

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

CASE NO. 2021060374

PARENT ON BEHALF OF STUDENT,

v.

LOS ANGELES UNIFIED SCHOOL DISTRICT.

DECISION

JANUARY 18, 2022

On June 9, 2021, the Office of Administrative Hearings, called OAH, received a due process hearing request from Parent on behalf of Student, naming Los Angeles Unified School District. OAH granted the Parties' joint request to continue the matter on July 15, 2021. Administrative Law Judge Cararea Lucier heard this matter by videoconference on October 26 and 27, 2021, and November 2, 4, 16, 17, 18, 19, and 30, 2021.

Parent represented Student. Parent and Student attended all hearing days on Student's behalf, although Parent sometimes chose to exit the hearing for short periods

of time for medical appointments or to care for Student's needs. Mark Waterman, Attorney at Law, represented Los Angeles Unified School District, with assistance from law clerk Morgan Kimmey. Ryan McNeil, Due Process Specialist, attended all hearing days on Los Angeles' behalf.

The matter was continued to December 21, 2021, for written closing briefs. The record was closed, and the matter submitted on December 21, 2021.

ISSUES

1. Did Los Angeles Unified School District deny Student a free appropriate public education, referred to as FAPE, by failing to conduct a triennial Functional Behavior assessment pursuant to her three-year review due by March 16, 2021?
2. Did Los Angeles deny Student a FAPE by failing to conduct a triennial Occupational Therapy assessment pursuant to her three-year review due by February 1, 2020?
3. Did Los Angeles deny Student a FAPE by failing to conduct a triennial Speech and Language assessment pursuant to her three-year review due by February 9, 2020?
4. Did Los Angeles deny Student a FAPE by failing to conduct a triennial Adaptive Physical Education assessment pursuant to her three-year review due by March 20, 2020?
5. Did Los Angeles deny Student a FAPE because the September 25, 2020, Individualized Education Program, referred to as IEP:
 - a. Did not provide a reading or math goal reasonably calculated to ensure meaningful educational benefit;

- b. Failed to include reading goals in the areas of reading comprehension, sight words, and vocabulary;
 - c. Failed to include writing goals in the areas of writing fluency, spelling, vocabulary, punctuation, and grammar; and
 - d. Failed to include math goals in the areas of math facts, math reasoning, counting, addition, multiplication, and division?
- 6. Did Los Angeles deny Student a FAPE because the April 9, 2021, IEP:
 - a. Did not provide reading, writing, or math goals reasonably calculated to ensure meaningful educational benefit;
 - b. Failed to include reading goals in the areas of reading comprehension, sight words, and vocabulary; and
 - c. Failed to include math goals in the areas of math facts, math reasoning, subtraction, and addition?
- 7. Did Los Angeles deny Student a FAPE by failing to provide Student with in-person Behavior Intervention Implementation, referred to as BII, and Behavior Intervention Development, referred to as BID, services pursuant to the September 25, 2020, and April 9, 2021, IEPs?
- 8. Did Los Angeles deny Student a FAPE by failing to provide Language and Speech services during COVID-19 school closure?
- 9. Did Los Angeles deny Student a FAPE by failing to provide Occupational Therapy services during COVID-19 school closure?

PROCEDURAL MATTERS

On January 4, 2022, Los Angeles filed an objection and motion to strike Student's closing brief. Approximately half of Student's closing brief is primarily concerned with

issues not relevant to the time period in this matter. Additionally, in her closing brief Student raises new issues and claims outside of the jurisdiction of the Office of Administrative Hearings. However, parts of Student's brief relate to issues and facts relevant to the nine issues raised in Student's complaint. Accordingly, Los Angeles' motion to strike is denied. However, this Decision is limited to the nine issues pled in Student's complaint. Additionally, any facts or evidence newly asserted in Student's closing brief will not be considered in this Decision.

JURISDICTION

This hearing was held under the Individuals with Disabilities Education Act, its regulations, and California statutes and regulations. (20 U.S.C. § 1400 et seq.; 34 C.F.R. § 300.1 (2006) et seq.; Ed. Code, § 56000 et seq.; Cal. Code Regs., tit. 5, § 3000 et seq.) The main purposes of the Individuals with Disabilities Education Act, referred to as the IDEA, are to ensure:

- all children with disabilities have available to them a 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

free appropriate public education to the child. (20 U.S.C. § 1415(b)(6) & (f); 34 C.F.R. § 300.511 (2006); Ed. Code, §§ 56501, 56502, 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 in this matter. (*J.G. v. Department of Education* (9th Cir. 2019) 772 Fed.Appx. 567.) 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 a 16-year-old girl at the time of hearing who resided within Los Angeles' geographic boundaries with her mother, Parent, at all relevant times. She had a medical diagnosis of Down Syndrome and was eligible for special education and related services under the eligibility category of Intellectual Disability.

ISSUES 1, 2, 3, AND 4: TRIENNIAL ASSESSMENTS

In her complaint of June 9, 2021, Student contended Los Angeles denied Student a FAPE by failing to timely conduct Student's triennial assessments in the areas of Functional Behavior, Occupational Therapy, Speech and Language, and Adapted Physical Education. At hearing, Student did not present any evidence relating to these issues. Similarly, Student did not address these issues in her written closing brief.

Los Angeles contended that it tried to conduct triennial assessments, but Parent refused to sign the assessment plan.

A reassessment must occur not more frequently than once a year, unless the parent and the district agree otherwise, and must occur at least once every three years, unless the parent and the district agree, in writing, that a reassessment is unnecessary. (20 U.S.C. § 1414(a)(2)(B); 34 C.F.R. § 300.303(b); Ed. Code, § 56381, subd. (a)(2).) A reassessment performed every three years is commonly referred to as a triennial assessment.

Reassessments require parental consent, or, in the absence of parental consent, an order following a due process hearing. (20 U.S.C. § 1414(c)(3); Ed. Code, § 56381, subd. (f)(1).) To obtain parental consent the school district must provide proper notice to the student and his or her parent. (20 U.S.C. §§ 1414(b)(1); 1415(b)(3), (c)(1); 34 C.F.R. § 300.304(a); Ed. Code, § 56321, subd. (a).) The district must give the parent at least 15 days to review, sign, and return the proposed assessment plan. (Ed. Code, § 56321, subd. (a).) The assessment must be completed and an IEP team meeting held within 60 days of receiving consent, exclusive of school vacations in excess of five school days and other specified days. (20 U.S.C. § 1414(a)(1)(C); 34 C.F.R. § 300.301(c); Ed. Code, §§ 56043, subd. (f)(1), 56302.1, subd. (a), & 56344, subd. (a).)

The U.S. Department of Education has not waived legal requirements relating to triennial assessments during school closures for Covid-19 and distance learning. (California Department of Education Special Education Guidance for Covid-19, September 30, 2020.

It is well settled that parents who want their children to receive special education services must allow reassessment by the district, with assessors of its choice. (*Gregory K. v. Longview Sch. Dist.* (9th Cir. 1987) 811 F.2d 1307, 1315; *Johnson v. Duneland Sch.*

Corp. (7th Cir. 1996) 92 F.3d 554, 558; *Andress v. Cleveland Indep. Sch. Dist.* (5th Cir. 1995) 64 F.3d 176, 178-179; *Dubois v. Connecticut State Bd. of Educ.* (2d Cir. 1984) 727 F.2d 44, 48.)

Student did not meet her burden of proof regarding allegations that Los Angeles failed to timely conduct Student's triennial assessments in the areas of Functional Behavior, Occupational Therapy, Speech and Language, and Adapted Physical Education. Parent prevented Los Angeles from conducting timely triennial assessments because she refused to consent to the assessments.

Los Angeles provided Parent with an assessment plan for Student's triennial assessments on February 14, 2020. At hearing, Parent provided contradictory testimony as to when she received the assessment plan and evaded direct questions. On cross-examination, Parent presented as hostile and belligerent, which impaired her credibility as a witness. Ultimately, Parent acknowledged that the assessment plan was handed directly to her and she provided a written response to Los Angeles on February 17, 2020.

Parent wrote her objections directly on the assessment plan. She appeared to find fault with the fact that the IEP team checked the box indicating the assessments were for the purpose of considering if any changes were needed with respect to Student's special education needs rather than the box on the form indicating the assessments were for a triennial review. However, the fact that Los Angeles did not check the box on the form which Parent believed most correct did not render the assessment plan defective.

Los Angeles attempted on multiple occasions to obtain Parent's consent for the February 14, 2020, assessment plan, but Parent continued to refuse. As of the dates of the hearing, Parent had not consented to Los Angeles' proposed triennial assessments of Student.

Parent asserted that she wanted Student to be assessed, but by a different team of assessors. Parent raised vague concerns with the district's proposed assessors, suggesting they had conflicts, and in her closing brief suggested that she would like independent educational evaluations of Student. However, the law does not allow parents to choose assessors for a special education assessment. (See 20 U.S.C. § 1414(b)(3)(A)(iv); 34 C.F.R. § 300.304(c)(1)(iv); Ed. Code, § 56322; see *R.A. v. West Contra Costa County Unified School Dist.* (N.D. Cal. Aug. 17, 2015, Case No. 14-cv-0931-PJH) 2015 WL 4914795, **14-15, *affd.* (9th Cir. 2017) 696 Fed.Appx. 171 (School district excused from assessing student as school district not required to acquiesce to parent's request for the assessment not required by the IDEA).)

Parent unreasonably refused to consent to the triennial assessment plan, denying Los Angeles the opportunity to timely complete Student's assessments. As such, Parent's allegation that Los Angeles failed to timely assess Student is defeated by her refusal to consent to the assessments at issue.

ISSUES 5 AND 6: IEP GOALS

In her complaint of June 9, 2021, Student contended Los Angeles denied Student a FAPE by failing to offer appropriate goals in the IEPs of September 25, 2020, and April 9, 2021. At hearing and in her closing brief, Student contended that Los Angeles was not providing Student with a quality education.

Los Angeles asserted that it offered Student appropriate goals in all areas of need.

An annual IEP must contain a statement of measurable annual goals designed to: (1) meet the individual's needs that result from the individual's disability to enable the pupil to be involved in and make progress in the general curriculum; and (2) meet each of the pupil's other educational needs that result from the individual's disability. (20 U.S.C. § 1414(d)(1)(A)(i)(II); 34 C.F.R. § 300.320(a)(2)(i); Ed. Code, § 56345(a)(2).) Annual goals are statements that describe what a child with a disability can reasonably be expected to accomplish within a 12-month period in the child's special education program. (*Letter to Butler*, 213 IDELR 118 (OSERS 1988); Notice of Interpretation, Appendix A to 34 C.F.R., part 300, Question 4 (1999 regulations).)

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, § 56344; See *Adams v. State of Oregon* (9th Cir. 1999) 195 F.3d 1141, 114: An IEP is evaluated in light of information available at the time it was developed and is not to be evaluated in hindsight.)

Student failed to provide any evidence that Los Angeles denied Student a FAPE related to the proposed annual goals in Student's IEPs of September 25, 2020, and April 9, 2021. At the IEP team meeting on September 25, 2020, Los Angeles proposed goals for Student in the areas of:

- Visual Motor (completing worksheets in class);
- Behavior Intervention (asking for assistance);
- Classroom Language (answering comprehension questions);

- Articulation (increasing speech intelligibility);
- Auditory Skills (answering “wh” questions);
- Physical Fitness (push-ups);
- English Language Development (describing vocabulary);
- Functional Reading (reading aloud at 60 words per minute);
- Functional Writing (writing simple 4-5 word sentences);
- Functional Math (solving two-digit subtraction problems);
- Self Advocacy (answering questions about her FM system); and
- Visual Motor (copying 4-5 lines).

Parent attended the 6-hour IEP team meeting on September 25, 2020, asking questions and giving input at the meeting. Overall, Parent believed that Student was not receiving an appropriate education from Los Angeles. Parent had numerous concerns, which she also raised in public comments before the Los Angeles Unified School District School Board. With respect to the goals and objectives in the September 25, 2020, IEP, Parent did not raise any specific objections at the IEP team meeting or in the due process hearing. Parent explained that she was not provided with a full, finalized copy of the final IEP in Spanish at the meeting, which she believed impaired her ability to fully articulate her concerns with the goals. When she received a copy of the IEP she forwarded it to her attorney at the time, who drafted the complaint in the current matter.

Karina Lopez attended the IEP team meeting on September 25, 2020, as a support for Parent and Student. Lopez does not have formal education or training in special education but has attended training for parents provided by Los Angeles. Lopez does not call herself an advocate, but she understood Parent’s concerns and assisted in communicating them to the IEP team. In her opinion, Parent believed that Student’s

goal in the area of writing was too low, and that Student could achieve at a higher level with more redirection. Lopez also believed Parent felt the math goal was not appropriate because she had lower math skills than suggested. Lopez and Parent felt that Student could not count as well as the IEP team reported.

Juana Gutierrez also testified in support of Student. Although she did not attend the September 25, 2020, IEP team meeting, she had known Student for over seven years. She believed Student had great potential but was not receiving a quality education from Los Angeles.

Student did not meet her burden of proof that Los Angeles failed to provide a reading or math goal reasonably calculated to ensure meaningful educational benefit in the September 25, 2020, IEP. Jasmine Campbell was Student's classroom teacher for the 2020-2021 school year. She attended the IEP team meeting on September 25, 2020, and helped develop the goals. The IEP team offered Student an appropriate goal in reading to support Student's increased literacy and reading speed. With respect to Math, Campbell credibly established that the IEP goal was appropriate to increase Student's skills in subtraction. The goals were developed according to Student's assessed levels in the Unique Learning System and were supported by individually tailored curriculum.

Student did not provide any evidence that Student required goals in the areas of

- reading comprehension,
- sight words,
- vocabulary,
- writing fluency,
- spelling,

- vocabulary,
- punctuation,
- grammar,
- math facts,
- math reasoning,
- counting,
- addition,
- multiplication, or
- division.

Student also did not address these issues in her closing brief. As such, Student did not meet her burden of proof that Los Angeles failed to include goals in the areas of reading comprehension, sight words, vocabulary, writing fluency, spelling, vocabulary, punctuation, grammar, math facts, math reasoning, counting, addition, multiplication, and division in the September 25, 2020, IEP.

On April 9, 2021, Los Angeles convened an annual IEP team meeting for Student. Los Angeles invited Parent and encouraged her to participate on numerous occasions. Parent did not attend the IEP meeting because Los Angeles did not provide her with proof that they invited Student's one-to-one aide, Beatriz Delgado, as Parent requested. At the April 9, 2021, IEP team meeting, Los Angeles proposed goals in the areas of:

- Functional Math (solving word problems involving money);
- Behavior Intervention (completing non-preferred task and assignments);
- Functional Reading (reading aloud with accuracy);
- English Language Development (identifying vocabulary);
- Functional Writing (writing simple sentences);
- Visual Motor (copying 5-7 lines of text);

- Communication (describing characters and settings);
- Physical Fitness (push-ups);
- Hearing (answering “wh” questions);
- Articulation (2-3 syllable words);
- Expressive Language (describing objects, pictures, and events); and
- Self Advocacy (wearing her hearing aids).

Student did not meet her burden of proof that Los Angeles failed to provide reading, writing, or math goals reasonably calculated to ensure meaningful educational benefit in the April 9, 2021 IEP. Ms. Campbell attended the April 9, 2021, IEP team meeting and helped develop the goals. The math goal was appropriate to Student’s level and would help her identify numbers using dollars so that she could buy things in real life situations. The proposed reading and writing goals were appropriate to Student’s level and supported her ability to read and write independently.

Student did not provide any evidence that as of April 9, 2021, Student required goals in the areas of reading comprehension, sight words, vocabulary, math facts, math reasoning, subtraction, or addition. She also did not address these issues in her closing brief. As such, Student did not meet her burden of proof that Los Angeles denied Student a FAPE because it failed to include goals in the areas of reading comprehension, sight words, vocabulary, math facts, math reasoning, and subtraction in the April 9, 2021 IEP.

ISSUES 7, 8, 9: IMPLEMENTATION OF SERVICES DURING COVID-19 SCHOOL CLOSURES AND DISTANCE LEARNING

Student contended that Los Angeles failed to implement Student's services in the areas of Occupational Therapy and Speech and Language during virtual learning following school closures in March of 2020. Additionally, Student asserted Los Angeles did not implement the BII services required by Student's IEPs. Student did not address the issues of in-person services, or whether Student required BID services, at hearing or in her closing brief.

Los Angeles contended that any services Student missed were due to circumstances outside of its control, including disruptions caused by the Covid-19 pandemic, and Parent's refusal to allow Student to access services. Los Angeles asserted that it tried to make up time missed and offered compensatory education for all time missed, regardless of the cause.

A school district violates the IDEA if it materially fails to implement a child's IEP. (20 U.S.C. § 1401(9).) A material failure occurs when there is more than a minor discrepancy between the services provided to a disabled child and those required by the IEP. (*Van Duyn v. Baker School Dist.* (9th Cir. 2007) 502 F.3d 811, 815, 822.) "[T]he materiality standard does not require that the child suffer demonstrable educational harm in order to prevail." (*Id.*)

Local Educational Agencies must continue to implement a student's IEP during distance learning. (California Department of Education Special Education Guidance for Covid-19, September 30, 2020.)

After the school closures due to the Covid-19 pandemic on March 13, 2020, Los Angeles did not provide Student with all the Occupational Therapy and Speech and Language services required by her IEPs of October 28, 2019, February 12, 2020, and September 25, 2020.

Student was entitled to 60 minutes per week of Speech and Language Therapy. While the evidence overwhelming established that Student missed Speech and Language services, witnesses had differing explanations for the cause. Parent testified that Student missed Speech and Language and Occupational Therapy services because the service providers did not allow Student into virtual sessions. Parent complained that even though the service providers apologized when the internet and technology issues arose from their end, she was frequently frustrated by internet connectivity issues and technological glitches. Often times the computer would become frozen on the "loading" message, leaving Student waiting for minutes to hours.

Los Angeles staff corroborated Parent's claims that Student missed Speech and Language services. Lara Johnson was the Speech and Language Pathologist at Foshay Learning Center for the 2019-2020 school year who was responsible for providing services to Student. Johnson did not provide the Speech and Language services in Student's IEP after the school closures on March 13, 2020. Johnson followed the requirements of her supervisors which was to try her best to be available for students and families and to provide services if parents requested them. She did not work on Student's IEP goals from March 13, 2020, through the end of the 2019-2020 school year. During the 2019-2020 school year Johnson did not have the training to use computerized break-out rooms for virtual learning, but she sometimes attended Student's virtual classroom to provide collaborative support to the classroom teacher. Student only attended her virtual classroom one or two times when Johnson was in the

classroom. On one occasion, on May 21, 2020, Johnson observed Parent interrupting the virtual classroom and making comments to Student and the class: "This is boring. Is this what you have been missing?" Although the teacher, Rena Rodriguez, muted Parent, Parent was able to unmute herself and continued to make similar comments. Administrator Eva Arrechiga canceled the class for all students and rescheduled it for May 26, 2020. Johnson attended the make-up class, but Student did not. At hearing, Johnson testified directly and with great candor, even when conceding facts that were adverse to Los Angeles. She appeared sad when discussing the services Student missed but remained calm and professional throughout her testimony. As such, Johnson was a highly credible witness and her testimony was given significant weight.

Student also missed Speech and Language services during the 2020-2021 school year, as Los Angeles continued to offer virtual learning due to the Covid-19 pandemic. Eugenia Coronado was the Speech and Language Pathologist at Foshay Learning Center for the 2020-2021 school year from the end of September 2020, through December 2020. Foshay did not have a Speech Pathologist for August and most of September of 2020. As such, Student did not receive any Speech and Language Therapy from August 17, 2020, through October 6, 2020. Coronado offered Student 30 minutes per week of individual services and 30 minutes of group services. Parent made it clear to Coronado that she did not want Student to attend group Speech services, so Coronado provided Student with 30 minutes per week of individual services from October 7, 2020, through December 18, 2020. Student made some progress in Speech during this time but would have made more progress if she had accessed all of the Speech and Language services required by her IEPs of February 12, 2020, and September 25, 2020.

Diane Perez was the Speech and Language Pathologist assigned to Foshay Learning Center from December 2020 through the end of the 2020-2021 school year. Perez was familiar with Student, and responsible for providing services to her. Perez testified that Student missed Speech and Language services during the 2020-2021 school year, but that she compensated Student by making up all missed time to date. She believed that any missed Speech services were due to Parent not accessing the services. However, Perez contradicted herself by testifying that Parent declined all Speech services, but then saying Parent agreed to individual services only. Perez appeared tired, uncomfortable and nervous while testifying. Some of her answers were vague and nonsensical. Perez was not a careful witness, and her testimony was given little weight.

Adrienne Arias was a Least Restrictive Environment Specialist employed by Los Angeles. For the 2020-2021 school year her job responsibilities included supporting teachers and administrators at Foshay Learning Center. Arias was familiar with Student, observed her in her virtual classroom, and attended IEP team meetings for her on September 25, 2020, and April 9, 2021. Student missed some Speech and Language services because for a period of time Foshay did not have a Speech and Language Pathologist. Arias also recalled that Parent complained that Student missed Speech and Language services because of connectivity issues, and Parent alleged that the Speech and Language therapist hung up on Student. Student also had attendance issues, and at times Parent chose not to access group Speech and Language services.

Parent did not provide any specific evidence as to the amount of Speech and Language services Student missed during the Covid-19 school closures and distance learning. However, an IEP dated September 25, 2020, documented that the IEP team determined that Student was owed 745 minutes of Speech and Language services for services missed between February 12, 2020, and September 25, 2020. An IEP dated April 9, 2021, determined that Los Angeles owed Student an additional 835 minutes of Speech and Language services. The preponderance of the evidence demonstrated that Los Angeles failed to provide Student with 1,580 minutes of the Speech and Language Therapy required by her IEPs for the time period at issue.

Student was entitled to 60 minutes per week of Occupational Therapy. Student missed some Occupational Therapy services during the 2020-2021 school year. Natalie Chavez was the Occupational Therapist assigned to Foshay Learning Center for the 2020-2021 school year. Chavez was familiar with Student, and responsible for providing services to her. Chavez was a forthright witness, and her testimony was given substantial weight. Chavez occasionally had difficulties with her internet, which delayed Occupational Therapy services to Student, but she always tried to make up missed minutes by extending the time of her session or rescheduling. Chavez reviewed district service records to confirm that Student received all Occupational Therapy services for the 2019-2020 school year. For the IEP team meeting of April 9, 2021, Chavez reviewed Student's logs and found that Student had missed approximately two hours of Occupational Therapy, which was likely due to Student's absences. Chavez offered to make up the 129 minutes of missed time but had been unable to do so because Student stopped attending school after April of 2021. The evidence established that Los Angeles failed to provide 129 minutes of Occupational Therapy services for the time period at issue.

The preponderance of the evidence established that Los Angeles materially failed to implement the Occupational Therapy and Speech and Language services in Student's IEPs after the Covid-19 school closures, thereby denying Student a FAPE.

Student did not meet her burden of proof with respect to the implementation of BII services in Student's September 25, 2020, and April 9, 2021, IEPs. Beatriz Delgado was the paraprofessional assigned as Student's BII from February 12, 2020, until April 28, 2021. She has been a BII for Los Angeles for over 11 years. Delgado presented as a candid, calm, and careful witness. She answered difficult questions with honesty and respect to others. For example, she contradicted testimony from Los Angeles staff that Parent used curse words and called them vulgar names. Although Parent had a temper, Delgado never observed Parent using swear words. Delgado was a highly credible witness and her testimony was given substantial weight. Delgado attended all Student's virtual classes, even when Student was absent. She was present every day, and logged onto the virtual classroom via Zoom. When Student was late to class, Delgado helped Student join the classroom or break-out sessions. Delgado implemented the BII services in Student's IEP by guiding Student, reading aloud, correcting mistakes, and encouraging her to follow teacher directions and participate in the virtual classroom. After Ms. Delgado took an emergency leave of absence at the end of April 2021, Los Angeles assigned a substitute BII for Student. Student did not present any evidence that Los Angeles failed to implement Student's BII services for the time period at issue. The evidence demonstrated that Los Angeles implemented Student's BII services as required by Student's September 25, 2020, and April 9, 2021, IEPs.

CONCLUSIONS AND PREVAILING PARTY

Pursuant to 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:

Los Angeles Unified School District did not deny Student a FAPE by failing to conduct a triennial Functional Behavior assessment pursuant to her three-year review due by March 16, 2021.

Los Angeles prevailed on Issue 1.

Issue 2:

Los Angeles Unified School District did not deny Student a FAPE by failing to conduct a triennial Occupational Therapy assessment pursuant to her three-year review due by February 1, 2020.

Los Angeles prevailed on Issue 2.

Issue 3:

Los Angeles Unified School District did not deny Student a FAPE by failing to conduct a triennial Speech and Language assessment pursuant to her three-year review due by February 9, 2020.

Los Angeles prevailed on Issue 3.

Issue 4:

Los Angeles Unified School District did not deny Student a FAPE by failing to conduct a triennial Adaptive Physical Education assessment pursuant to her three-year review due by March 20, 2020.

Los Angeles prevailed on Issue 4.

Issue 5:

Los Angeles Unified School District did not deny Student a FAPE because the September 25, 2020, IEP:

- a. Did not provide a reading or math goal reasonably calculated to ensure meaningful educational benefit;
- b. Failed to include reading goals in the areas of reading comprehension, sight words, and vocabulary;
- c. Failed to include writing goals in the areas of writing fluency, spelling, vocabulary, punctuation, and grammar; and
- d. Failed to include math goals in the areas of math facts, math reasoning, counting, addition, multiplication, and division.

Los Angeles prevailed on Issue 5.

Issue 6:

Los Angeles Unified School District did not deny Student a FAPE because the April 9, 2021, IEP:

- a. Did not provide reading, writing, or math goals reasonably calculated to ensure meaningful educational benefit;
- b. Failed to include reading goals in the areas of reading comprehension, sight words, and vocabulary; and
- c. Failed to include math goals in the areas of math facts, math reasoning, subtraction, and addition.

Los Angeles prevailed on Issue 6.

Issue 7:

Los Angeles Unified School District did not deny Student a FAPE by failing to provide Student with in-person Behavior Intervention Implementation, referred to as BII, and Behavior Intervention Development, referred to as BID, services pursuant to the September 25, 2020, and April 9, 2021, IEPs. Los Angeles prevailed on Issue 7.

Issue 8:

Los Angeles Unified School District denied Student a FAPE by failing to provide Language and Speech services during COVID-19 school closure. Student prevailed on Issue 8.

Issue 9:

Los Angeles Unified School District denied Student a FAPE by failing to provide Occupational Therapy services during COVID-19 school closure. Student prevailed on Issue 9.

REMEDY

Under federal and state law, courts have broad equitable powers to remedy the failure of a school district to provide FAPE to a disabled child. (20 U.S.C. § 1415(i)(1)(C)(iii); Ed. Code, § 56505, subd. (g); see *School Committee of the Town of Burlington, Massachusetts v. Dept. of Education* (1985) 471 U.S. 359, 369 [105 S.Ct. 1996, 85 L.Ed.2d 385] (*Burlington*).) This broad equitable authority extends to an Administrative Law Judge who hears and decides a special education administrative due process matter. (*Forest Grove School Dist. v. T.A.* (2009) 557 U.S. 230, 244, fn. 11 [129 S.Ct. 2484, 174 L.Ed.2d 168].)

In remedying a FAPE denial, the student is entitled to relief that is appropriate in light of the purposes of the IDEA. (20 U.S.C. § 1415(i)(2)(C)(iii); 34 C.F.R. § 300.516(c)(3) (2006).) The purpose of the IDEA is to provide students with disabilities a free appropriate public education which emphasizes special education and related services to meet their unique needs. (Burlington, *supra*, 471 U.S. 359, 374.) Appropriate relief means relief designed to ensure that the student is appropriately educated within the meaning of the IDEA. (Student W. v. Puyallup School Dist. (9th Cir. 1994) 31 F.3d 1489, 1497 (Puyallup).) The award must be fact-specific and be reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place. (Reid *ex rel.* Reid v. District of Columbia (D.C. Cir. 2005) 401 F.3d 516, 524.)

A school district also may be ordered to provide compensatory education or additional services to a student who has been denied a FAPE. (*Park v. Anaheim Union High School Dist.* (9th Cir. 2006) 464 F.3d 1025, 1033.) Compensatory education is a prospective award of educational services designed to catch-up the student to where he should have been absent the denial of a FAPE. (*Brennan v. Regional School Dist. No. 1* (D.Conn. 2008) 531 F.Supp.2d 245, 265; *Orange Unified School Dist. v. C.K.* (C.D.Cal. June 4, 2012, No. SACV 11-1253 JVS(MLGx)) 2012 WL 2478389, *12.) An award of compensatory education need not provide a day-for-day compensation. (*Puyallup, supra*, 31 F.3d 1489, 1496-1497.) The conduct of both parties must be reviewed and considered to determine whether equitable relief is appropriate. (*Id.* at p. 1496.)

The failure to materially implement an IEP is a substantive violation of the IDEA. The materiality standard under *Van Duyn* does not require that the child suffer demonstrable educational harm in order to prevail, but the specific harms suffered by a

student may be considered when determining, which, if any, remedies are appropriate. (*Kym McLaughlan et al v. Torrance Unified School District* (C.D. Cal. June 15, 2021, Case No. 2:20-cv-02295-GW-(RAOx)) 2021 WL 3044170.)

IEP teams may make individualized determinations as to whether students require compensatory education due to missed or inadequate services related to distance learning. (California Department of Education Special Education Guidance for Covid-19, March 20, 2020.) The IEP team's ability to consider and offer compensatory education does not bar parents from bringing due process complaints or usurp the authority of administrative law judges to consider allegations regarding the implementation or appropriateness of special education during the pandemic related school closures and distance learning. The federal government did not waive the federal requirements under the IDEA. (Id.) However, an IEP team's proactive consideration of whether a student requires compensatory education may mitigate the impact of a school district's failure to implement a Student's IEP during the Covid-19 pandemic.

The U.S. Department of Education, Office of Special Education and Rehabilitative Services, referred to as OSERS, issued non-binding guidance advising that a child's IEP team may determine whether compensatory services are necessary to mitigate the impact of disruptions and delays in providing appropriate services to the child. In pertinent part, two situations that might require consideration of whether, and what, compensatory services are necessary include: (1) if the special education and related services that were provided during the pandemic through virtual, hybrid, or in-person instruction were not appropriate to meet the child's needs; and (2) if some or all of the child's IEP could not be implemented using the methods of service delivery available

during the pandemic (for example, if the physical therapy and behavioral intervention strategies included in the child's IEP could not be provided through virtual means.) (Return to School Roadmap: Development and Implementation of Individualized Education Programs in the Least Restrictive Environment under the Individuals with Disabilities Education Act, Office of Special Education and Rehabilitative Services, OSEP QA 21-06 (September 30, 2021) 79 IDELR 232.)

A determination of compensatory services by the child's IEP team is an appropriate proactive mitigating measure intended to address the needs of the child due to the LEA's failure or inability to provide appropriate services. If challenged, such determinations may receive deference from a court if arrived at consistent with IDEA requirements and based on the expertise of, and the exercise of judgment by, school authorities. (*Ibid.*)

Los Angeles denied Student a FAPE by materially failing to implement her Occupational Therapy and Speech and Language services after the school closures due to Covid-19. However, Los Angeles attempted to mitigate the impact of Student's lack of services by offering compensatory education at Student's IEP's of September 25, 2020, and April 9, 2021. Los Angeles offered Student minute-for-minute compensatory education for the 129 minutes of Occupational Therapy and 1,580 minutes of Speech and Language services missed during the time period at issue. The IEP team offered Student compensatory education services to account for all time missed, regardless of the reason. As an equitable matter, Los Angeles' offer of compensatory education was generous, and sufficient to place Student where she would have been educationally had she accessed the missed services. Los Angeles demonstrated that is willing and able to provide the promised compensatory education, and any failure for Student to receive this compensatory education is the result of Parent's actions, especially not having

Student attend school since April of 2021 due to the dispute with Los Angeles. Accordingly, Student is not entitled to any further remedy for Los Angeles' failure to implement the services in her IEPs for the time period at issue.

ORDER

1. All of Student's 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/

Cararea Lucier
Administrative Law Judge
Office of Administrative Hearings