, was thorough, sincere, and neutral. Dr. Carter was a credible and convincing witness.

All witnesses that discussed this issue agreed that Student needed some form of in-person assistance or support to access virtual services. Witnesses differed on the amount of assistance Student required and who should provide it. Thus, as of May 21, 2020, the overwhelming weight of the evidence demonstrated that Student could not access education virtually without significant support of an in-person assistant, as Student needed assistance to access the technology and attend to it throughout the school day. Enterprise failed to offer this assistance to Student in the IEP, the May 21, 2020 IEP, relying exclusively on Parent to provide the needed in-home support. Enterprise offered no legal authority supporting its ability to delegate to Parent the obligation to provide one-on-one support throughout the entire school day. Accordingly, the IEP's placement offer was not reasonably calculated to offer Student a FAPE in light of Student's circumstances. The evidence further demonstrated that from the time of the initial offer May 21, 2020 through the time of filing, May 19, 2021, Enterprise did not offer any in-person service or support or provide any services to Student.

Enterprise argued that despite the consensus by Enterprise witnesses that virtual services were not the preferred delivery method for Student, it was excused from offering in-person services because it did not have medical releases and sufficient medical information at the time of the FAPE offer, such as seizure and gastronomy tube procedures, how to administer medication, and how to properly feed Student, to safely offer in-person services, especially in light of the COVID-19 pandemic. It is also believed that the health care protocols given to Enterprise before May 21, 2020 IEP were incorrect because they did not provide for social distancing. Further, Parent offered to assist Student with the facilitation of the virtual services. Thus, it was unnecessary to offer any other service or support to Student to provide a FAPE. Enterprise's arguments are misplaced as it cannot be relieved of liability for offering services it knew at the time the offer was made, Student could not access.

Despite the COVID-19 pandemic, Enterprise could have offered in-person services to Student at that time. On April 9, 2020, the California Department of Education updated its COVID-19 guidance. It clarified that local educational agencies were not precluded from providing in-person or in-home services in exceptional situations, to maintain the mental and physical health and safety of students and to support distance learning. Some individuals serving students with disabilities were designated essential workers, including occupational therapists, speech pathologists, behavioral health workers, workers who support vulnerable populations to ensure their health and well-being, and workers supporting K-12 schools for the purposes of distance learning.

A local educational agency must create access to the instruction, including "planning for appropriate modification or accommodations based on the individualized needs of each student and the differences created by the change in modality such as a

virtual classroom." (Cal. Dept. of Educ., Special Education Guidance for COVID 19 School Closures and Services to Student with Disabilities (April 9, 2020).) State and federal orders and guidance all supported the concept that local educational agencies could and should consider in-person supports for students in exceptional circumstances. Here, the evidence established that Student's circumstances supported home placement for safety reasons due to Student's medical conditions, immune-comprised state, and medical fragility, and needed in-person service to support distance learning, which was permitted under the latest CDE guidance.

Enterprise also had other alternatives than to offer virtual services alone. Enterprise could have offered Student an in-person service or support to help facilitate access to virtual learning such as an assistant or in-person services through a nonpublic agency, so that Student could begin participating in school. Then, Enterprise could have adjusted the FAPE offer as needed.

Here, Enterprise's offer to Student amounted to approximately 30 minutes a day of services. Thus, Enterprise did not need the specificity in medical records as argued to offer an in-person assistant, service, or support to facilitate virtual services, or offer in-person services for that time period daily. Enterprise could certainly work around Student's daily feeding and medication schedules. The IEP team could have offered both aide services and nursing services had it had such concerns regarding Student's health. Or, it could have come up with other solutions to serve Student for 30 minutes per day in the home through virtual services. Instead, Enterprise made an offer Student's IEP team members knew was not a FAPE and made no efforts to modify its virtual services only offer. Enterprise's offer of exclusive virtual services denied Student a FAPE.

Additionally, Enterprise had the health protocols to enter the home safely and a significant amount of medical information about Student to offer some in-person support for the related services it offered to Student. Dr. Carter testified that the home health protocols, and updated protocols provided before May 21, 2020, were enough for a foundation to provide for Student's medical safety and sufficient to begin developing a healthcare plan. While Pagan believed that protocols were not correct because it did not require a physical distance of 6 feet from other people while in the home, Enterprise failed to introduce any evidence that required this. Thus, Dr. Carter's testimony was given significant weight.

At hearing, Enterprise argued that it was also relieved of its duty to provide a FAPE because Parent offered to assist in the facilitation of virtual learning and thus, it was appropriate for it to anticipate that Parent would provide the necessary assistance when it made the FAPE offer. First, the evidence did not establish that at the time the IEP offer was made, Parent agreed to assist with distance learning. Second, even if Parent did agree to assist at that time, Parent is not required to undertake this task, especially given Student's significant medical and educational deficits. This was not a case of getting a student on a computer and into a virtual classroom as many parents did during virtual learning. The evidence established that Student needed assistance to facilitate the technology and maintain attention while in school with consistent support. While a trained assistant may not have been needed, someone who could partner while Student was receiving services was required.

This was not the responsibility of Parent. A child eligible for special education must be provided access to specialized instruction and related services which are individually designed to provide educational benefit through an IEP reasonably calculated to enable a child to make progress appropriate in light of the child's

circumstances. (*Rowley, supra*, 458 U.S. 176, 201-204; *Endrew F., supra,* 137 S.Ct. 988, 1000.) An offer of FAPE from a school district includes related services' like transportation, and developmental, corrective, and other supportive services, that may be required to assist an individual with exceptional needs to benefit from special education. (Ed. Code, §§ 56363, subd. (a), 56345, subd. (a)(4).) Conversely, Enterprise had a duty to provide these services to Student during school. Accordingly, Student proved by the preponderance of the evidence that Enterprise's offer of virtual services denied Student a FAPE from May 21, 2020, through May 19, 2021, the time of filing.

Student raised two arguments in the closing brief that were not pled in this case. Specifically, that Enterprise failed to find Student eligible for special education in February 2020 and that Enterprise failed to offer nursing services. The only issue in Student's amended due process request that mentions special education eligibility and may have arguably given notice to Enterprise of this issue, was withdrawn before hearing. No issues included a claim for nursing services. Additionally, the timeliness of Enterprise's special education eligibility determination and possible need for nursing services were not issues stated in the August 2021 prehearing conference order that listed the hearing issues. Between August 2021 through the time of hearing, Student's counsel failed to request clarification or reconsideration of the listed issues in the August 2021 prehearing conference order. The undersigned ALJ further clarified the issues on the first day of hearing and eligibility and nursing services were not raised. Accordingly, Enterprise had no notice of these issues for hearing. Therefore, whether Enterprise should have found Student eligible for special education in February 2020 and whether it should have offered nursing services is not determined in this Decision.

ISSUES 2(b) AND 3: ASSESSMENTS

ISSUE 3: MAY ENTERPRISE CONDUCT ITS HEALTH/MEDICAL ASSESSMENT OF STUDENT BY A LICENSED PHYSICAN, WITHOUT CONDITIONAL RELEASES TO COMMUNICATE WITH DOCTORS KELLY CARTER, FRANCES PAOLA VELEZ-BARTOLOMEI, AND NILIKA SINGHAL, REGARDING STUDENT'S EDUCATIONALLY RELATED HEALTH NEEDS?

Enterprise seeks an order permitting it to assess Student's health and medical needs without medical releases that limit the mode of communication between Student's physicians and Enterprise. Enterprise maintains that it provided a legally compliant assessment plan on May 21, 2020, which Parent signed on March 1, 2021. However, because Parent limited the medical releases by restricting the mode of communication between Enterprise and Student's physicians, it resulted in conditional consent to the assessment. Thus, Enterprise requests permission to assess without conditions placed on communications between it and three of Student's physicians.

Student asserts that it neither limited the scope of the medical assessment nor limited the type of medical information that Enterprise could obtain from Student's medical providers. Thus, Student asserts consent was not conditional.

Student also argued that the proposed assessment plan is legally defective. Despite the alleged defect, Student suggested the health assessment could proceed, but also requested to allow Parent's proposed communication limitations to stand. Student's suggestion that the assessment should proceed does not render the issue moot. Rather, Student still seeks an order permitting Parent's proposed limitations.

Accordingly, there continues to be an ancillary controversy regarding the limits of the medical releases that Enterprise in particular associates with the health assessment. Thus, a controversy continues to exist that warrants analysis of the proposed assessment plan since both parties want the assessment enforced but cannot agree as to the medical releases. Thus, an analysis of the assessment plan is warranted.

Reassessment of a student requires parental consent. (20 U.S.C. § 1414(c)(3); 34 C.F.R. § 300.300(c)(1) (2008); Ed. Code, § 56381, subd. (f)(1).) "If the parent refuses to consent to the reevaluation, the public agency may, but is not required to, pursue reevaluation by using the consent override procedures described in paragraph (a)(3) of this section." (34 C.F.R. § 300.300(c)(1)(ii); see Ed. Code, § 56501, subd. (a)(3) [school district may initiate due process hearing procedures if parent refuses to consent to an assessment.].)

To obtain parental consent, the school district must provide proper notice to the student and parent consisting of a proposed assessment plan and a copy of parental procedural safeguards under the IDEA and related state laws. (20 U.S.C. §§ 1414(b)(1), 1415(b)(3); 34 C.F.R. § 300.304(a) (2006); Ed. Code, § 56321, subd. (a).) School districts must provide parent with the proposed assessment plan. (Ed. Code, § 56321, subd. (a).) The assessment plan must be in a language easily understood by the public and the native language of the parent, explain the type of assessments being proposed, and notify the parent that no IEP will result from the assessment without consent of the parent. (Ed. Code, § 56321, subd. (b)((1)-(4).)

The May 21, 2020 assessment plan was written in English, the language Parent used to communicate with Enterprise. It was written clearly in terms understandable by

the general public and explained the types of assessments to be conducted. The assessment plan, however, did not state that no IEP would result from the assessment without consent of the parent.

Thus, Enterprise failed to establish by a preponderance of the evidence that the statutory requirements for notice of a proposed assessment were met. The failure to provide this notice is not trivial. Parent knew that an IEP team meeting would be held for Student. That an IEP team meeting will be held is not equivalent to informing parents that no IEP will result from the assessment without consent. That knowledge may alter parents' conduct. For example, a parent may mistakenly believe that if they consent to an assessment and the members of the IEP team determine services are necessary, the services may be provided even if the parent does not attend the meeting and consent to services. Expressly informing parents that no IEP will result from the assessment without parental consent may change, for example, whether or not a parent attends an IEP team meeting to review the assessment.

Enterprise has the burden of proof to establish its assessment plan is legally compliant such that the assessment can be conducted absent parental consent, or in this case, without Parent's proposed limitations. Enterprise failed to provide a legally complaint assessment plan. For this reason, Enterprise is not entitled to assess Student. Accordingly, Enterprise failed to prove by a preponderance of the evidence that it is legally entitled to conduct a reassessment of Student in the area of health by a medical doctor under the May 21, 2020 assessment plan.

ISSUE 2(b): DID ENTERPRISE DENY STUDENT A FAPE DURING THE 2020-2021 SCHOOL YEAR THROUGH MAY 19, 2021, BY FAILING TO TIMELY COMPLETE THE MEDICAL ASSESSMENT CONSENTED TO ON MARCH 1, 2021?

Student asserts Parent consented to the May 21, 2020 health assessment plan on March 1, 2021; however, Enterprise failed to conduct it. Enterprise contends that Parent signed conditional medical releases precluding it from obtaining Student's medical information to allow it to appropriately conduct the health assessment. Enterprise argues this resulted in conditional consent which may be regarded as having refused consent and vitiates its obligation to complete it. Thus, it has not failed to timely complete an assessment that it is not required to conduct.

Student's burden of proof varies from Enterprise's burden of proof. While Enterprise is required to prove that the proposed assessment plan was legally compliant to conduct the assessment without parental consent, Student does not have to prove this to show that an assessment was untimely. Once Parent signed the assessment plan, whether it was legally compliant or not, it triggered Enterprise's duty to conduct the assessment. Thus, while it has already been determined that the assessment plan was legally incompliant, it does not preclude Student from seeking a remedy for failing to timely conduct the assessment if it can be proven that Parent consented to it, as Parent did not know it was defective.

The IDEA provides for reevaluations, referred to as reassessments in California law, to be conducted no more frequently than once a year, but at least once every three years, unless the parent and the agency agree that it is unnecessary. (20 U.S.C.

§ 1414(a)(2)(B); 34 C.F.R. § 300.303(b) (2006); Ed. Code, §§ 56043, subd. (k), 56381, subd. (a)(2).) The district must also conduct a reassessment if it determines that the educational or related service needs of the child warrant a reassessment. (20 U.S.C. § 1414(a)(2)(A)(i); 34 C.F.R. § 300.303(a)(1) (2006); Ed. Code, § 56381, subd. (a)(1).)

The school district must give the parents 15 days to review, sign, and return the proposed assessment plan. (Ed. Code, § 56321, subd. (a).) The reassessment must be completed, and an IEP team meeting convened to discuss the results within 60 days of the school district's receipt of parents' written consent to the assessment plan, not counting days between the pupil's regular school session, terms, or days of school vacation in excess of five schooldays. (Ed. Code, §§ 56344, subd. (a), 56043, subd. (f)(1).)

Here, the weight of the evidence established that Enterprise completed an initial health assessment of Student by February 19, 2020, and an updated health assessment of Student on April 23, 2020. On May 21, 2020, Enterprise presented an assessment plan to Parent, proposing to conduct a reevaluation of Student in the area of health by a medical doctor.

The uncontradicted evidence showed that on March 1, 2021, Parent signed the proposed assessment plan, provided it to Enterprise, and signed three medical releases. Parent added language to each release requiring any direct communication between Student's medical providers and Enterprise be in writing. Further, on March 2, 2021, Student's counsel gave permission for Enterprise to also communicate verbally with Student's doctors if either Parent or Student's counsel participated in such communications. It is uncontested that Enterprise had not taken any steps to conduct the assessment by the 60-day deadline, through the date of the hearing. Enterprise

maintains that Parent's limitations on the mode of communication with Student's physicians amounted to Parent's conditional consent and refusal of the proposed assessment. Thus, Enterprise was not obligated to conduct it.

Federal courts have held that parents who place conditions on assessments may be regarded as having refused consent. Enterprise cites these federal cases and OAH decisions in support of its contention that Parent's signed medical releases limiting the mode of information exchange between Student's physicians, and it resulted in refused consent. However, these cases and decisions are distinguished from the facts here.

In *M.T.V. v. Dekalb County Sch. Dist.* (11th Cir. 2006) 446 F.3d 1153, the school district requested parents' consent to reevaluation, and they refused. The school district requested a due process hearing to enforce its right to evaluate the student by an expert of its choice. The administrative law judge ruled in favor of the school district and ordered parents to cooperate with the reevaluation. Upon review, the district appellate courts agreed that the IDEA gave school districts the right to reevaluate student by an expert of its choice and affirmed the decision ordering parents to consent to the school district's request for reevaluation. (*Id.* at p. 1160.)

Enterprise cited *G.J. v. Muscogee County School Dist.* (M.D. Ga. 2010) 704 F.Supp.2d 1299, affd. 11th Cir. 2012) 668 F.3d 1258. In that case, parents attached conditions to their approval of the assessment, including requiring particular assessors, agreement to meetings before and after the assessment, and limitations on the use of assessment. The administrative law judge found this to be a refusal to consent, and district and appellate courts affirmed. (*Id.*, 704 F.Supp.2d at p.1309; 668 F.3d at p. 1264.)

Similarly, in *R.A. v. West Contra Costa Unified School Dist*. (N.D. Cal., Aug. 17, 2015, Case No. 14-cv-0931-PJH) 2015 WL 4914795 [nonpub. opn.], a parent approved an assessment plan on the condition that parent be allowed to see and hear the assessment when conducted. The administrative law judge found that parent inappropriately refused to allow school district to complete the assessment and ordered it to be completed without interference. The district court found that conditions placed on the assessment negated the mother's consent. (*Id*. at p. 13.) The appellate judge affirmed. (*R.A. by and through Habash v. West Contra Costa Unified School Dist.* (9th Cir. 2017) 696 Fed.Appx. 171, 172.)

Additionally, in *Soledad Unified Sch. Dist. v. Student*, (2021) OAH case number 2021030990, parent failed to make the student available for the assessment. Thus, the administrative law judge determined the school district could assess the student without parental consent or conditions placed on the assessment.

Further, in *Trivium Charter School V. Student* (2020) OAH case number 2020010158, parent refused consent to the assessment because parent did not believe the school district had competent assessors, the assessments would involve paper, some tests were timed, student would miss class instruction during testing, the assessments would only capture a particular day and time, student's private doctors and providers could not give input on the assessment instruments and process, and parent could not choose other assessors. The administrative law judge found that these were assessment conditions that the school district was not obligated to accommodate and allowed the school district to assess the student without parental consent.

Finally, in *Student v. Upland Unified Sch. Dist.*, (2020) OAH case numbers 2019080542, 2020040245, and 2020010465, the administrative law judge found that parent failed to sign the assessment plan provided by the school district and refused to consent to it. Thus, student was not entitled to FAPE by the school district.

All of the above cases are inapplicable here. Additionally, OAH decisions are not binding authority. (Cal. Code Regs., titl. 5 § 3085.) Even if they were, the decisions cited are distinguishable. No documentary or testimonial evidence established that Parent attempted to prevent the commencement of the assessment in any way, insisted on participating in observations, required particular assessors, requested assessment updates, required input on testing tools, disrupted assessment scheduling, limited the assessment's scope, or refused consent to the assessment. The facts here vary greatly from these cases. Here, Parent limited the mode of communication between Enterprise and Student's medical providers, while not limiting the scope or substance of communications. Neither did Parent place conditions on consent to the assessment plan itself. Importantly, Enterprise never reached out to a single medical provider to see if the information provided would give the IEP team Student's needed medical information. Thus, Enterprise's argument is unconvincing.

Enterprise did cite cases related to medical assessments and communications between a school district and a student's physician to bolster its assertions; however, it overlooked the contrary facts in them. In *Shelby S. v. Conroe Ind. Sch. Dist.* (5th Cir. 2006) 454 F.3d 450, 454-455, cert. den. (2007) 549 U.S. 111, (*Shelby S.*), the school district requested to speak to student's physician, and parent limited the communication by requiring the school district to write out fourteen questions subject to approval. Parent then edited the doctor's responses to the questions before they were provided to

the school district. Parent also allowed the school nurse and student's teacher to talk with the student's physician for the limited purpose of obtaining information for educational purposes but not for prognosis. When the school district requested a medical assessment because it needed more medical information, parent refused stating it would likely cause student serious harm and was unwarranted. (*Id.* at 453.) The district and appellate court affirmed the hearing officer's decision finding that the school district may seek an independent medical evaluation of a medically fragile student to resolve conflicting and incomplete information about the student's condition over parental objection. (*Shelby S., supra*, at p. 454.)

Unlike *Shelby S.*, Parent did not object to the health assessment by a medical doctor, and no evidence was presented that Parent or anyone else scripted communications between Student's physicians and Enterprise, required pre-approval of written questions, edited responses, and limited the scope of communications during the statutory time period at issue. Thus, Enterprise's application of this case to the present facts in unpersuasive.

Further, in *Riverdale Joint Unified Sch. Dist.* (2018) OAH case number 2018030746, (*Riverdale*) one of the issues before the administrative law judge was whether the school district was entitled to a release of information authorizing it to communicate with two doctors. There, the parents refused to sign any medical release and believed the notes from their health professionals and own opinions were enough to justify home hospital instruction. The administrative law judge disagreed and determined the parents had obstructed the school district's efforts to medical information and ordered parents to sign an exchange for documents and oral information regarding student's condition over a specified time period, thus, allowing direct contact by the school district with student's physicians. Contrary to the facts in

Riverdale, Parent here signed medical releases and allowed direct communication with doctors in writing without any limitations and oral communications with the participation of Parent or Student's attorney but without limits to the substance of the communication. Thus, this case is factually distinguishable from *Riverdale*.

In *Anaheim Elementary Sch. Dist. v. Student*, (2020) OAH case number 2020090678 (*Anaheim*), the parents refused to allow any direct communication between the school district and student's physician. Thus, the administrative law judge found that parents' refusal to allow the school nurse to communicate with Student's physician improperly limited its ability to gather relevant information that would assist in assessing how Student's health would impact his education. The administrative law judge ordered the assessment without parental consent and instructed parents to permit the school district to communicate with Student's physician to discuss the contents of three documents, despite their objections. Here, again, Parent has allowed both direct communication with Student's physicians in writing and orally with the participation of Parent or Student's attorney, thus distinguishing *Anaheim*.

Finally, Enterprise cites *Irvine Unified School District v. Student*, (2006) OAH case number N2005090857 (*Irvine*), arguing that student with autoimmune disease was compelled to undergo a medical assessment over parental objection where the assessment was necessary and appropriate to provide student a FAPE. Contrary to the instant case, the school district in *Irvine* requested a medical assessment and parents refused to sign the assessment plan expressing concern that it would endanger student's health. The *Irvine* case had nothing to do with medical releases or communications with student's physicians. Here, Parent signed the assessment plan and consented to a health assessment by a medical doctor. Thus, Enterprise's application of *Irvine* to the facts here is inappropriate.

Enterprise's arguments are unconvincing. All of the cases and decisions cited by Enterprise are not on point, and it failed to present any authority that mandates: a parent to sign a medical release agreeing to unfettered communication between the medical provider and school district to conduct a health or medical assessment, or any law that demonstrates limiting the mode of communication between a doctor and school district effectively results in a conditional assessment, or vitiates consent relieving it of its obligation to complete the assessment.

Even if the law supported that a parent's limitation on the mode of communications may be construed as conditional consent of the proposed health assessment, Enterprise failed to show that this impeded its ability to conduct it. Enterprise introduced a substantial amount of evidence at hearing alleging the need for additional medical information of Student and that the limited medical releases hampered its ability to access Student's medical information to enable it to conduct a comprehensive health assessment by a medical doctor. Yet, the evidence overwhelmingly demonstrated that Enterprise employees made no attempts to contact Student's medical providers in writing or arrange a phone call with Parent or Student's attorney present to solicit medical information. Instead, the evidence showed that Enterprise intentionally decided to continue making medical information requests through Parent and Student's attorney instead of employing the medical releases, then repeatedly claimed the information received was insufficient or that it needed more medical information. Enterprise cannot now claim that Parent obstructed its efforts to conduct a health assessment when no efforts were made to utilize the medical releases to receive the sought-after medical information. Enterprise does not know either way if

Student's medical records or discussion with Student's physicians, even with Parent or attorney present, would have provided the information it requested. Thus, Enterprise's argument is premature, speculation, and fails.

Under these facts, the delay in completing Student's health assessment by a medical doctor is attributed to Enterprise, not Parent. Accordingly, Student proved by a preponderance of the evidence that Enterprise failed to timely complete the health assessment consented to on March 1, 2021.

The failure to conduct a timely assessment is a procedural violation of the IDEA. (*Park, ex rel. Park v. Anaheim Union High Sch. Dist.* (9th Cir. 2006) 464 F.3d, 1025, pp.1032-1033 (*Park*). A procedural violation does not automatically require a finding that a FAPE was denied. A procedural violation results in a denial of a FAPE only if the violation: impeded the child's right to a FAPE; significantly impeded the parent's opportunity to participate in the decision-making process; or caused a deprivation of educational benefits. (20 U.S.C. § 1415(f)(3)(E)(ii); see 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*).

The evidence showed that Enterprise requested the health assessment to solicit more medical information to make a further determination on the appropriate placement for Student but failed to conduct it. Student lost the opportunity to consider other alternative placements, depriving Student of educational benefit. Further, the lack of a completed assessment precluded the IEP team, including Parent, from considering the assessment information for future placement and services, thus, impeded Parent's

ability to participate in the IEP decision-making process. Therefore, the failure to timely complete the health assessment constituted a substantive denial of FAPE from May 8, 2021, through May 19, 2021.

Student argued for the first time in Student's closing brief that Student consented to the May 21, 2020 assessment plan on December 9, 2020, and therefore the assessment was untimely as of March 2021. Student failed to allege this issue in the amended due process hearing request. The issue was neither listed as an issue in the August 2021 prehearing conference order nor raised during issue clarification at hearing. Thus, Enterprise had no notice of this prior alleged consent, and it will not be addressed in this Decision.

CONCLUSIONS AND PREVAILING PARTY

Under 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:

Enterprise denied Student a FAPE from May 21, 2020, through the end of the 2019-2020 school year, by offering virtual services without offering services or accommodations to access them.

Student prevailed on Issue 1.

Issue 2(a):

Enterprise denied Student a FAPE during the 2020-2021 school year through the time of filing, May 19, 2021, by offering virtual services without offering services or accommodations to access them.

Student prevailed on Issue 2(a).

Issue 2(b):

Enterprise denied Student a FAPE by failing to timely complete the health assessment consented to on March 1, 2021, which deprived Student educational benefit and significantly impeded Parent's opportunity to participate in the decision-making process.

Student prevailed on Issue 2(b).

Issue 3:

Enterprise failed to prove that it is legally entitled to conduct a health/medical because it did not establish that it gave proper notice to Parents.

Student prevailed on Issue 3.

REMEDIES

Student prevailed on Student's Issues 1, 2(a), 2(b), and 3. As remedies, Student's requested OAH compel Enterprise to provide services to Student and to conduct its health assessment.

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

An administrative law judge can award compensatory education as a form of equitable relief. (*Park, supra*, 464 F.3d at p. 1033.) School districts may be ordered to provide compensatory education or additional services to a student who has been denied a FAPE. (*Ibid.*; *Parents of Student W. v. Puyallup Sch. Dist., No. 3* (9th Cir. 1994) 31 F.3d 1489, 1496.) These are equitable remedies that courts may employ to craft "appropriate relief" for a party. An award of compensatory education need not provide a "day-for-day compensation." (*Id.* at p. 1497.) The conduct of both parties must be reviewed and considered to determine whether equitable relief is appropriate. (*Id.* at p. 1496.) 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 Sch. Dist. No. 1* (D. Conn. 2008) 531 F.Supp.2d 245, 265.) An award to compensate for past violations must rely on an individualized assessment, just as an IEP focuses on the individual student's needs. (*Reid ex rel. Reid v. Dist. of Columbia* (D.D.C. Cir. 2005) 401 F.3d 516, 524.) The award must be fact-specific and "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." (*Ibid.*)

Student failed to submit any documentary or testimonial evidence that addressed compensatory education including amounts and duration. Ultimately, the undersigned relied upon the equitable judicial discretion to craft an appropriate compensatory education remedy.

As to Student's Issues 1 and 2(a), it was determined that Student was denied a FAPE from May 21, 2020, through May 19, 2021, for Enterprise's failure to offer Student a FAPE. The evidence established that Student did not receive special education and related services during the FAPE denial period. However, the acrimonious nature of the relationship between the parties affected their ability to reach agreement. This conduct is attributed to both Enterprise and Parent, but no fault of Student. Thus, equity favors Student in fashioning the remedy, and compensatory education is appropriate for this FAPE denial. Given the severity of Student's disabilities and Enterprise's failure to provide services, an award of nearly day-for-day compensation is appropriate.

Student did not receive special education and related services for approximately 40 weeks. This includes approximately two weeks of instructional time during the 2019-2020 school year. Student was also entitled to extended school year services. According to the IEP document, which was the only evidence presented regarding such, Enterprise's extended school year was June 10, 2020, through June 30, 2020, approximately three weeks. However, the minimal amount of time a California school district can offer extended school year is 20 days, which is four weeks of instructional time. (5 C.C.R. § 3043, subd. (d).) Additionally, Student did not receive approximately 34 weeks of instructional time during the 2020-2021 school year through May 19, 2021. This amounts to approximately 40 weeks without school instruction.

The undersigned carefully considered the evidence presented in this matter and the specific FAPE denials found. At the May 21, 2020 IEP team meeting, Enterprise offered one hour per week of direct individual specialized academic instruction and speech and language services, 30 minutes per week of direct individual occupational therapy services, and four hours per year of consultation in physical therapy, with all services provided at home remotely.

Enterprise is ordered to provide Student with 40 hours of direct, individual, in-person, in-home, specialized academic instruction, 40 hours of direct, individual, in-person, in-home, speech and language, 20 hours of direct, individual, in-person, in-home, occupational therapy, and four hours of direct, individual, in-person, in-home, physical therapy as equitable remedies for Enterprise's FAPE denials in Issues 1 and 2(a).

Student also prevailed on Issue 2(b) and 3. Student requests OAH to order Enterprise to conduct its health assessment by a medical doctor. As discussed, Enterprise's proposed assessment plan for the health assessment was defective. Thus, the ALJ cannot enforce it.

Enterprise requested a health assessment of Student conducted by a medical doctor which Student consented to on March 1, 2021. Student established that Enterprise failed to timely conduct the health assessment and is entitled to a remedy. Here, Student took many months to consent to the health assessment, however, it was determined that the proposed assessment plan notice was defective. Once Parent consented to it, Enterprise failed to conduct it delaying a new or revised FAPE offer to Student. Equity favors Student in fashioning the remedy, and under these circumstances, an independent educational evaluation is warranted.

An independent health evaluation at public expense may be awarded as an equitable remedy if necessary to grant appropriate relief to a party. (Los Angeles Unified Sch. Dist. V. D. L. (C.D. Cal. 2008) 548 F.Supp.2d 815, 822-823.) An independent educational evaluation is an evaluation conducted by a qualified examiner not employed by the public agency responsible for the education of the student in question. (34 C.F.R. § 300.502 (a)(3)(i).) If an independent educational evaluation is at public expense, the criteria under which the evaluation is obtained, including the location of the evaluation and the qualifications of the examiner, must be the same as the criteria the public agency uses when it initiates an evaluation, to the extent those criteria are consistent with the parent's right to an independent educational evaluation. (34 C.F.R. § 300.502(e)(1).) Except for these criteria, the public agency may not impose conditions or timelines related to obtaining the independent educational evaluation at public expense. (34 C.F.R. § 300.502(e)(2.)

Accordingly, Student is entitled to an independent educational evaluation in the area of health to further determine Student's educationally related health and medical needs. Should Student decide to obtain an independent health evaluation, it must be conducted by a licensed physician of Parents' choice. The independent evaluation must be in accordance with Enterprise's assessor qualification and location criteria for independent educational evaluations, as long as Enterprise's criteria does not interfere with Parent's right to obtain the evaluation. The licensed physician will also be invited to attend the IEP team meeting during which the assessment will be reviewed. The cost must not exceed $5000.

All of Student's other requests for relief are denied. Enterprise's requests for relief are denied.

ORDER

1. Enterprise must fund 40 hours of direct, individual, in-person, in-home, specialized academic instruction for Student provided by a certified nonpublic agency of Parent's choice. Enterprise must establish direct payment to any certified nonpublic agency selected by Parent. All hours will be available to be used until February 1, 2024, and will thereafter be deemed forfeited.
2. Enterprise must fund 40 hours of direct, individual, in-person, in-home, speech and language services for Student provided by a certified nonpublic agency of Parent's choice. Enterprise must establish direct payment to any certified nonpublic agency selected by Parent. All hours will be available to be used until February 1, 2024, and will thereafter be deemed forfeited.
3. Enterprise must fund 20 hours of direct, individual, in-person, in-home, occupational therapy services for Student provided by a certified nonpublic agency of Parent's choice. Enterprise must establish direct payment to any certified nonpublic agency selected by Parent. All hours will be available to be used until February 1, 2024, and will thereafter be deemed forfeited.
4. Enterprise must fund 4 hours of direct, individual, in-person, in-home, physical therapy for Student provided by a certified nonpublic agency of Parent's choice. Enterprise must establish direct payment to any certified nonpublic agency selected by Parent. All hours will be available to be used until February 1, 2024, and will thereafter be deemed forfeited.

5. Student is entitled to obtain an independent educational evaluation in the area of health for the purpose of determining Student's educationally related health and medical needs.

   a. The independent educational evaluation in the area of health, must be conducted by a licensed physician of Parent's choice, who meets Enterprise's qualification and location requirements.

   b. Enterprise must fund the independent health evaluation of Student including the selected assessor's time to conduct the evaluation, review of records, school observations, and interviews of school staff, Parent, and Student, at the assessor's usual hourly rate, as long as such rate does not exceed the typical hourly rate for such assessments in the professional community, not to exceed $5000.

   c. Enterprise must fund up to two hours for the assessor to prepare for and attend, in-person or virtually, an IEP team meeting to present the evaluation findings, including mileage reimbursement at the Federal internal revenue service business reimbursement rate.

   d. If Parent decides to obtain the independent educational evaluation, Parent must choose an assessor and give notice to Enterprise within 30 days of this Decision. Enterprise must contract with the selected assessor within 15 days of receiving notice of Parent's selection.

   e. Enterprise must convene an IEP team meeting within 15 days of receipt of the independent educational evaluation, to consider the results of the report, unless Enterprise and Parent agree to a different timeline.

RIGHT TO APPEAL THIS DECISION

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

/s/

Cynthia Fritz
Administrative Law Judge
Office of Administrative Hearings