

BEFORE THE  
OFFICE OF ADMINISTRATIVE HEARINGS  
STATE OF CALIFORNIA

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CASE NO. 2021050037

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PARENT ON BEHALF OF STUDENT,

v.

SAN DIEGUITO UNION HIGH SCHOOL DISTRICT

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DECISION

JANUARY 3, 2022

On April 29, 2021, the Office of Administrative Hearings, called OAH, received a due process hearing request from Parent on Student's behalf, naming San Dieguito Union High School District, and other respondents OAH has since dismissed. Student filed a second amended complaint on June 18, 2021. OAH granted a continuance of the due process hearing on July 29, 2021.

Administrative Law Judge Adrienne L. Krikorian held the due process hearing by videoconference on November 2, 3, 4, 5, 8, 9, and 16, 2021. Attorney Kathleen Loyer represented Student. Student's Father, called Parent, attended the hearing on all

hearing days. Attorneys Sarah Sutherland and Aundrea Cardoza represented San Dieguito. Tiffany Hazlewood, Director of School and Student Services appeared on San Dieguito's behalf on all hearing days.

OAH continued the matter to December 13, 2021 for written closing briefs at the parties' request. On December 13, 2021, at approximately 9:15 a.m., Student's counsel notified OAH that she was having difficulty accessing Caselines, the online evidence program used by OAH. The ALJ confirmed shortly thereafter that Caselines was available and OAH notified both parties that closing briefs were due by 4:30 p.m. The parties timely filed their closing briefs.

However, on December 15, 2021, Student's counsel filed a Notice of Errata including six substitute pages to Student's closing brief, asserting that counsel inadvertently filed a draft instead of final version of Student's closing brief. San Dieguito filed an objection to the Notice on December 17, 2021, and Student filed a response on December 20, 2021. The undersigned ALJ considered the objection and response. The objection is sustained. The due date for closing briefs was requested by Student's counsel on November 16, 2021, the last day of hearing. San Dieguito's counsel agreed to the due date, which was affirmed by the ALJ. The briefs were to be filed without reply by the opposing party. Student's Notice of Errata, which added six pages of legal argument, was untimely. The record was closed and the matter submitted on December 13, 2021 after the original closing briefs were filed.

## ISSUES

Free appropriate public education is referred to as FAPE. Individuals with Disabilities Education Act is referred to as IDEA. Individualized education program is

referred to as IEP. The issues have been rephrased to remove reference to San Diego County Office of Education based on its dismissal from the matter.

1. Did San Dieguito deny Student a FAPE by failing to meet its duty to develop and execute an appropriate "child find" policy under the IDEA?
2. Did San Dieguito deny Student a FAPE by failing to provide Student's parents with mandated information regarding Student's right to services while Student was privately placed in a for-profit nonpublic school?
3. Did San Dieguito deny Student a FAPE during the applicable two-year statute of limitations by failing to timely conduct Student's annual and triennial assessments?
4. Did San Dieguito deny Student a FAPE by failing to assess Student during Student's 2020 triennial assessment in the areas of sensory integration and assistive technology?
5. Did San Dieguito deny Student a FAPE by failing to use appropriate accommodations to timely assess Student during the 2020 Covid-19 pandemic school closures?
6. Did San Dieguito deny Student a FAPE in 2020 during the Covid-19 pandemic school closures by failing to find Student eligible for special education under the primary category of other health impairment and secondary category of emotional disturbance?
7. Did San Dieguito deny Student a FAPE by failing to timely conduct annual IEP meetings during the 2018-2019, 2019-2020 and 2020-2021 school years?

8. Did San Dieguito deny Student a FAPE by failing to invite and solicit input from current teaching and therapy staff, including a general education teacher, at Student's April 2, 2021 IEP team meeting?
9. Did San Dieguito deny Student a FAPE in Student's April 2, 2021 IEP by failing to include appropriate present levels of performance?
10. Did San Dieguito deny Student a FAPE in Student's April 2, 2021 IEP by failing to offer an appropriate placement?
11. Did San Dieguito deny Student a FAPE in Student's April 2, 2021 IEP by failing to offer appropriate goals in the areas of occupational therapy, social emotional, behavior, mental health, vision and sensory integration?
12. Did San Dieguito deny Student a FAPE in Student's April 2, 2021 IEP by failing to offer appropriate supports and services in the areas of mental health, behavior, sensory therapy, assistive technology, vision, and social skills?

## 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 IDEA are to ensure:

- all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment and independent living, and

- the rights of children with disabilities and their parents are protected. (20 U.S.C. § 1400(d)(1); see Ed. Code, § 56000, subd. (a).)

The IDEA affords parents and local educational agencies the procedural protection of an impartial due process hearing 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.Ed.2d 387]; and see 20 U.S.C. § 1415(i)(2)(C)(iii).) Student had the burden of proof on all issues. The factual statements in this Decision constitute the written findings of fact required by the IDEA and state law. (20 U.S.C. § 1415(h)(4); Ed. Code, § 56505, subd. (e)(5).)

Student was 15 years old and lived with Parents at the time of hearing within the boundaries of San Dieguito. Student was found eligible for special education as other health impaired in 2011 while in elementary school in the Del Mar Union School District. Del Mar and San Dieguito are part of the North Coast Consortium for Special Education, which is the equivalent of a special education local plan area, called a SELPA.

Student had a history of increasing behavioral and social emotional issues that resulted in danger to Student, his family, and teachers and students at school. Parents were also concerned that Student was increasingly addicted to technology. Parents withdrew Student from Del Mar in May 2017 and privately placed Student, at Parents' expense, at a private for profit school, NewBridge School, in Poway, California. Parents

also privately placed Student, at Parents' expense, from October 2019 until July 2021 at Cherry Gulch Residential Therapeutic Boarding School, a private for-profit elementary and middle school for boys in Emmett, Idaho. Student's placement at Cherry Gulch restricted him from access to technology, except occasional use of computers on a reward basis. Student had occasional therapeutic home visits when his behavior at Cherry Gulch justified those visits.

Student transferred to Novitas Therapeutic Boarding School, a residential high school for boys affiliated with Cherry Gulch in Emmett, Idaho, for two months in the summer of 2021. Student returned in August 2021 to live with Parents and attended High Tech High in San Diego, California in the early fall of 2021. High Tech High, a public charter school, is an independent local educational agency, called LEA, and not part of San Dieguito LEA.

#### ISSUE 1: DID SAN DIEGUITO DENY STUDENT A FAPE BY FAILING TO MEET ITS DUTY TO DEVELOP AND EXECUTE AN APPROPRIATE "CHILD FIND" POLICY UNDER THE IDEA?

Student contends San Dieguito denied Student a FAPE by failing to have a child find policy in place for pupils like Student who were privately placed out of state by parents. San Dieguito contends it had a board-approved child find policy in place at all relevant times and implemented it as to children within its boundaries as legally required.

Despite broader contentions by both parties, this Decision only decides the specific question, in Issue 1, of whether San Dieguito had child find duty to Student and denied Student a FAPE by failing to meet its child find duty. This Decision finds that San Dieguito had no child find duty to Student before or after May 2020.

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

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 considering 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].)

## SAN DIEGUITO HAD NO "CHILD FIND" DUTY TO CHILDREN ATTENDING PRIVATE SCHOOLS OUTSIDE ITS BOUNDARIES

An LEA is required to locate, identify and assess all children with disabilities residing within the service area of the LEA. (20 U.S.C. § 1412((a)(3)(A); Ed. Code § 56171; 34 C.F.R. section 300.111.). The obligation extends to children whose parents live within the LEA service area whose children attend LEA schools and children whose parents live outside of the LEA but who are enrolled in private schools within the LEA. (20 U.S.C.

§ 1412(a)(10)(ii); 34 C.F.R. section 300.131.). This duty is commonly referred to as “child find.” The purpose of this child find activity is to ensure the equitable participation of parentally-placed private school children in services that a school district may provide to children who attend private school in the district, as well as an accurate count of those children. (Office of Special Education Programs, Letter to Eig, January 28, 2009, 52 IDELR 136.)

The statutes and regulations that impose a duty on an LEA to find possibly disabled children in private schools set forth geographical limits on that duty. An LEA must search for such children in its own service area, but not outside that area. Title 34 Code of Federal Regulations section 300.131(a) requires the LEA to locate, identify and evaluate disabled children “in the school district served by the LEA.” Title 34 Code of Federal Regulations section 300.131(f) imposes on an LEA a child find duty that extends to disabled students who are residents of other states but attending a private school located in the state of the LEA. (See also Analysis of Comments and Changes to 2006 IDEA Part B Regulations, 71 Fed. Reg. 46593 (Aug 14, 2006).)

The activities undertaken to carry out this responsibility for private school children with disabilities shall be comparable to activities undertaken in accordance with Section 1412(a)(10)(A)(ii) of Title 20 of the United States Code. (Ed. Code § 56171). Education Code section 56171 similarly requires the LEA to engage in child find activities for students “attending private school in the service area of the local educational agencies where the private school is located.” These statutory limitations to engaging in child find in private schools in the service area of the LEA would be meaningless if an LEA also was somehow required to conduct child find activities in private schools outside their areas.



The legislative purpose is obvious. The LEA in which the private school is physically located is the appropriate entity to look for disabled children in that school. This takes advantage of the LEA's location, local knowledge and connections. It also relieves the school district from searching beyond its own area. If the child find duty in private schools is not limited to the LEA's service area, the boundaries would potentially be limitless, including the entire state or other states. Requiring each LEA to search for disabled children in every private school in the country would be chaotic, wasteful and duplicative. Yet, that is the assumption of Student's argument: that San Dieguito had some undefined obligation to look for Student in a private school in Idaho, or somewhere else.

Under the facts of Student's case, Student's residence within San Dieguito's LEA had no effect on the LEA's child find responsibilities. The LEA had a child find duty to every possibly disabled child in schools located within the boundaries of the LEA, resident or not. Education Code section 48000 cited by Student does not affect a district's child find duty. Section 48200 embodies a general rule that the school district in which a parent resides is the district having responsibility for the education of a child of those parents between the ages of six and 18. But that section imposes a correlative duty on parents to send their child to that district's schools: the child "shall attend the public full-time day school ... in which the residency of either the parent or legal guardian is located." The section does not address responsibility when parents decline to send their child to the local school of residence, or impact children who are under the mandates of the IDEA and its corresponding regulations.

In this case, before May 2020, the legal responsibility for any child find activities while Student was enrolled in Idaho in a private school was the LEA where the private school was located, not San Dieguito. (34 C.F.R. § 300.131(f).) San Dieguito had no duty

or obligation under child find for Student until May 2020, when Parents enrolled Student in San Dieguito. Student offered no legal authority that supported a finding that San Dieguito's child find duty extended to finding a child placed by parents in private therapeutic residential facilities located outside of San Dieguito's boundaries, including outside of California, particularly without notice to the local school district.

Once Parents informed San Dieguito about Student and thereafter enrolled Student in San Dieguito to initiate the assessment process, the child find duty for any LEA ended. From April 2019, two years before the complaint was filed, to May 2020, the child find duty belonged to the LEA where the private school Student attended was located.

### **SAN DIEGUITO HAD A WRITTEN CHILD FIND POLICY IN PLACE**

Even if San Dieguito had a duty to Student for child find before May 2020, which it did not, San Dieguito established at hearing that it maintained and implemented a child find program consistent with the requirements of California and federal law. The child find policy was approved by the school board and implemented through procedures developed by San Dieguito. San Dieguito implemented the child find policy within the LEA including by reaching out to public schools and all private schools within the LEA. The LEA sought out children with disabilities who had not yet been found eligible for special education, and initiated evaluations of those children. San Dieguito established that its child find policy was consistent with its obligations under the law and therefore did not deny Student FAPE.

## CHILD FIND ALSO DID NOT APPLY TO STUDENT BECAUSE STUDENT WAS ELIGIBLE FOR SPECIAL EDUCATION WHEN STUDENT LEFT DEL MAR

Student was eligible for special education as other health impaired since 2012. He had an IEP since 2012. His last IEP before May 2020 was his March 7, 2017 IEP.

Student was not a child who required "child find" by San Dieguito. The child find duties apply to all children with disabilities residing in a state who need special education and related services but who have not yet been found eligible for special education. (20 U.S.C. §§ 1414(a)(3).) The LEA has the responsibility to locate and assess the child and to determine whether the child is eligible. (*Ibid.*) Once a child has been determined to be eligible for special education, the LEA's child find obligation find no longer applies as was the case with Student.

Pupils enrolled in Del Mar matriculated to middle school into the San Dieguito LEA. However, Student did not matriculate from Del Mar to San Dieguito. Parents elected instead, in May 2017, to unilaterally place Student at private expense for sixth and seventh grade at NewBridge School, outside of San Dieguito's LEA. Parents notified Del Mar of Parent's decision to withdraw Student from Del Mar. Del Mar informed Parents in August 2017, in writing, that Del Mar would no longer provide Student special education placement or services because of the unilateral private placement.

Del Mar, as a "feeder" school, failed to notify San Dieguito that Parents lived within the SELPA. Del Mar instead incorrectly electronically reported Student as "exited" in the Special Education Information System, which was shared by schools in the SELPA. However, Del Mar did not evaluate Student or determine at an IEP team meeting that

Student was no longer eligible for special education. (20 U.S.C. § 1414(c)(5)(A); E. Code § 56381, subd. (h).) Thus, Student officially remained eligible for special education when he left Del Mar, despite Del Mar's mistake of reporting Student "exited."

San Dieguito first learned about Student in May 2020 when Parents filed for due process, claiming Student "remained eligible" for special education at that time and required special education and services. San Dieguito also learned from Parents, staff at Del Mar, and prior records from Del Mar that Student had previously attended Del Mar and was eligible for special education while he attended Del Mar. Initially, however, San Dieguito's staff were confused by the SEIS entry as to whether Del Mar had officially exited Student from special education by assessing Student.

Student argues that San Dieguito had a "child find" duty to Student which required the LEA to check the SELPA's SEIS system looking for disabled children like Student, potentially in other LEA's, providing San Dieguito the ability to find Student in Idaho. This argument is not legally supported and is also illogical. First, the child find duty applies to those children who have not yet been found eligible for special education, which was not the case with Student. Second, even if San Dieguito had looked in SEIS, San Dieguito would have found that Student no longer needed special education and services, whether that was correct or not. San Dieguito would have reasonably concluded that, once exited by Del Mar from special education in August 2017, Student was a general education student to whom no special education duty was due. Student does not identify any specific event that would have triggered a re-examination by San Dieguito of that status before May 2020.

San Dieguito was unaware from the end of the 2017-2018 school year to May 2020, that Student had matriculated to San Dieguito. San Dieguito had no notice before May 2020, whether through the SELPA's online database or otherwise, that Student was a child within the LEA with a disability and or eligible for special education. Thus, San Dieguito had no way of knowing where Student was, what school he was attending, or whether he had needs requiring special education services and supports. Under the facts of this case, the lack of knowledge about Student excused San Dieguito from any duty to Student until San Dieguito knew Student existed.

#### SAN DIEGUITO MET ITS DUTY UNDER THE IDEA TO STUDENT IN MAY 2020 BY INITIATING AN ASSESSMENT AND OFFERING AN INTERIM IEP

San Dieguito had no child find duty to Student before May 2020. Student was still eligible for special education in May 2020. Credible testimony from San Dieguito's assessment team members confirmed that they did not see evidence that Student was officially exited from special education by Del Mar. San Dieguito immediately responded to Parents' May 2020 due process complaint by offering an interim program for Student at Torrey Pines High School that included Student's goals and services from his last Del Mar IEP and a "triennial" assessment plan, and by holding an IEP team meeting in mid-June 2020. At this point, child find was not applicable to Student. Therefore, San Dieguito correctly proceeded as if Student was still eligible.

In summary, Student did not meet Student's burden of proving that San Dieguito had no written child find policy, that San Dieguito failed to implement its child find policy, or that San Dieguito had a child find duty to Student.

## ISSUE 2: DID SAN DIEGUITO DENY STUDENT A FAPE BY FAILING TO PROVIDE STUDENT'S PARENTS WITH MANDATED INFORMATION REGARDING STUDENT'S RIGHT TO SERVICES WHILE STUDENT WAS PRIVATELY PLACED IN A FOR-PROFIT NONPUBLIC SCHOOL?

Student contends in Issue 2 that San Dieguito's duty to provide Parents with "mandated information" dated back to the end of the 2017-2018 school year, when Student advanced to seventh grade and middle school. San Dieguito contends it timely provided Parents with procedural safeguards immediately after receiving notice that Parent resided within the LEA in May 2020.

A LEA shall establish and maintain procedures to ensure that children with disabilities and their parents are guaranteed procedural safeguards with respect to the provision of a FAPE. (20 U.S.C. § 1415(a).) The required procedures include an opportunity to examine all records relating to the child, to participate in meetings with respect to the identification, evaluation and educational placement of the child, and the provision of FAPE. (20 U.S.C. § 1415(b).) The procedures also include the right to prior written notice in the native language of the parent whenever the agency proposes to initiate or change, or refuses to initiate or change, the identification, evaluation or educational placement of the child. (*Ibid.*, subd. (b)(3) & (b)(4)) The procedures also include an opportunity for mediation, to present a complaint for due process. (*Id.*, subd.(b)(5) through (b)(8).)

As discussed in Issue 1, San Dieguito had no duty under the IDEA to Student until May 2020, when Parents enrolled Student in San Dieguito for the 2020-2021 school year, for the purpose of seeking an administrative placement at Cherry Gulch and

funding for tuition there. When San Dieguito first learned about Student in May 2020, the school district responded by providing Parents with an assessment plan and a copy of Parents' Rights. San Dieguito staff proceeded as if Student was still eligible, although staff was unclear of Student's eligibility status because of the SEIS records.

Parent acknowledged receipt of Parents' Rights from San Dieguito. Parent credibly and sufficiently established at hearing that Parent was familiar with Student's rights to a FAPE in May 2020 and thereafter, and with Parents' rights to participate in decision-making relating to Student's educational program at public school based on Student's history of special education eligibility while attending Del Mar. San Dieguito timely fulfilled its duty to inform Parents of their rights under the IDEA by providing documentation of Parents' rights shortly after learning about Student. Student offered no credible or persuasive evidence that San Dieguito failed to provide any specific "mandated" information or category of information to Parents.

Student did not prove that San Dieguito procedurally violated the IDEA or denied Student a FAPE at any time before or after May 2020 by failing to provide Parents with mandated information regarding Student's right to services.

### ISSUE 3: DID SAN DIEGUITO DENY STUDENT A FAPE DURING THE APPLICABLE TWO-YEAR STATUTE OF LIMITATIONS BY FAILING TO TIMELY CONDUCT STUDENT'S ANNUAL AND TRIENNIAL ASSESSMENTS?

Student contends San Dieguito, as the residence of Parents, should have assessed Student annually and triennially and it failed to do so. San Dieguito contends it had no legal duty to assess Student before May 2020 while he was privately placed in Idaho.

The IDEA does not require a school district to assess a student annually. At the beginning of each school year, each local educational area must have an IEP in effect for each child with a disability within its jurisdiction. (34 C.F.R. § 300.323(a); Ed. Code, § 56344(c).) After a school district deems a child eligible for special education by way of assessments, it must perform reassessments if warranted by the child's educational needs or the need for related services. (20 U.S.C. § 1414 (a)(2)(A)(i); 34 C.F.R. § 300.303(a)(1); Ed. Code, § 56381, subd. (a)(1).) Absent an agreement to the contrary between a school district and a student's parents, reassessments must not occur more than once a year, or more than three years apart. (20 U.S.C. § 1414 (a)(2)(B); 34 C.F.R. § 300.303(b); Ed. Code, § 56381, subd. (a)(2).)

Under the facts of this case, San Dieguito had no responsibility, including conducting assessments, for Student until May 2020, when the LEA was notified by Parent. Once San Dieguito learned that Student existed, San Dieguito immediately issued an assessment plan and began the process of assessing Student. Based upon Student's records from Del Mar, Student's last assessments were earlier than May 2017. Therefore, when San Dieguito initiated the assessment process it characterized the assessment as a triennial assessment and listed multiple areas of suspected need for assessment. As discussed in Issue 4, the assessment process occurred over a period of eight months. Student offered no evidence that San Dieguito failed any duty to assess Student from April 2019, two years before the complaint was filed, until it initiated its multidisciplinary assessments of Student in early June 2020.



From June 2020 until San Dieguito's combined 2020 multidisciplinary triennial and 2021 "initial" assessment were completed in or about March 2021, San Dieguito met its obligation to assess Student. Student did not meet his burden of proof that San Dieguito denied Student a FAPE by failing to conduct annual or triennial assessments during the two year statutory period.

#### ISSUE 4: DID SAN DIEGUITO DENY STUDENT A FAPE BY FAILING TO ASSESS STUDENT DURING STUDENT'S TRIENNIAL ASSESSMENT IN THE AREAS OF SENSORY INTEGRATION, AND ASSISTIVE TECHNOLOGY?

Student contends San Dieguito failed to assess Student in the 2020 triennial assessment in the areas of sensory integration and assistive technology. San Dieguito contends it was prevented from assessing Student in any area of suspected need, including assistive technology and sensory integration, in summer and fall of 2020 because Cherry Gulch did not provide San Dieguito with access to Student, rating scales from staff, or enough educational records and information about Student. San Dieguito also contends Parent did not request an assistive technology assessment or express concern that assistive technology was an area of need.

The discussion of Issue 4, as defined by the parties in the October 15, 2021 Order Following Prehearing Conference, is limited to analysis of the 2020 triennial assessment as reported to the November 2, 2020 IEP team. For clarification, the evidence at hearing established that the San Dieguito assessment team characterized the 2020 assessment as "triennial" based on its assumption that Student remained eligible for special education when it initiated the assessment. The evidence also established that the "triennial" assessment was incomplete when presented to the November 2020 IEP team.

The assessment team expanded upon the 2020 assessment and incorporated the earlier information into a new “initial” multidisciplinary assessment which San Dieguito initiated in January 2021 with a new assessment plan after it found Student not eligible in November 2020.

A disability is “suspected,” and a child must be assessed, when the district is on notice that the child has displayed symptoms of that disability or that the child may have a particular disorder. (*Timothy O. v. Paso Robles Unified School Dist.* (9th Cir. 2016) 822 F.3d 1105, 1120-21.) That notice may come in the form of concerns expressed by parents about a child’s symptoms, opinions expressed by informed professionals, or other less formal indicators, such as the child’s behavior. (*Id.* at p. 13, citing *Pasatiempo by Pasatiempo v. Aizawa* (9th Cir. 1996) 103 F.3d 796, and *N.B. v. Hellgate Elementary School Dist.* (9th Cir. 2008) 541 F.3d 1202.) Reassessment in this case was warranted because of the lapse of time after Student’s 2015 assessments, and his changes of placements between 2017 and 2019. (20 U.S.C. § 1414 (a)(2)(A)(i); 34 C.F.R. § 300.303(a)(1); Ed. Code, § 56381, subd. (a)(1).)

Dr. Debra Lawler and Heather Lutz testified at hearing. Both were credentialed school psychologists and worked for San Dieguito for over 20 years. Lawler had a doctoral degree in educational psychology. Lutz had a master’s degree in counseling psychology. Both were familiar with and experienced in the IEP and assessment process. Lutz focused her work at San Dieguito on students who required mental health counseling and services.

Both Lawler and Lutz interacted with Parents and Cherry Gulch staff during the entire assessment process and at IEP meetings beginning in June 2020. They both interviewed Student in February 2021 and co-wrote a comprehensive multidisciplinary assessment report for Student that consisted of more than 200 pages of test data and history about Student. Their testimony was credible based upon their education, experience as school psychologists, qualifications in the field of psychology and their knowledge of Student through a thorough records review and one-to-one observations and interviews with Student, Parents, and Cherry Gulch therapists working with Student. Throughout the hearing, their testimony was thoughtful and was not disturbed at all on cross-examination. Student offered no reason their statements should not be accorded substantial weight.

San Dieguito initiated the 2020 comprehensive multidisciplinary assessment for Student by offering Parents an assessment plan in early June 2020, at the direction of Director Hazlewood. The assessment team determined Student needed to be reassessed because his last multidisciplinary assessment was in 2015. The assessment plan included assessments in academics, health, intellectual development, motor development, and social emotional development.

Parents signed the assessment plan on June 1, 2020, and added a note requesting a sensory assessment. Parents' note did not include a request for an assistive technology assessment or raise concerns about assistive technology that would have put San Dieguito on notice of the need for an assistive technology assessment.

San Dieguito met with parents and their attorney on June 19, 2020 to discuss the assessment team's plan to move forward, and to obtain an understanding of Student's current status and needs. Parents agreed the May 26, 2020 assessment plan was comprehensive and requested that the assessment team review previous assessments from Del Mar. The school district staff worked during the Covid-19 pandemic school closures and through summer 2020 to gather information about Student from Cherry Gulch, Student and Parents.

The assessment team interviewed Ryan Hale on June 10, 2020. Hale, a licensed social worker, was Student's lead therapist at Cherry Gulch from October 2019 until Student was discharged. Hale, who testified at hearing, communicated regularly with Student's teachers and treatment team. Hale reported Student's academic and social emotional progress, and noted Student had an electronics addiction, an eating disorder, and behavior issues. Hale did not report that Student had a need for assistive technology or sensory needs that impeded his access the educational program. Hale also declined to attend the June 2020 IEP team meeting because he was on summer break.

Parents participated in an interview on September 9, 2020 and provided the assessment team with historic and more recent information about Student. Parents reported they opted out of formal assessments and testing while Student was at Cherry Gulch because they were satisfied with Student's progress. Parents requested that San Dieguito delay the assessments at some time between September and the end of October 2020 because Student and some of Student's teachers had been affected by Covid-19, which also contributed to San Dieguito's inability to acquire information about Student's present levels of performance in any area of need. Parent also

requested a two-to-three week delay during fall 2020 to allow Parent time to consult with counsel about some of the materials the assessment team requested from Cherry Gulch.

During 2020, Lawler, Lutz, and director Hazlewood unsuccessfully attempted multiple times to acquire complete and current information about Student from Cherry Gulch. The assessment team could not access Student to conduct an occupational therapy assessment or any other interview. The assessment team provided Cherry Gulch staff with the Educationally-Based Sensory Inventory and teacher feedback forms. All three professionals credibly testified that Cherry Gulch staff did not return any assessment data or other documentation of Student's progress before the November 2020 IEP team meeting. The assessment team could not get enough current information about Student from Cherry Gulch staff to properly assess Student to determine eligibility or evaluate Student's need for any specific services and supports, including sensory needs.

Additionally, Lawler credibly testified that Cherry Gulch restricted Student from having any electronic devices, except under limited circumstances as a reward, which made it impossible for San Dieguito to gather any recent or current information about Student's possible need for assistive technology devices to assist him with his education. Cherry Gulch also did not make Student available in fall 2020 for virtual observations or one-to-one interviews with Lawler or Lutz to allow exploration of sensory or any other needs.

Finally, the Cherry Gulch director informed Lawler that Parents' tuition arrangement with Cherry Gulch did not include special education IEP services. Its staff were not paid to participate in completing assessment tools like those provided by

Lawler and Lutz, further impeding the assessment team's ability to properly assess Student in any area of suspected need from June 2020 through October 30, 2020.

San Dieguito made reasonable efforts to comprehensively assess Student in suspected areas of need in 2020. Student did not meet his burden to show that San Dieguito denied Student a FAPE during the 2020 triennial assessment by failing to assess Student in the areas of sensory integration and assistive technology.

#### ISSUE 5: DID SAN DIEGUITO DENY STUDENT A FAPE BY FAILING TO USE APPROPRIATE ACCOMMODATIONS TO TIMELY ASSESS STUDENT DURING THE 2020 COVID-19 PANDEMIC SCHOOL CLOSURES?

Student contends that during the 2020 Covid-19 pandemic school closures, San Dieguito should have accepted Parent's offer to pay the expense of travel by San Dieguito assessors to Cherry Gulch to assess Student in person.

San Dieguito contends its acceptance of Parents' offer to pay travel expenses was impermissible as a "gift" to the public agency, travel to Idaho was restricted and not possible during the Covid 19 pandemic in fall 2020, and that its assessment team made numerous efforts to obtain documents and data both virtually, through email, and rating scales to teaching staff, without reciprocal cooperation from Cherry Gulch.

Assessments must be conducted in a way that: 1) uses a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information, including information provided by the parent; 2) does not use any single measure or assessment as the sole criterion for determining whether a child is a child with a disability; and 3) uses technically sound instruments that may assess the relative

contribution of cognitive and behavioral factors, in addition to physical or developmental factors. The assessments used must be:

- 1) selected and administered so as not to be discriminatory on a racial or cultural basis;
- 2) provided in a language and form most likely to yield accurate information on what the child knows and can do academically, developmentally, and functionally;
- 3) used for purposes for which the assessments are valid and reliable;
- 4) administered by trained and knowledgeable personnel; and
- 5) administered in accordance with any instructions provided by the producer of such assessments. (20 U.S.C. § 1414(b) & (c)(5); Ed. Code, §§56320, subds. (a) & (b), 56381, subd. (h).)

Individuals who are both “knowledgeable of the student’s disability” and “competent to perform the assessment, as determined by the school district, county office, or special education local plan area” must conduct assessments of students’ suspected disabilities. (Ed. Code §§ 56320, subd. (g); 56322; see 20 U.S.C. § 1414(b)(3)(B)(ii).) The determination of what tests are required is made based on information known at the time. (See *Vasheresse v. Laguna Salada Union Sch. Dist.* (N.D. Cal. 2001) 211 F.Supp.2d 1150, 1157-1158 [assessment adequate despite not including speech/language testing where concern prompting assessment was deficit in reading skills].)

Here, Student did not offer any evidence, including any expert testimony, or cite to any persuasive authority as to what “appropriate accommodations” San Dieguito should have implemented, and did not implement, to ensure that San Dieguito could assess Student between June and October 30, 2020. While well-intended, Parents’ offer

to pay transportation costs to enable the San Dieguito assessment team to proceed was contrary to the intent of the IDEA, which assures disabled children a “free” appropriate public education. It was also an impermissible gift to a public agency. San Dieguito properly declined Parents’ offer. Student did not establish what more the assessment team should have done, during a worldwide pandemic, other than the multiple efforts over four months that Hazlewood, Lutz and Lawler made to reach out to Cherry Gulch staff for information in writing about and for virtual access to Student during that time.

Hazlewood, Lutz, and Lawler attempted to reach out to Cherry Gulch staff by email, telephone, and virtual meetings. The assessment team offered to observe Student virtually because of travel restrictions during the Covid-19 pandemic. The assessment team sent assessment rating scales to Cherry Gulch staff by private email to ensure they could complete and return the results to San Dieguito. The assessment team chose to send rating scales to Cherry Gulch staff rather than Parents because Student had lived at Cherry Gulch for the past two years and staff had more day to day knowledge of Student.

Hazlewood, Lutz, and Lawler received limited information back from Cherry Gulch from June through October 30 2020, but no responses to rating scales. Cherry Gulch did not provide any access to Student. The lack of enough valid and useful information from Cherry Gulch prevented the assessment team from appropriately assessing Student’s present levels of performance during 2020. The only information the assessment team had available to them in 2020 was a folder of historic records from Del Mar provided by Student’s attorney and Parent.



Additionally, the Cherry Gulch director informed Lawler that Parents did not give Cherry Gulch permission to share anything about Student but the information in the historical folder. Although Parent generally disagreed at hearing with Lawler's testimony regarding whether and why Cherry Gulch cooperated by providing necessary information in 2020, Lawler, Lutz, and Hazlewood credibly and consistently testified on this point based upon their consistent and direct involvement in the assessment process beginning in June 2020, and each of their reported personal contacts with Cherry Gulch staff. Student offered no reason why their statements should not be accorded substantial weight.

Student did not meet his burden of proof that San Dieguito failed to use appropriate accommodations to assess Student in the fall of 2020.

#### ISSUE 6: DID SAN DIEGUITO DENY STUDENT A FAPE IN 2020 DURING THE COVID-19 PANDEMIC SCHOOL CLOSURES BY FAILING TO FIND STUDENT ELIGIBLE FOR SPECIAL EDUCATION UNDER THE PRIMARY CATEGORY OF OTHER HEALTH IMPAIRMENT AND SECONDARY CATEGORY OF EMOTIONAL DISTURBANCE?

The question addressed by this Decision is whether Student should have been found eligible in November 2020 as other health impaired and under the secondary category of emotional disturbance.

As discussed in Issue 1, no one offered any evidence that Del Mar properly exited Student from special education by way of any assessments. Thus, Student was eligible for special education from before May 2017, when Parents privately placed Student in a

residential private placement in Poway, California, through November 2, 2020. In 2017, when Del Mar mistakenly reported Student as "exited," Student's March 7, 2017 IEP was the operative IEP. Student's eligibility was reported in that IEP as other health impaired with no secondary eligibility noted.

San Dieguito had a duty under the IDEA to conduct a legally compliant assessment in 2020 based upon current information to validly determine continued eligibility and an appropriate placement. (Ed. Code §§ 56320 & 56322.) San Dieguito proceeded with its 2020 triennial assessment and November 2, 2020 IEP team meeting unsure of Student's special education status, but in possession of Student's historic educational records from Del Mar, including the March 7, 2017 IEP. San Dieguito had no records in June 2020 from Cherry Gulch.

As discussed in Issue 4, San Dieguito made numerous but unsuccessful efforts to conduct a triennial multidisciplinary assessment in preparation for an eligibility determination. Parents delayed San Dieguito's efforts to assess Student, and requested San Dieguito to rely instead on historic and old information from Del Mar. Parents requested an administrative placement at Cherry Gulch, rather than a comprehensive IEP offer with placement, goals and services determined by San Dieguito. Cherry Gulch did not fully cooperate during the assessment process by providing thorough and necessary information, or access to Student.

The IEP team met on November 2, 2020 to discuss San Dieguito's 2020 triennial assessment. Parents, their attorney, educational specialist Justin Fields, an occupational therapist, Lawler, Lutz and Hazlewood all attended the meeting by videoconference.

Parents and their attorney participated in the discussions, asked questions, and provided input. The assessment team agreed to make minor modifications to the assessment report at Parents' request.

The November 2, 2020 IEP team reviewed the incomplete 2020 multidisciplinary assessment report, noting the information the assessment team received from Cherry Gulch was insufficient to draw appropriate and valid conclusions about eligibility. The IEP team explained that although Parents provided historic information about Student, San Dieguito's access to Student's current information was limited because of lack of access to Cherry Gulch staff and Student.

The San Dieguito IEP team members reasonably concluded they could not confirm Student's eligibility in November 2020, including which specific eligibility categories applied, based upon the lack of valid and complete assessment data at that time. Whether a student was denied a FAPE is determined by looking to what was reasonable at the time, not in hindsight. (*Adams v. State of Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149, citing *Fuhrman v. East Hanover Bd. of Education* (3d Cir. 1993) 993 F.2d 1031, 1041 (*Adams*).) The Ninth Circuit has endorsed the "snapshot rule," explaining that an IEP "is a snapshot, not a retrospective." The IEP must be evaluated in terms of what was objectively reasonable when it was developed. (*Ibid.*)

The assessment team reported to the IEP team that, based on the limited information received during the assessment process, Student had not received any special education supports and services pursuant to an IEP since spring 2017, when Parents privately placed Student at New Bridge. Based only on the limited available

information from Cherry Gulch, and the lack of valid information between May 2017 and May 2020, and incomplete information thereafter, the San Dieguito IEP team members reasonably concluded Student's needs could be met by modifying the general education regular program. The San Dieguito IEP team members ended the IEP meeting by concluding Student was not eligible for special education. Parents disagreed and filed for due process, which was later dismissed.

Student's argument that San Dieguito denied Student a FAPE by failing to find Student eligible under either eligibility category is notably undermined because, shortly after Parents filed their second due process request in or about November 2020, San Dieguito again offered to assess Student. In January 2021, Parents signed a new assessment plan for an "initial" assessment. Building upon the limited data San Dieguito had already acquired about Student, Lawler and Lutz attempted again to acquire information from Cherry Gulch. This time, with Parents' cooperation, San Dieguito received historic and current daily progress reports from Student's teachers and providers at Cherry Gulch. Hale interviewed with the assessment team in February 2021, providing additional information. The assessment team met in person with and assessed Student during a home visit. San Dieguito could then prepare a multidisciplinary assessment report consisting of more than 200 pages with all the information it had. The IEP team ultimately found Student eligible on April 2, 2021 under the primary category of emotional disturbance and secondary category of other health impaired.

These facts support the conclusion that, when San Dieguito's team concluded Student was not eligible in November 2020, thereby exiting him from special education, the decision was reasonable and was not a denial of FAPE. Student offered no evidence or persuasive legal authority that supported a finding that, despite the lack of complete current and valid assessment information, including any direct access to Student, San Diego had a legal duty in November 2020 to find Student eligible as other health impaired or add a secondary eligibility of emotional disturbance.

The evidence was persuasive that San Dieguito was prevented in November 2020, despite multiple attempts to do so, from reaching any valid conclusions about current eligibility because of the lack of information about Student's present levels of performance through appropriate testing tools. Student had attended two residential placements, without formal IEP's, outside of the district between 2017 and 2020. Student was five years older since his last assessments in 2015 and had received no formal IEP services while at Cherry Gulch. Student was making educational and social emotional progress based on his grades and progress reports at Cherry Gulch.

Student did not show that, based on the information available to San Dieguito in November 2020, San Dieguito erred in determining Student was not eligible in November 2020 under other health impaired or secondarily under emotional disturbance. Student did not meet his burden of proof that San Dieguito denied Student a FAPE in November 2020 by failing to find Student eligible for special education under the secondary category of emotional disturbance.

## ISSUE 7: DID SAN DIEGUITO DENY STUDENT A FAPE BY FAILING TO TIMELY CONDUCT ANNUAL IEP MEETINGS DURING THE APPLICABLE TWO-YEAR STATUTORY PERIOD?

Student contends San Dieguito, as the LEA of Parents' residence, should have initiated IEP team meetings for Student, regardless of where Student lived during the two year statutory period. San Dieguito contends it had no duty to conduct annual IEP team meetings for Student.

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, 300.321, and 300.501.) In order to provide a FAPE, a school district must develop an IEP that is reasonably calculated to provide an eligible disabled child with an educational benefit. (*Rowley, supra*, 458 U.S. at p. 206-207.) The district must review the child's IEP at least once a year and make revisions if necessary. (20 U.S.C. § 1414(d)(4); Ed. Code, § 56341.1, subd. (d).)

As discussed in connection with annual and triennial assessments in Issue 3, Student did not prove that San Dieguito had any duty to Student to hold annual IEP team meetings before May 2020, before it knew of Student's existence, and while Student resided at a private placement outside of San Dieguito's boundaries. (Ed. Code, § 56170; 34 C.F.R. § 300.130.)

However, in May 2020, when Parents enrolled Student at Torrey Pines High School after filing a due process complaint, San Dieguito responded by offering an interim IEP for Student that included Student's goals and services from his last Del Mar

IEP, a “triennial” assessment plan, and by holding an IEP team meeting in mid-June 2020. Parents signed the assessment plan but informed San Dieguito that they did not intend for Student to attend Torrey Pines High School, even after Student was discharged from Cherry Gulch returned to live at home. San Dieguito held another IEP team meeting on November 2, 2020 to discuss triennial assessment results. San Dieguito held a third IEP meeting on April 2, 2021, considered a comprehensive multidisciplinary assessment, found Student eligible and made a placement offer with related services. (Ed. Code, § 56325, subd. (a)(1); *Ms. S. ex rel. G. v. Vashon Island School Dist.*, *supra*, 337 F.3d at p. 1134; 20 U.S.C. § 1414(d)(1)(B).)

Student did not meet his burden of proving San Dieguito denied Student a FAPE during the 2018-2019, 2019-2020, or 2020-2021 school years by failing to hold annual IEP team meetings. (Ed. Code, § 56174.5; 34 C.F.R. § 300.137(a).)

#### ISSUE 8: DID SAN DIEGUITO DENY STUDENT A FAPE BY FAILING TO INVITE AND SOLICIT INPUT FROM CURRENT TEACHING AND THERAPY STAFF, INCLUDING A GENERAL EDUCATION TEACHER, AT STUDENT’S APRIL 2, 2021 IEP TEAM MEETING?

Student contends San Dieguito should have included input from Cherry Gulch staff at the April 2, 2021 IEP team meeting before making the FAPE offer to Student. San Dieguito contends a district general education teacher attended the April 2, 2021 “initial” IEP team meeting, which is the IEP team meeting at issue. San Dieguito also contends it invited Student’s case manager and therapist Hale to attend the meeting virtually. Both the case manager and Hale declined to attend and did not offer anyone else from Cherry Gulch. San Dieguito also contends it gathered enough input from

Student's teachers and other staff at Cherry Gulch between fall 2020 and February 2021, through historic daily and monthly progress reports, and data provided during the combined 2020 and 2021 multidisciplinary assessments, to make an appropriate offer of FAPE to Student.

This Decision only decides whether the April 2, 2021 IEP team meeting included the necessary IEP team members. In closing argument, Student only addressed the "triennial review" which the evidence established occurred in November 2020, contending San Dieguito did not invite anyone from Cherry Gulch to that meeting. Attendance at the November 2020 IEP meeting was not, however, at issue, as defined by the issues in the October 15, 2021 Order Following Prehearing Conference and is not addressed or decided by this Decision.

Unless excused in writing, the IEP team must consist of parents or their representative, a regular and special education teacher, a qualified representative of the school district, and an individual who can interpret instructional implications of assessment results. (20 U.S.C. section 1414(d)(1)(B)). The IEP team may also include individuals who have the knowledge or special expertise regarding the child. (34 C.F.R. § 300.321(a).)

San Dieguito held an IEP team meeting for Student on April 2, 2021 to discuss its multidisciplinary "initial" assessment from February and March 2021. The attendees included Parent, Parent's educational specialist Justin Fields, Parent's attorney, general education teacher Charlene FalcisStephens, a district nurse, Lawler, Lutz, an occupational therapist, a program supervisor and Hazlewood. All team members attended through teleconference. Lawler invited Hale from Cherry Gulch to participate in the April 2, 2021 IEP team meeting. Hale responded that he was not available. Cherry Gulch did not



identify anyone else who would attend on behalf of Cherry Gulch. San Dieguito shared draft copies of the current multidisciplinary report and the draft IEP in advance with IEP team members.

In *M.L. v. Federal Way School District* (9th Cir. 2004) 394 F.3d 634, none of the student's past, current or future regular education teachers were included in the IEP meeting. (*Id.* at p. 640.) The court held that the IDEA requires that the IEP team must include "at least one general education teacher." (*Id.* at pp. 643-644.) The court noted that, although it would have been "most useful" to have input at the meeting from a teacher familiar with the student, "any regular education teacher would have contributed his or her knowledge of the ability of a disabled student to benefit from being placed in a regular education classroom." (*Id.* at p. 649.)

Here, San Dieguito general education teacher FalcisStephens attended and participated in the IEP team meeting. Parents, educational specialist Fields and Attorney Loyer all fully participated in all aspects of the meeting, including asking questions, providing input, expressing disagreement and concerns, and discussing goals and objectives, placement options and eligibility.

The 2021 Multidisciplinary Report considered by the IEP team summarized hundreds of pages of Student's educational and medical records, prior assessments, reports from Student's treatment team at Cherry Gulch, test results, feedback from Student, and data from assessors' virtual observations of Student. The current data also came from daily progress reports and written feedback by Student's general education teachers at Cherry Gulch representing present levels of performance. Based on their involvement in the assessment process, Hazlewood, Lawler, and Lutz credibly and persuasively testified they had more than enough information about Student based on

their history of gathering and reviewing information over more than nine months, to lead a meaningful discussion about Student's present levels of performance, needs and recommendations for placement.

No one from Cherry Gulch, including a general education teacher who was currently working with Student, attended or participated during the April 2, 2021 IEP team meeting. However, Student did not establish through any credible evidence that the absence of, or lack of participation by, any representatives from Cherry Gulch was material to the decision making process, or that such absence rose to the level of a procedural violation that deprived Parents of the ability to meaningfully participate in the IEP meeting or deprived Student of educational benefit or access to a FAPE.

In summary, San Dieguito did not procedurally violate the IDEA by not having a Cherry Gulch general education teacher at the IEP team meeting in April 2021. The evidence established Parents, assisted by their educational specialist and attorney, meaningfully participated in the meeting, and the IEP team members had enough data about Student and input from Cherry Gulch about Student's needs to develop an IEP offer of placement, supports and services to address Student's unique educational needs and provide him a FAPE. Student did not meet his burden of proof.

#### ISSUE 9: DID SAN DIEGUITO DENY STUDENT A FAPE IN STUDENT'S APRIL 2, 2021 IEP BY FAILING TO INCLUDE APPROPRIATE PRESENT LEVELS OF PERFORMANCE?

Student contended at hearing that the baselines recorded in the April 2, 2021 IEP goals were not appropriate to develop measurable goals. San Dieguito contends the April 2, 2021 IEP offered Student appropriate goals that addressed Student's identified

needs in multiple areas. San Dieguito contends the IEP team relied on the present levels of performance, including Student self-reporting, to develop its offer of FAPE.

The IEP is a written statement for a child with exceptional needs that includes a statement of present levels of performance, a statement of measurable annual goals, and a description of the child's progress toward meeting the annual goals. (Ed. Code § 56345(a).) The IEP is to be read as a whole. No requirement exists that necessary information be included in a particular section of the IEP if that information is contained elsewhere. (20 U.S.C. § 1414(d)(1)(A)(ii); 34 C.F.R. § 300.320(d)(2); Ed. Code, § 56345, subd. (h).) Present levels of performance include 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. (34 C.F.R. § 300.320(a).)

The 49-page April 2, 2021 IEP summarized Student present levels in the draft document presented to the IEP team. The summary was very detailed and consisted of 16 pages. The present levels included summaries from the final multidisciplinary assessment report as well as Student's self-reports. The present levels covered all areas including:

- strengths,
- preferences and interests,
- academics including test scores,
- gross/fine motor development,
- visual perception,
- social emotional and behavior,
- mental health,
- treatment reports,

- parent reports and perspective of progress,
- vocational, adaptive/daily living skills, and
- health.

The IEP identified several areas of need for goals based upon the present levels of performance. Additionally, each of the 13 draft goals offered to Student included baselines that were based upon Student's self-perception, Cherry Gulch reports and records, and assessment test scores.

Educational psychologist Dr. Elizabeth Hughes testified on behalf of Student at hearing. Hughes had never met or assessed Student, but reviewed Student's educational file and progress reports from Cherry Gulch, and medical records. Student's counsel questioned Hughes about the baselines for Goals 1, 2, and 3, by characterizing them as present levels of performance. Dr. Hughes opined that the baselines for goals one, two and three were not enough to create a meaningful goal to fully address Student's needs. However, Hughes did not comment on the 16 pages of present levels of performance recorded in the IEP leading up to the draft goals. Hughes's opinions on the goals were not persuasive or credible to establish that the reported present levels of performance in any of the goals were insufficient to prove a denial of FAPE. Hughes had no personal knowledge of Student and her opinions did not encompass all aspects of the IEP document or reported present levels of performance upon which the IEP team relied to develop the goals.

In summary, Student did not prove that the IEP team relied upon incomplete or inappropriate present levels of performance. Student did not prove that San Dieguito procedurally violated the IDEA regarding the present levels of performance in the April 2, 2021 IEP. Student did not meet his burden of proof.

## ISSUE 10: DID SAN DIEGUITO DENY STUDENT A FAPE IN STUDENT'S APRIL 2, 2021 IEP BY FAILING TO OFFER AN APPROPRIATE PLACEMENT?

Student contends San Dieguito's placement offer did not provide the environment needed by Student and recommended by his treatment team at the time of the April 2, 2021 IEP team meeting.

San Dieguito contends its offer of New Haven nonpublic school was the least restrictive environment for Student. New Haven included an appropriate academic program and a residential component if Student required a more restrictive setting closer to home. San Dieguito contends it offered Student wrap services to assist in the transition from residential placement.

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. (See *Gregory K. v. Longview School Dist.* (9th Cir. 1987) 811 F.2d 1307, 1314.) A school district is not required to place a student in a program preferred by a parent, even if that program will result in greater educational benefit to the student. (*Ibid.*) 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 of educational services and/or placement must be designed to meet the student's unique needs, comport with the student's IEP, be reasonably calculated to provide the pupil with some educational benefit in light of the child's appropriate circumstances, and in the least restrictive environment. (*Ibid*; *Rowley, supra*, 458 U.S. at p. 188- 89; *Endrew F. v. Douglas County School Dist. RE-1* (2017) 580 U.S. \_\_\_\_ [137 S.Ct. 988.]

Whether a student was denied a FAPE is determined by looking to what was reasonable at the time, not in hindsight. (*Adams, supra*, 195 F.3d at p. 1149.) The IEP must be evaluated in terms of what was objectively reasonable when it was developed. (*Ibid.*)

If Parents of a private school child request an IEP for their child, and the child is eligible, the LEA where Student lives is required to honor that request. (*District of Columbia v. Vineyard* (D.D.C. 2013) 971 F.Supp.2d 103, 111; *Letter to Eig* (OSEP 2009) 52 IDELR 136 (LEA where student resides cannot refuse to conduct the evaluation and determine the child's eligibility for FAPE because the child attends a private school in another district).) Parents are entitled to place a student in private school even though the district of residence did not previously deny the student a FAPE and may also seek a FAPE from the district in which parents continued to reside. (*J.S. v. Scarsdale Union Free School* (S.D.N.Y. 2011) 826 F.Supp.2d 635, 665-668 ("a district-of residence's obligations do not simply end because a child has been privately placed elsewhere, as the District argues—rather, the IDEA's obligations may be shared."); 71 Fed. Reg. 46593 (2006); *Board of Educ. of Evanston-Skokie Community Consol. School Dist. 65 v. Risen* (N.D. Ill., June 25, 2013, No. 12 C 5073) 2013 WL 3224439, at \*12-14; *District of Columbia v. Oliver* (D.D.C., Feb. 21, 2014, No. CV 13-00215 BAH/DAR) 2014 WL 686860, at \*4 (Districts have no obligation to provide FAPE to parentally placed private school students with disabilities; but they do have an obligation to make FAPE available and cannot fulfill this duty without developing an IEP).)

An offer of placement must be made to a unilaterally placed student even if the district strongly believes that the student is not coming back to the district, or parents have indicated that they will not be pursuing services from the district, as was the case

with Student and Parents. The requirement of a formal, written offer should be enforced rigorously and provides parents with an opportunity to accept or reject the placement offer. (*Union School Dist. v. Smith* (9th Cir. 1994) 15 F.3d 1519, 1526.)

The IDEA does not make a district's duties contingent on parental cooperation with, or acquiescence in, the district's preferred course of action. (*Anchorage School Dist. v M.P.* (9th Cir. 2012) 689 F.3d 1047, 1055.) Re-enrollment in public school is not required to receive an IEP. (See *Woods v. Northport Public School* (6th Cir. 2012) 487 Fed. Appx. 968, 979-980 ["It was inappropriate to require [student] to re-enroll in public school in order to receive an amended IEP"...[]..."It is residency, rather than enrollment, that triggers a district's IDEA obligations."]; Cf. *N.B. v. State of Hawaii Department of Educ.* (D. Hawaii, July 21, 2014, No. CIV 13-00439 LEK-BMK) 2014 WL 3663452 (A district's obligation to implement an interstate transfer student's IEP begins when the student enrolls in public school).)

## SAN DIEGUITO OFFERED PLACEMENT IN A NONPUBLIC DAY SCHOOL WITH WRAP SERVICES

San Dieguito offered Student placement from April 2, 2021 through April 2, 2022, inclusive of 2021 extended school year through August 1, 2021, at a nonpublic day school under contract with the SELPA or school district. The IEP team recommended New Haven, where 100 percent of the school day would be outside of the general education setting. The IEP team based the placement offer on the 2021 comprehensive multidisciplinary assessment report which identified Student's need for a therapeutic, small and structured educational setting with integrated mental health and behavioral services for Student to access the general education curriculum and make progress toward his goals. The IEP team also offered wrap around services which would be

defined and provided by New Haven to ensure a smooth transition from Cherry Gulch. The IEP team explained that Student would have an individual transition plan when he turned 16 years old, and that New Haven could support transition skills, including community integration.

In determining the educational placement of a child with a disability, a school district must ensure that the placement decision is made by a group of persons including the parents and other persons knowledgeable about the child. The IEP team must consider the meaning of the evaluation data and the placement options and consider educating the child in the least restrictive environment. (34 C.F.R. § 300.116.) Placement is determined annually and is based on the child's IEP. It must be as close as possible to the child's home and at the school that he or she would attend if non-disabled unless the IEP team determines otherwise. (*Id.*) In selecting the least restrictive environment, consideration is given to any potential harmful effect on the child or the quality of services that he or she needs. (*Id.*) A "specific educational placement" is that unique combination of facilities, personnel, location or equipment necessary to provide instructional services to an individual with exceptional needs. (Cal. Code Regs., tit. 5, § 3042, subd. (a).)

The April 2, 2021 IEP team engaged in a thorough discussion of placement options for Student. Parents and their attorney actively participated, expressed concerns, asked questions, and made requests and suggestions. The assessment team members offered feedback and explained the reasons for the placement offer. The assessment team explained they incorporated all feedback they received from Cherry Gulch into the decision making process for placement. The IEP team members explained that New Haven could provide small class sizes while being closer to home and less restrictive than Novitas or residential placement.



To conclude whether a special education student could be satisfactorily educated in a regular education environment, the Ninth Circuit balanced four factors in *Sacramento City Unified School Dist. v. Rachel H.* (9th Cir. 1994) 14 F.3d 1398, 1404 (*Rachel H.*). The analysis in *Rachel H.* looks at the educational benefits of placement full-time in a regular class. It also looks at the nonacademic benefits of such placement, and the effect a student had on the teacher and children in the regular class. The fourth factor considers the costs of mainstreaming a student. (*Id.*)

Here, the April 2, 2021 IEP team considered and decided that both a general education placement and a strictly residential placement were not appropriate for Student on April 2, 2021. Student was still in a residential setting preparing to transition home. The IEP team properly determined based on comprehensive multidisciplinary assessment results that Student required a less restrictive environment than Cherry Gulch but was not yet ready for a general education placement.

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

Lawler and Lutz had years of experience working with children with mental health issues. Based upon their experience and their knowledge of Student based upon the comprehensive multidisciplinary assessment, each credibly opined at hearing and

explained to Parents during the IEP meeting that based on Student's February 2021 assessment results and Student's present levels of performance, New Haven nonpublic school was an appropriate placement for Student in the least restrictive environment. The program included a sufficiently rigorous educational curriculum on a smaller campus to meet Student's academic potential. The program included courses that met at A through G requirements for college entry. The offer included onsite the therapeutic mental health services, which was a critical component to Student's transition from a residential placement and Student's completion of high school. The program had services that addressed social skills and provided counseling individually and in groups throughout the day, in compliance with the proposed IEP. The IEP team explained to Parents that New Haven also had a residential component if Student continued to need residential placement, while remaining closer to home.

The IEP team explained to Parents that, if Student was not yet ready to return home, the IEP team would start the wrap around services to provide overlapping therapeutic collaborations and start preparing the structures in the home to support the transition. The New Haven team would collaborate with the Cherry Gulch team to support a smooth transition. However, the IEP service grid noted the start date for services was April 2, 2021, and that services would be offered until April 2, 2022. The IEP had no written provision for delaying the start of the placement offer or what wrap services would look like during the delay.

Parents objected to the proposed placement at New Haven at the April 2, 2021 IEP team meeting. Parents were concerned that Student, who was exhibiting symptoms of bipolar disease, was not immediately ready to leave Cherry Gulch or make an

immediate transition home and to a non-residential placement. Parents remained concerned for safety issues caused by Student's historic dangerous behavior at home and while at Cherry Gulch. Parents and their attorney opined to the IEP team that Student needed to transition to Novitas from Cherry Gulch.

Parents also expressed concern to the IEP team that Student did not do well in large classes. Student required teachers who understood specialized instruction, behavior management, and conditions like ADHD, anxiety disorders and mood swings. Parents were concerned that Student was extremely bright and should not be in a class with less capable students who functioned lower academically than Student. Student had a long-term goal of attending High Tech High, which Parents supported.

Parents requested that San Dieguito fund past and future expenses at Cherry Gulch and Student's planned step-down program at Novitas to allow Student to successfully transition out of residential placement. Parents' request was based in part on Student's self-evaluation reported to Parents. Student felt Student had made a lot of progress controlling negative behaviors at Cherry Gulch and did not want to fail or regress because he wanted to be ready to attend High Tech High in the fall of 2021.

Hale reported to the San Dieguito IEP assessment team that Student was working through Cherry Gulch's phase system for discharge. In early 2021 Student continued to have behavioral incidents that impeded his progress toward reaching the highest phase, which would qualify Student for discharge from Cherry Gulch. His discharge date was postponed more than once. Hale opined to San Dieguito staff in February 2021 that

Student would be ready to transition to Novitas from Cherry Gulch by the end of Cherry Gulch's school year in June 2021. Hale offered no opinion at hearing on the appropriateness of placement at New Haven at any time after Student returned home.

Student's expert, educational and school psychologist Dr. Russell Griffiths testified at hearing. Dr. Griffiths's opinions were based only upon his review of Student's records. Dr. Griffiths never met or spoke with Student, Parents, or any Cherry Gulch staff. Dr. Griffiths opined that Student had problems with transitions. Student required a "step down" residential facility after leaving Cherry Gulch to slowly integrate into the community for four to six months, before Student transitioned to living at home. Dr. Griffiths recommended that an appropriate placement for Student might then be a nonpublic school. Dr. Griffiths' opinion that a nonpublic school would be appropriate for Student after leaving Cherry Gulch was not inconsistent with the San Dieguito placement offer.

Dr. Sharon Lerner-Baron was a licensed clinical psychologist who worked with Student's family as a consultant beginning in 2011. Dr. Lerner-Baron began treating Student directly after Student returned home in August 2021. Dr. Lerner-Baron opined that, after Student returned home from Cherry Gulch and Novitas, Student was more flexible, had a better understanding of triggers that prompted behaviors, was less aggressive, more aware of what was happening in Student's surroundings, would ask for help and was compliant in therapy. Dr. Lerner-Baron's opinions did not support Student's position on San Dieguito's placement offer, because Dr. Lerner-Baron did not specifically criticize placement at New Haven or explain why New Haven was not appropriate or the least restrictive environment for Student once he returned home.

## THE APRIL 2, 2021 PLACEMENT OFFER DENIED FAPE FROM APRIL 2, 2021 UNTIL JUNE 11, 2021

Student proved that the April 2, 2021 offer was not appropriate for Student for the remaining two months of the regular school year at San Dieguito through June 11, 2021, based on information available to the IEP team leading up to the April 2, 2021 IEP team meeting. (*Adams, supra*, 195 F.3d at p. 1149.) On April 2, 2021, Student was not yet ready to return home and attend a less restrictive setting. At the time of the IEP meeting, Student was emotionally prepared to transition from Cherry Gulch to Novitas, a less restrictive program, and to return home by the end of the summer expecting to transition to High Tech High. The IEP team members knew of Student's emotional and behavioral history, current status and expectations. Testimony from Student's Cherry Gulch therapists and psychiatrist established that Student required transition planning and a step down plan to remove Student from Cherry Gulch and eventually return him home to attend a new placement.

The evidence did not support a finding that Student could make that transition immediately after the IEP team meeting in April 2, 2021 or shortly thereafter, as contemplated by the start date of the IEP placement offer. The IEP team offered Parents undefined transition services if Student was not ready to make the transition, generally utilizing the wrap services provided by New Haven. However, the IEP team did not include that offer as part of the written IEP placement offer. Thus, San Dieguito's contention that the school district was prepared to work with Parents to transition Student to New Haven over an undefined period was not supported by the written offer of placement in the April 2, 2021 IEP.

The purpose of a written offer is to alert parents of the need to consider seriously whether a school district's proposed placement is appropriate under the IDEA. It helps parents determine whether to oppose or accept the placement with supplemental services. (*Union v. Smith, supra*, 15 F.3d at p. 1519.) The requirement of a formal written offer creates a clear record that will eliminate troublesome factual disputes about what additional educational assistance the school district offered to supplement a placement. Failure to make a clear written offer of placement and services is a procedural violation of the IDEA. (*Union, supra*, 15 F.3d at p. 1527); see also, title 20 U.S.C. § 1414(d)(1)(A)(i), 34 C.F.R. § 300.320(a), and Ed. Code § 56345, subd. (a),).

Student proved that San Dieguito denied Student a FAPE by failing to make an appropriate placement offer for Student, including defining an appropriate transition plan for Student to New Haven from Cherry Gulch, for the remainder of the 2020-2021 school year, which ended on June 11, 2021.

#### THE APRIL 2, 2021 PLACEMENT OFFER WAS AN APPROPRIATE PLACEMENT FOR STUDENT FOR THE 2021 EXTENDED SCHOOL YEAR AND THE 2021-2022 SCHOOL YEAR

Student did not meet his burden of proving that San Dieguito denied Student a FAPE regarding the placement offer for the 2021 extended school year and the 2021-2022 school year. San Dieguito's April 2, 2021 IEP placement offer was appropriate for after June 11, 2021, based upon the information available to the IEP team when the offer was made. (*Adams, supra*, 195 F.3d at p. 1149). The placement offer met the "more than de minimus test" articulated in *Endrew F., supra*, 137 S. Ct. at pp. 1000-1002 [the adequacy of a given IEP turns on the "unique circumstances of the child for whom it was created."]

Student did not contend that at the time of the April 2, 2021 IEP offer, New Haven was too restrictive for Student's needs in comparison to a public high school, which he ultimately enrolled in and successfully attended for the 2021-2022 school year. Instead, Student argued in his closing brief the offer did not include a step down program to prepare him to transition to the lesser restrictive placement.

However, the evidence was persuasive that, in April 2021, at the time the IEP team offered New Haven with wrap services, Student was preparing to transition to a less restrictive environment for educational purposes at Novitas, with the proper supports and services, and then return home in August 2021. The opinions of those treating Student were not sufficiently persuasive to prove that, with the embedded support services in the New Haven program, the additional wrap services offered by San Dieguito, and the proper "cocktail" of medications, Student could not successfully make that same transition to living at home for the 2021 extended school year, with support, and access the educational program and intense therapy services offered at New Haven during extended school year through August 1, 2021, and for the 2021-2022 school year. No one on Student's behalf offered a credible expert opinion that Student could not successfully make the transition to the less restrictive environment at New Haven for the 2021 extended school year with appropriate transitional support once he returned to live at home.

The proposed placement at New Haven addressed Student's mental health and emotional needs by incorporating a therapeutic program throughout the day to enable Student to access his education. The placement offered Student a comprehensive college preparatory program, based on Student's academic ability. The program included wrap services to address social emotional needs affiliated with the home

environment that impacted Student's ability to attend school and access his education. The placement offer included the availability of a residential component if needed by Student, keeping him in a therapeutic residential setting closer to home.

Student's 2020-2021 school records from Cherry Gulch reflected a grade average of 3.4, with passing grades in all classes during the semester before Student was assessed. Most of the reported behavioral incidents arose outside of the classroom at Cherry Gulch and were not directly associated with Student's educational program. Notably, none of Student's experts opined that Student would require continued residential placement to access his education in the fall of 2021. (See, *Clovis Unified School Dist. v Calif. Office of Admin. Hearings* (9th Cir. 1990) 903 F.2d 635, 643 [analysis must focus on whether residential placement may be considered necessary for educational purposes]. Instead, the testimony focused on Student's emotional readiness to leave Cherry Gulch with appropriate behavior management skills to allow Student to return to safely living at home.

The April 2, 2021 IEP team offered placement in the least restrictive environment for Student for 2021 extended school year and the 2021-2022 school year based on the information available to the IEP team at that time. (*Daniel R.R., supra*, 874 F.2d at p. 1050; *Adams, supra*, 195 F.3d at p. 1149.) Whether Parents ever intended to place Student in a district school when Student returned home was not relevant to a determination of whether the offer was appropriate on April 2, 2021, when the offer was made. Parents' concerns about Student's readiness to come home in April 2021 were not sufficiently persuasive to establish that, when the IEP team offered placement for



extended school year and the next school year at New Haven, the offer with wrap transition services was not an appropriate placement for the 2021-2022 school year beginning in the summer of 2021.

In summary, Student proved that San Dieguito denied Student a FAPE from April 2, 2021 until June 11, 2021 by failing to offer an appropriate placement for Student given his transitional needs during that time period. However, Student did not meet his burden of proving that April 2, 2021 IEP denied Student a FAPE by failing to offer Student an appropriate placement for the 2021 extended school year and the 2021-2022 school year.

#### ISSUE 11: DID SAN DIEGUITO DENY STUDENT A FAPE IN STUDENT'S APRIL 2, 2021 IEP BY FAILING TO OFFER APPROPRIATE GOALS IN THE AREAS OF OCCUPATIONAL THERAPY, SOCIAL EMOTIONAL, BEHAVIOR, MENTAL HEALTH, VISION AND SENSORY INTEGRATION?

This Decision only decides the question of whether San Dieguito denied FAPE by failing to offer appropriate goals in the areas specifically identified in Issue 11 as framed in the October 2021 Order Following Prehearing Conference.

The IEP for each child with a disability must include a statement of measurable annual goals. The statement of goals must include benchmarks or short-term objectives related to meeting the child's needs that result from the child's disability. The annual goals must be designed to enable the child to be involved in and progress in the general curriculum, and to meet each of the child's other educational needs that result

from the child's disability. (34 C.F.R. §300.320(b).) The IEP for each child with a disability must include a statement of how the child's progress toward the child's annual goals will be measured. (34 C.F.R. § 300.320(b)(4).)

The IEP must include appropriate objective criteria, evaluation procedures, and schedules for determining, on at least an annual basis, whether the annual goals are being achieved, and a statement of how the student's progress toward the goals will be measured. (*Jessica E. v. Compton Unified School Dist.* (C.D. Cal. 2017, No. CV16-04356-BRO) 2017 WL 2864945; 20 U.S.C. § 1414(d)(1)A(i); see also Ed. Code, § 56345.) An examination of the goals in an IEP is central to the determination of whether a student received a FAPE. IEP goals and goal achieving methods are considered as of the time the plan was implemented. The examination of those goals asks whether those methods were "reasonably calculated" to confer a meaningful benefit. (*Adams, supra*, 195 F.3d at p. 1149.)

The April 2, 2021 IEP offered Student 13 goals. The goals included five goals in executive functioning, and one goal each in Class Engagement, math, reading, Key Ideas and Details, Text Types and Purposes, Emotional Dysregulation, Self-Concept, and Social Emotional Problem Solving. Student claims the IEP should have included goals in occupational therapy, social emotional, behavior, mental health, vision and sensory integration. San Dieguito argued the IEP offered goals in conjunction with placement, related services and supports designed to enable Student to access and make progress in the general education curriculum.

The purpose of annual goals is to permit the IEP team to determine whether the student is making progress in an area of need. (Ed. Code, § 56345, subd. (a).) For each area in which a special education student has an identified need, the IEP team must

develop measurable annual goals that are based upon the child's present levels of academic achievement and functional performance, and which the child has a reasonable chance of attaining within a year. (Ed. Code, § 56345; *Letter to Butler* (OSERS 1988) 213 IDELR 118.)

The IEP team need not draft IEP goals in a manner that the parents find optimal, if the goals are objectively measurable. (*Bridges v. Spartanburg County School Dist. Two* (D.S.C. 2011, No. 7:10-cv-01873-JMC) 57 IDELR 128.). The IEP must contain a description of how the child's progress toward meeting the annual goals described will be measured and when periodic reports on the progress the child is making toward meeting the annual goals, such as through the use of quarterly or other periodic reports, concurrent with the issuance of report cards, will be provided. (20 U.S.C.A. § 1414(d)(1)(A)(iii).)

Goals 11, 12, and 13 addressed emotional dysregulation, self-concept, and social emotional problem solving. Hughes speculated that goal 11 could have been more appropriate if it addressed identifying triggers that impacted behavior. She did not, however persuasively opine that the goal was not appropriate for Student. Hughes opined goal 12 was appropriate. Hughes opined goal 13 in social emotional and problem solving was not inappropriate but could also focus on decreasing aggression. Hughes's testimony on the goals did not carry enough weight to establish that goals 11, 12, and 13 were inappropriate or that Student required more goals in those areas. Hughes offered no credible opinions on whether Student required any goals in occupational therapy, vision, behavior, mental health, vision and sensory integration, in part because she never met or assessed Student.

Lawler and Lutz both credibly testified that Student's needs in the areas of social emotional, behavior and mental health were also addressed by the proposed placement at New Haven. Those areas of need would be addressed in the New Haven program throughout the day, with wrap around services that extended to the home environment. The areas of need would be addressed by New Haven staff once Student enrolled and the staff had an opportunity to work with Student. Student offered no credible expert opinion or other evidence that Student required any other specific goal addressing social emotional, behavior or mental health, or what those goals should have looked like.

Student offered no qualified expert opinion or other evidence that Student required an occupational therapy goal, what area of need the goal should address, or what that goal should have looked like. Student had historic difficulty as a young boy with fine motor skills which impacted his ability to write cursive script. However, Student never learned cursive script and was skilled at using a keyboard and technology to access his educational program. He received passing grades in all classes. Student did not prove that San Dieguito's decision to not include an occupational therapy goal in the April 2, 2021 IEP deprived Student of access to his education or otherwise denied him a FAPE.

Regarding vision, Student wore glasses although sometimes sporadically. The IEP team noted that Student failed his vision testing during the multidisciplinary assessment. Student received private vision therapy services while in Idaho. However, Student offered no expert testimony or other evidence that explained what Student's needs in vision were at the time the IEP team made the April 2, 2021 offer. Student offered no credible evidence that his vision historically impeded his ability to learn or

make educational progress. Student offered no credible evidence that Student required a specific goal addressing vision, or what that goal should have been, to help him access his educational program.

In summary, Student did not meet his burden of proof on Issue 11.

## ISSUE 12: DID SAN DIEGUITO DENY STUDENT A FAPE IN STUDENT'S APRIL 2, 2021 IEP BY FAILING TO OFFER APPROPRIATE SUPPORTS AND SERVICES IN THE AREAS OF MENTAL HEALTH, BEHAVIOR, SENSORY THERAPY, ASSISTIVE TECHNOLOGY, VISION, AND SOCIAL SKILLS?

Student contends the wrap around services offered in the April 2, 2021 IEP were undefined and therefore did not address Student's needs. San Dieguito contends the April 2, 2021 IEP appropriately addressed Student's unique needs as they were known to the school district at the time the IEP team made the FAPE offer.

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 considering the child's circumstances. (*Rowley, supra*, 458 U.S. at pp. 201-204; *Endrew F., supra* 137 S.Ct. at p. 1000.) Whether Student was denied a FAPE is determined by looking to what was reasonable at the time, not in hindsight. (*Adams, supra* 195 F.3d at p. 1149.)

## MENTAL HEALTH, BEHAVIOR AND SOCIAL SKILLS

The April 2, 2021 IEP team determined that the offer of New Haven as placement would meet Student's needs in the area of mental health, behavior and social skills. The

offer contemplated that Student would transition from Cherry Gulch shortly after the IEP meeting. New Haven had embedded mental health, social emotional and social skills services and supports throughout the day. The wrap services of 120 minutes a week were designed to provide Student and the family with transitional services during and after Student's transition from Cherry Gulch, and thereafter during the school day and at home. IEP accommodations included access to listening to calming music during non-instructional time at school. Services included individual counseling 60 minutes a week, group counseling and guidance 45 minutes a week, parent counseling 100 minutes a week.

As discussed in Issue 10, the IEP offer denied Student a FAPE for the remainder of the 2020-2021 school year because San Dieguito's placement offer did not sufficiently address Student's immediate needs for transition from Cherry Gulch. However, Student offered no credible expert testimony from any of Student's experts that established that, as Student engaged in and completed the transition to New Haven from Cherry Gulch, San Dieguito's offer at New Haven of embedded mental health, social emotional and social skills services and supports throughout the day, and or the wrap around support services, were insufficient or inappropriate for Student such that the offer of those services rose to the level of a denial of FAPE for the 2021-2022 school year.

## SENSORY THERAPY AND ASSISTIVE TECHNOLOGY

Assistive technology is any item, piece of equipment or product system used to increase, maintain or improve the functional capabilities of individuals with disabilities. (20 U.S.C. § 1401(1)). Schools must use assistive technology devices and services if needed to maximize accessibility for children with disabilities. (20 U.S.C. §1400(c)(5)(H).)

Assistive technology services are defined as “any service that directly assists a child with a disability in the selection, acquisition or use of an assistive technology device,” and includes the evaluation of the assistive technology needs of the child, the customization, maintenance, repair and replacement of devices, and training and technical assistance for the child, the child’s family and professionals serving the child. (20 U.S.C. § 1401(2)(A)-(F); 34 C.F.R. § 300.6 (a)-(f); 71 Fed. Reg. 46548 (Aug. 14, 2006); Cal. Code Regs. tit. 5 § 3051.19(a) [any service that directly assists an individual with exceptional needs in the selection or use of an assistive technology device that is educationally necessary].)

Occupational therapy is also a related service that can be provided to assist a child to benefit from special education. (20 U.S.C. § 1401(26); 34 C.F.R. § 300.34; Ed. Code, § 56363, subd. (a).)

Student offered no credible evidence, including expert testimony, that at the time of the April 2, 2021 IEP team meeting Student required assistive technology or occupational therapy services to access his educational program as part of the placement at New Haven. Student did not receive any special education related services at Cherry Gulch, yet he successfully accessed his educational program and achieved grades of B or better. None of the Cherry Gulch staff reported that Student required assistive technology or occupational therapy to access his educational program. To the contrary, the evidence established that Student was not permitted to access technology, except occasionally a laptop computer as a reward for achieving certain levels of behavior, because Student was addicted to technology. Student made educational progress at Cherry Gulch maintaining a 3.4 grade average without special education assistive technology or occupational therapy services.

The April 2, 2021 IEP team discussed assistive technology, embedded access to a variety of technology in Student's goals and accommodations and offered an assistive technology consult when Student returned home. Student did not prove that San Dieguito denied Student a FAPE by not offering assistive technology or occupational therapy services in the April 2, 2021 IEP.

## VISION

Student contended that because Student received private vision therapy services while living in Idaho, San Dieguito should have offered those services in its April 2, 2021 IEP. Student also contended Student failed a standard vision test administered by the school nurse, suggesting the need for vision therapy.

Student did not meet his burden of proof. Student offered no qualified or credible expert testimony that established what the significance of failing a standard vision test was to Student's ability to access his educational program, or whether Student's vision deficits could be adequately addressed by other means such as corrective lenses. Student also offered no testimony from the vision therapist who worked with Student as to Student's needs for vision therapy as that service related to accessing his educational program. No one from Cherry Gulch offered any credible evidence that Student's vision negatively impacted Student's access to his educational program. The fact that Student "failed" a standard vision test was insufficient to prove that San Dieguito denied Student a FAPE by failing to offer vision therapy.

Student did not meet his burden of proof on any part of Issue 12.



## 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: San Dieguito did not deny Student a FAPE by failing to meet its respective duties to develop and execute an appropriate “child find” policy under the IDEA. San Dieguito prevailed on Issue 1.

Issue 2: San Dieguito did not deny Student a FAPE by failing to provide Student’s parents with mandated information regarding Student’s right to services while Student was privately placed in a for-profit nonpublic school. San Dieguito prevailed on Issue 2.

Issue 3: San Dieguito did not deny Student a FAPE during the 2018-2019, 2019-2020 or 2020-2021 school years by failing to timely conduct Student’s annual and triennial assessments. San Dieguito prevailed on Issue 3.

Issue 4: San Dieguito did not deny Student a FAPE by failing to assess Student during Student’s triennial assessment in the areas of sensory integration, and assistive technology. San Dieguito prevailed on Issue 4.

Issue 5: San Dieguito did not deny Student a FAPE by failing to use appropriate accommodations to timely assess Student during the 2020 Covid-19 pandemic school closures. San Dieguito prevailed on Issue 5.

Issue 6: San Dieguito did not deny Student a FAPE in 2020 during the Covid-19 pandemic school closures by failing to find Student eligible for special education under the primary category of other health impairment and secondary category of emotional disturbance. San Dieguito prevailed on Issue 6.

Issue 7: San Dieguito did not deny Student a FAPE by failing to timely conduct annual IEP meetings during the applicable two year statutory period. San Dieguito prevailed on Issue 7.

Issue 8: San Dieguito did not deny Student a FAPE by failing to invite and solicit input from current teaching and therapy staff, including a general education teacher, at Student's April 2, 2021 IEP team meeting. San Dieguito prevailed on Issue 8.

Issue 9: San Dieguito did not deny Student a FAPE in Student's April 2, 2021 IEP by failing to include appropriate present levels of performance. San Dieguito prevailed on Issue 9.

Issue 10: San Dieguito denied Student a FAPE in Student's April 2, 2021 IEP by failing to offer an appropriate placement for the period April 2, 2021 through June 11, 2021. San Dieguito did not deny Student a FAPE in Student's April 2, 2021 IEP by failing to offer an appropriate placement for the 2021-2022 school year. Student partially prevailed on Issue 10 for the time period April 2, 2021 through June 11, 2021. San Dieguito prevailed on Issue 10 for 2021 extended school year and the 2021-2022 school year.

Issue 11: San Dieguito did not deny Student a FAPE in Student's April 2, 2021 IEP by failing to offer appropriate goals in the areas of occupational, social emotional, behavior, mental health, vision and sensory integration. San Dieguito prevailed on Issue 11.

Issue 12: San Dieguito did not deny Student a FAPE in Student's April 2, 2021 IEP by failing to offer appropriate supports and services in the areas of mental health, behavior, sensory therapy, assistive technology, vision, and social skills. San Dieguito prevailed on Issue 12.

## REMEDIES

Student proved in Issue 10 that San Dieguito denied Student a FAPE by failing to make an appropriate placement offer for the time period of April 2, 2021 until the end of the school year on June 11, 2021. As a remedy, Student requested reimbursement for past tuition, transportation, and vision therapy services while Student was at Cherry Gulch.

School districts may be ordered to provide compensatory education or additional services to a student who has been denied a FAPE. (*Student W. v. Puyallup School Dist.* (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 or hour-for-hour compensation. (*Id.* at pp. 1496-1497.) The conduct of both parties must be reviewed and considered to determine whether equitable relief is appropriate. (*Id.* at p. 1496.)

ALJ's have broad latitude to fashion appropriate equitable remedies for FAPE denials. (*School Comm. of Burlington v. Department of Educ.* (1985) 471 U.S. 359, 370 [105 S.Ct. 1996, 85 L.Ed.2d 385] (*Burlington*); *Puyallup, supra*, 31 F.3d at p.1496.) In remedying a FAPE denial, the student is entitled to relief that is "appropriate" considering the purposes of the IDEA. (20 U.S.C. § 1415(i)(2)(C)(iii); 34 C.F.R. § 300.516(c)(3).) "[E]quitable considerations are relevant in fashioning relief." (*Burlington, supra*, 471 U.S. at p. 374.) Appropriate relief means "relief designed to ensure that the student is appropriately educated within the meaning of the IDEA." (*Puyallup, supra*, 31 F.3d. at p. 1497.)

If the parents of a child with a disability, who previously received special education and related services under the authority of a public agency, enroll the child in a private preschool, elementary school, or secondary school without the consent of or referral by the public agency, a court or a hearing officer may require the agency to reimburse the parents for the cost of that enrollment if the court or hearing officer finds that the agency did not make FAPE available to the child in a timely manner prior to that enrollment and that the private placement is appropriate. A parental placement may be found to be appropriate by a hearing officer or a court even if it does not meet the state standards that apply to education provided by the state educational agency and LEAs. (34. C.F.R. 300.148(c).)

Here, San Dieguito's obligation to Student was limited to offering Student an appropriate IEP on April 2, 2021, including an appropriate transition plan from Cherry Gulch to New Haven, after finding Student eligible for special education. Before filing their complaint in May 2020, Parents never notified San Dieguito of Student's existence. Parents never provided San Dieguito written notice that they were privately placing Student at Cherry Gulch with the intent to seek tuition reimbursement from San

Dieguito. (34 C.F.R. § 300.148(d); Letter to Chamberlain, 60 IDELR 77 (OSEP 2012).)

Parents did not intend for Student to attend San Dieguito schools upon discharge from Cherry Gulch. Parents offered San Dieguito no opportunity to offer Student a FAPE until Parents filed their due process complaint in May 2020.

Parents never sought an IEP for Student from neither San Dieguito nor the local LEA in Idaho while Student attended Cherry Gulch, except when Parents filed due process complaints against San Dieguito in May and November 2020 for the purpose of receiving reimbursement for Cherry Gulch. Parents reminded the IEP team of their intent to keep Student at Cherry Gulch and seek reimbursement at the November 2020 and April 2, 2021 IEP team meetings. Student made educational and social emotional progress, without a current IEP, while he was at Cherry Gulch until he transitioned to High Tech High, a public charter school, all of which supports a finding that San Dieguito is not obligated to pay for past tuition, transportation or vision therapy at Cherry Gulch as an equitable compensatory remedy.

San Dieguito was not relieved, however, of the duty to offer Student a FAPE by offering an appropriate placement in the April 2, 2021 IEP despite Parents' intent not to return Student to San Dieguito. San Dieguito denied Student a FAPE for the time period from April 2, 2021 until June 11, 2021. Student's continued placement at Cherry Gulch during the spring of 2021 was appropriate to allow Student to prepare for transition back home and to a non-public school setting consistent with San Dieguito's April 2, 2021 FAPE offer.

As compensatory education only, Parents are entitled to reimbursement for educationally related expenses charged by Cherry Gulch and paid for by Parents from April 2, 2021 until June 11, 2021, consisting of tuition, educational therapy, and room

and board, and exclusive of any miscellaneous charges. Reimbursement shall be conditional on Parent providing to San Dieguito invoices and receipts proving educationally related charges and payment by Parents for that time period.

Student did not prove that Student required vision therapy to access his educational program during the relevant two month period. Therefore, Parents' request for reimbursement for vision therapy on May 14 and June 11, 2021 is denied.

Parents' request for reimbursement for past transportation costs before April 2, 2021 is denied for the reasons discussed above. Student proved by receipts and testimony from Parent that Student was entitled to reimbursement for Student's transportation for visits home between April 2 until June 11, 2021. Student travelled round trip between Idaho and California on April 28 and May 2, 2021 at a cost of \$216.80, excluding seat upgrade costs. Student travelled from San Diego to Idaho on June 9, 2021, with a one way ticket costing \$189. Total reimbursable transportation costs are \$405.80.

Although Student requested staff training regarding child find obligations as a remedy, Student did not prove that San Dieguito violated its child find obligations and therefore Student's request is denied. Student is entitled to no other relief.

## ORDER

1. San Dieguito shall reimburse Parents for educationally related expenses for Student charged by Cherry Gulch, inclusive of tuition, educational therapy, and room and board incurred from April 2, 2021 through June 11, 2021. Parents shall not receive reimbursement for any miscellaneous charges for items such as ski passes, computers, sundry accounts, water fountains, etc.

2. San Dieguito shall reimburse Parents \$405.80 for transportation costs for Student from April 2, 2021 until June 11, 2021.
3. Parents shall submit detailed invoices and proof of payment to San Dieguito from April 2, 2021 through June 11, 2021, within 30 days of the date of this decision.
4. San Dieguito shall pay Parents within 45 business days after the receipt of proof of charges and payment.
5. All other requests for relief are denied.

## RIGHT TO APPEAL THIS DECISION

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

/s/

Adrienne L. Krikorian  
Administrative Law Judge  
Office of Administrative Hearings