

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

CASE NO. 2021090903

PARENT ON BEHALF OF STUDENT,

v.

RIVERSIDE UNIFIED SCHOOL DISTRICT.

DECISION

JANUARY 25, 2022

On September 28, 2021, the Office of Administrative Hearings, called OAH, received a due process hearing request from Student, naming Riverside Unified School District as respondent. On November 22, 2021, the case was continued for good cause. Administrative Law Judge Penelope Pahl heard this matter via videoconference on December 7 through 10, and December 14, 2021.

Attorneys Robert Burgermeister and Coleman Alguire represented Student. One or both Parents attended all hearing days on Student's behalf, except for December 14, 2021. Attorneys Jack Clarke and Annalissa Maitz represented Riverside Unified School District. Cyndi Hartshorn, Riverside's Special Education Coordinator, attended all hearing days on Riverside's behalf.

At the parties' request the matter was continued to January 10, 2022, for written closing briefs. The record was closed, and the matter was submitted on January 10, 2022.

ISSUES

At the outset of the hearing, the issues were reviewed. Riverside objected to Student's issue numbered 2 (d) in the prehearing conference order. The issue alleged Riverside failed to conduct legally compliant assessments in all areas of need from January 27, 2021. Student's counsel reviewed the complaint and conceded the issue was not alleged. Accordingly, the issue was dismissed and the remaining sub-issues of Issue Number 2 were re-lettered for clarity.

The Issues heard were:

1. Did Riverside Unified School District deny Student a free appropriate public education, called a FAPE, from March 2020 through the end of the 2019-2020 school year by:
 - a. assigning Student to distance learning without assessing Student and providing necessary accommodations to ensure Student could obtain a FAPE through distance learning;

- b. failing to implement Student's IEP, specifically in-person services;
and
 - c. failing to address regression from being assigned to distance learning?
- 2. Did Riverside Unified School District deny Student a FAPE during the 2020-2021, and 2021-2022 school years through the time of filing, September 28, 2021, by:
 - a. assigning Student to distance learning without assessing Student and providing necessary accommodations to ensure Student could obtain a FAPE through distance learning;
 - b. failing to implement Student's IEP, specifically in-person services;
 - c. failing to address regression from being assigned to distance learning;
 - d. failing to offer adequate goals in the areas of communication, behavior, and academics including reading, writing, and math, from January 27, 2021;
 - e. failing to offer sufficient services in specialized academic instruction, occupational therapy, and speech and language, from January 27, 2021;
 - f. failing to offer services in behavior from January 27, 2021: and
 - g. failing to offer a one-to-one aide in behavior and academics from January 27, 2021?

LEGAL FRAMEWORK

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

The IDEA affords parents and local educational agencies the procedural protection of an impartial due process hearing with respect to any matter relating to the identification, assessment, or educational placement of the child, or the provision of a free, appropriate public education to the child. (20 U.S.C. § 1415(b)(6) & (f); 34 C.F.R. § 300.511; Ed. Code, §§ 56501, 56502, and 56505; Cal. Code Regs., tit. 5, § 3082.) The party requesting the hearing is limited to the issues alleged in the complaint, unless the other party consents; and has the burden of proof by a preponderance of the evidence. (20 U.S.C. § 1415(f)(3)(B); Ed. Code, § 56502, subd. (i); *Schaffer v. Weast* (2005) 546 U.S. 49, 57-58, 62 [126 S.Ct. 528, 163 L. Ed. 2d. 387]; and see 20 U.S.C. § 1415(i)(2)(C)(iii).) In this case, Student had the burden of proof. 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).)

IDEA ELIGIBILITY

Student was 11 years old and in fifth grade at the time of hearing. Student resided within Riverside's geographic boundaries. Student was eligible for special education under the categories of autism and intellectual disability.

ISSUE 1a: DID RIVERSIDE UNIFIED SCHOOL DISTRICT DENY STUDENT A FREE, APPROPRIATE PUBLIC EDUCATION, CALLED A FAPE, FROM MARCH 2020 THROUGH THE END OF THE 2019-2020 SCHOOL YEAR BY ASSIGNING STUDENT TO DISTANCE LEARNING WITHOUT ASSESSMENT?

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

DISTRICT-WIDE INSTRUCTION INTERRUPTION MARCH 16, 2020, TO APRIL 6, 2020.

Between March 16, 2020, and April 5, 2020, Riverside did not offer classes to any students in the district because of the shelter in place order and Riverside's previously scheduled Spring Break.

On March 4, 2020, California's Governor proclaimed a State of Emergency resulting from the Covid-19 virus pandemic. (Executive Order N-26-20.) On March 13, 2020, the Governor announced a statewide "shelter in place" order, scheduled to take effect on March 19, 2020, pursuant to California State Public Health orders as confirmed by Executive Order N-33-20. This Executive Order required all people who were not essential personnel to stay home and avoid public gatherings.

Beginning March 13, 2020, at the end of the school day, pursuant to the Governor's announced shelter in place order, Riverside closed all district school sites. No instruction was offered until April 6, 2020. The last week of March was Riverside's scheduled Spring Break.

On March 12, 2020, the U.S. Department of Education, called the US DOE, outlined the States' responsibility under the IDEA to children with disabilities during the COVID-19 outbreak. (*Questions and Answers on Providing Services to Children with Disabilities During the Coronavirus Disease 2019 Outbreak* (U.S. Dept. of Education, March 2020).) That document stated, "If an LEA, that is a local educational agency, closes its schools to slow or stop the spread of COVID-19, and does not provide any educational services to the general student population, then an LEA would not be required to provide services to students with disabilities during that same period of

time.” The US DOE is the agency responsible for developing regulations for and enforcement of the IDEA. When an agency interprets its own regulations, a heightened deference applies, and such an interpretation is controlling unless plainly erroneous or inconsistent with the regulation. (*Federal Express Corp. v. Holowecki* (2008) 552 U.S. 389, 397.)

Based on the guidance provided by the US DOE, Riverside was not required to provide Student a FAPE while Riverside schools were closed to all students to prevent the spread of the Covid-19 virus, so long as no alternative instruction was being offered to any students.

Student did not meet his burden to establish a FAPE denial on any basis from March 16, 2020, through April 5, 2020. This includes all contentions raised in Issue 1a, b, and c; specifically, the failure to assess and provide accommodations during distance learning, failure to implement in-person instruction, and failure to address regression.

ASSIGNMENT TO DISTANCE LEARNING

Student asserts that Riverside assigned him to distance learning following the Covid-19 shelter-in-place orders that resulted in school closures. Riverside Unified School District argues that Student was not assigned to distance learning.

Central to the parties’ argument was a dispute over the legal impact of the phrase, “assigned to distance learning.” Student asserted Riverside denied him a FAPE by assigning him to distance learning without assessing him before the transition and also by failing to provide him accommodations so he could access his education via distance learning. Riverside argued that Student was not “assigned” to distance learning

by his IEP team. Rather, the global pandemic forced Riverside to shift the delivery of services to a distance learning platform. Per Riverside, if Student was not “assigned” to distance learning, he cannot prevail on the issue. Riverside’s argument is unpersuasive.

The focus on the term “assignment,” is misplaced. Student did not argue that Riverside denied him a FAPE by delivering instruction through a distance learning platform. Rather, the issue pled is whether Riverside failed to assess Student before he moved to distance learning. Once in distance learning, Student argues Riverside failed to provide needed accommodations. The threshold question is not why Student was in distance learning. Rather, the threshold question is whether Student was entitled to FAPE once in distance learning through the end of the school year. Once resolved, the substantive claims regarding distance learning can be reached.

FAILURE TO ASSESS PRIOR TO THE INITIATION OF DISTANCE LEARNING IN APRIL OF 2020

Student contends that Riverside failed to assess him prior to assigning him to a distance learning environment. Riverside generally argues that Student failed to meet his burden of proof as to this issue.

Riverside’s distance learning program began April 6, 2020. Student failed to prove that assessments were requested or warranted prior to starting distance learning on April 6, 2020, or thereafter, through the end of the 2020 school year. After a child’s initial assessments to establish special education eligibility, the school district has an ongoing duty to assess the student’s needs, and continuing eligibility for special education. The school district must reassess a student eligible for special education at least once every three years; but not more than once a year unless Parents agree. (20

U.S.C. § 1414(a)(2)(B); Ed. Code, § 56381(a)(2).) The school district must assess or reassess the educational needs of a child with a disability if requested by Parent, or a teacher; or if the district “determines that the educational or related service needs, including improved academic achievement and functional performance of the child, warrant a reevaluation.” (Ed. Code, § 56381(a).)

The failure to assess is a procedural violation. Solely technical defects do not rise to the level of a denial of FAPE. (*Amanda J. v. Clark County. School District* (9th Cir. 2001) 267 F.3d 877, 892; 34 C.F.R. § 300.510(a)(2).) A denial of FAPE resulting from a procedural violation exists only if it is established that the procedural violation resulted in a denial of educational benefit or a failure to provide Parents a meaningful opportunity to participate in the development of Student’s IEP. (*Doug C. v. Hawaii Dept. of Educ.*, (9th Cir. 2013) 720 F. 3d. 1038, 1046.)

Student did not establish by a preponderance of the evidence that he required further assessments prior to the initiation of distance learning. Student’s triennial assessments had been completed in January and February of 2020. Student did not establish that Riverside was on notice that Student’s educational needs warranted a reevaluation during the period from March of 2020 to May 28, 2020, the last day of the 2019-2020 school year. Student argued that Riverside had a legal obligation to assess Student before shifting his placement or instruction method from in-person to distance learning. However, Student provided no legal authority for this contention.

Student presented no evidence of requests for assessments made at any time between March 16, 2020, and the end of the 2019-2020 school year. Nor did Student offer evidence that he was denied educational benefit, or that Parents were denied a meaningful opportunity to participate in the IEP development process, due to a failure

to assess Student's needs prior to the initiation of distance learning on April 6, 2020, or at any other time prior to the conclusion of the 2019-2020 school year. Student failed to meet his burden of proving that Riverside denied him a FAPE by failing to assess prior to the initiation of distance learning.

ISSUE 1a AND 1b: DID RIVERSIDE UNIFIED SCHOOL DISTRICT DENY STUDENT A FAPE, FROM APRIL 6, 2020, THROUGH THE END OF THE 2019-2020 SCHOOL YEAR, BY FAILING TO IMPLEMENT STUDENT'S IEP, SPECIFICALLY IN-PERSON SERVICES; AND BY FAILING TO PROVIDE NECESSARY ACCOMMODATIONS TO ENSURE STUDENT OBTAINED A FAPE THROUGH DISTANCE LEARNING?

Student asserts that Riverside failed to implement Student's IEP in person. Student specifically notes that he was entitled to all the specialized academic instruction, also call SAI, instructional minutes, speech therapy minutes, and "general education integration minutes" stated in his IEP. Citing to Education Code section 43501, Student asserts, "if Student is not provided at least 80% of the required service, then the district has materially failed to provide the service." Violations of Education Code section 43501, relating to the minimum school day, are not IDEA violations or violations of California special education laws and were not pled in this complaint.

Riverside argues that Student failed to prove it was responsible for changing Student's placement. Riverside further argued it offered many creative, adaptive, and resourceful options to deliver Student's special education and related services via remote learning while school sites were shut down due to state and local government orders.

A district's material failure to implement the child's IEP may violate the IDEA. 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 ex rel. Van Duyn v. Baker School Dist. 5J*, (9th Cir. 2007) 502 F.3d 811, 815.)

The March 2020, United States Department of Education, or US DOE, guidance to school districts regarding their responsibilities during Covid-19 advised:

If an LEA continues to provide educational opportunity to the general student population during a school closure, the school must ensure that Students with disabilities also have equal access to the same opportunities including the provision of FAPE. LEAs, and schools, must ensure that, to the greatest extent possible, each student with a disability can be provided the special education and related services identified in the student's IEP developed under the IDEA ... " (*Questions and Answers on Providing Services to Children with Disabilities During a Covid-19 Outbreak* (U.S.D.O.E., March 2020) Answer to Question A-1 p. 2.)

On March 21, 2020, the US DOE issued supplemental guidance, that stated school districts must provide a FAPE to students with disabilities during the COVID-19 pandemic, but expressly recognized that education and related services and supports might need to be different in a time of unprecedented national emergency.

(*Supplemental Fact Sheet Addressing the Risk of COVID-19 in Preschool, Elementary and Secondary Schools While Serving Children with Disabilities* (March 21, 2020, Office of Civil Rights and OSEP) at p. 2.) It stated that FAPE may include, as appropriate, services provided through distance instruction, provided virtually, online, or

telephonically. (*Id.*, at pp. 1-2.) The US DOE emphasized that the IDEA allowed for flexibility in determining how to meet the individual needs of students with disabilities. (*Id.*, at p. 2.)

On March 31, 2020, pursuant to Executive Order N-26-20, the California Department of Education, or CDE, issued guidance for providing distance learning during the COVID-19 pandemic. That guidance advised districts that, when they provided services to general education students, they were required to provide equitable access to students with disabilities by providing services appropriately tailored to the students' individual needs, to the greatest extent possible. (*Special Education Guidance for COVID-19* (CA Dept. of Education, 3-31-2020) p. 1, § 2.)

On April 27, 2020, the Secretary of Education declined an opportunity provided by Congress to seek relief from IDEA requirements due to Covid-19. (*Policy and Guidance - Report to Congress of U.S. Secretary of Education Betsy DeVos: Recommended Waiver Authority Under Section 3511(D)(4) of Division A of the Coronavirus Aid, Relief, and Economic Security Act* ("CARES Act," April 27, 2020.) Thus, even "[i]f State and local decisions require schools to limit or not provide in-person instruction due to health and safety concerns, IEP teams are not relieved of their obligation to provide FAPE to each child with a disability under IDEA." *Marrero v. Puerto Rico* (D.C. Puerto Rico, 2021) 2021 WL 219195, p. 3.)

IN-PERSON SERVICES

Student's triennial assessment was conducted in January and February 2020, just two to three months before Student's program shifted to distance learning. Student is a child with both autism and intellectual disability. The evidence, including the

assessments, established that, he was minimally communicative, using mostly one-word utterances and other sounds, gestures, and behaviors to indicate his needs and wants. Student's communication and social emotional development, including his ability to interact with others, was equivalent to that of an 18 to 20-month-old. His physical abilities and adaptive skills, including coping independently, eating, dressing, working, toileting, and technology use was equivalent to a three to four-and-a-half-year-old. The evidence further established that Student's cognitive abilities severely lagged behind his chronological age.

At school, Student required constant adult supervision and assistance with personal needs. However, Kirsten Carlson, Student's third grade teacher, and her classroom aides had adequate time to provide the assistance Student needed. Student was not provided a one-to-one aide in the special day class. Carlson established that Student's abilities at school were like those of a toddler. Although Student was in the third grade when she taught him, he was unable to walk to the office unaccompanied or use the bathroom without assistance.

Student was taught in 15-minute rotations to accommodate his attention span. Within those rotations Student often required breaks to complete an assigned task that he did not want to do. Student had difficulty with transitions. Teachers tried to link the various assignments during the day to provide continuity and help Student transition. Student was being taught to ask for breaks instead of exhibiting frustration; but was not able to do so without being prompted.

DISTANCE LEARNING – 2019-2020 SCHOOL YEAR

Pursuant to state and federal guidance Riverside was allowed to offer Student alternatives to in-person services such as distance learning, so long as the alternative

methods of instruction offered FAPE. (*Supplemental Fact Sheet Addressing the Risk of COVID-19 in Preschool, Elementary and Secondary Schools While Serving Children with Disabilities* (March 21, 2020, Office of Civil Rights and OSEP) at p. 2.; *Special Education Guidance for COVID-19* (CA Dept. of Education, 3-31-2020) p. 1, § 2.) On approximately April 6, 2020, Riverside began offering services through a distance learning system. Student's special day class was presented in "synchronous," and "asynchronous" formats. The synchronous format provided direct instruction with the teacher via computer. Parents were also offered the opportunity to schedule additional times for Student to work with the teacher via computer outside the scheduled sessions. Additionally, Student was given packets of work to be completed "asynchronously," that is, without the direct involvement of the teacher. Asynchronous materials were available online and in paper formats. This method of teaching took place from approximately April 6, 2020, to May 28, 2020, which was the last day of the 2019-2020 school year.

Riverside's alternative to in-person services did not offer Student a FAPE from April 6, 2020, to May 28, 2020. The evidence established that Riverside had no record of Student attending the distance learning classes offered from April 6, 2020, through the end of the school year. During the spring of 2020, Riverside's distance learning computer platform tracked the times students accessed the lessons being offered. Carlson also did not "see" Student after March 12, 2020, in synchronous learning sessions. Carlson continually contacted Parents, sending weekly texts and voice mails notifying Parents of the availability of materials and offering additional help outside the synchronous learning hours. Parents did not reply. Riverside had notice Student was not participating in the distance learning offered and did not take further steps to secure Student's participation.

Synchronous learning was the opportunity for Student to interact directly with his teacher and the teacher's aides to work on goals, and for the teacher to provide direct instruction and monitor progress. Because Student did not participate in synchronous learning, Student did not work on his academic or behavior goals. Student's academic and behavior goals during distance learning consisted of managing his personal items at the beginning and end of the day, matching digits to quantities, identifying body parts so he could communicate personal health needs, learning letter sounds, reading curriculum-based single-syllable sight words, and using break cards.

Riverside argues that Parents chose not to participate in the program offered. Near the end of the school year, Parents sent Carlson emails explaining that Student had not participated in distance learning due to connection problems, and interruptions due to responsibilities to their other child. Parents also noted their at-home Applied Behavior Analysis, or ABA, therapist, who helped Student with distance learning, left on May 22, 2020. Carlson was skeptical of the family's late claim of an inability to connect. Carlson reset the family's password and provided instruction regarding the use of the distance learning system when distance learning began. Regardless, Riverside may not excuse its failure to implement the IEP by blaming the Parents. (*Doug C., supra*, at p. 1045.)

Although Parent testified that Student did participate in some distance learning during the Spring of 2020, that testimony was contradicted by Carlson's testimony that the computer logs showed no computer contacts. No evidence described the extent of Student's participation between March and May of 2020. More significantly, no evidence established that any asynchronous work was submitted for teacher evaluation. Even if Student completed some asynchronous work independently, there is no

evidence that Carlson reviewed it. Student's teacher is charged with documenting and determining Student's progress. That is done, in part, by evaluating Student's work. Student did not participate in distance learning from April 6, 2020, to May 28, 2020.

Riverside is correct that during the global pandemic, it was given flexibility in how to provide instruction, including via distance learning. That flexibility, however, was not unfettered. The guidance Riverside relies upon still requires that Student's needs be met. The US DOE letter only allows flexibility, "in determining how to meet the individual needs of students with disabilities." Similarly, California's Executive Order requires equitable access for students with disabilities by providing services, "appropriately tailored to students' individual needs." The evidence in this case, particularly established by Student's teacher Carlson, was that Student did not participate in synchronous or asynchronous instruction from April 6, 2020, through the end of the school year. Riverside is unable to rely on their offers of creative online instruction if the instruction was not implemented.

The evidence established that Student's IEP provided for in person specialized academic instruction. The evidence also established that Student's academic, social emotional, and behavioral needs were not met via distance learning during the 2019-2020 school year. Accordingly, the failure to implement Student's IEP services in person constituted a material failure to implement the IEP and a denial of FAPE. Student also alleged Riverside failed to implement his IEP regarding in-person services because he lacked access to his general education peers. That claim is not analyzed separately. The FAPE denial found was significant and pervasive because Student did not receive educational benefit.

ACCOMMODATIONS

Student also asserted that Riverside failed to offer accommodations during distance learning so that he could access his education. Riverside generally argued that Student failed to meet his burden on this claim.

An IEP must contain a statement of the program modifications or supports that will be provided for the student to advance appropriately toward attaining his annual goals, and to be involved in and make progress in the regular education curriculum. The IEP must also include a statement of any individual accommodations that are necessary to measure the student's academic achievement and functional performance. (20 U.S.C. § 1414(d)(1)(A)(i)(IV), and (VI)(aa); Ed. Code, § 56345, subds. (a)(4), (6)(A).)

As found previously, Student established that he was denied a FAPE from April 6, 2020, through the end of the regular school year because Riverside failed to implement his in-person specialized academic instruction. Riverside's distance learning model did not meet his needs. Student's IEP included accommodations appropriate to an in-person environment, such as preferential seating. It also included some accommodations that could be implemented in a virtual environment, such as using a weighted blanket. However, no accommodations were added or revised via an IEP to address Student's specific needs during distance learning in light of the fact that Student was not accessing his distance learning.

On March 20, 2020, the California Department of Education, also called CDE, issued guidance that stated, when providing instruction through a distance learning model, local educational agencies must create access to the instruction for students with disabilities, including planning for appropriate modifications or accommodations based

on the individualized needs of each student and the differences created by the change in modality. (Cal. Dept. of Educ., Special Education Guidance for COVID-19, COVID-19 School Closures and Services to Students with Disabilities (March 20, 2020).)

The evidence established that Student did not attend synchronous lessons and did not submit any asynchronous assignments. Accordingly, he received no educational benefit from this program during that time. Riverside's global failure to provide an appropriate program to Student during distance learning included the failure to provide accommodations to help him access his education during distance learning. Thus, Student was denied a FAPE for Riverside's failure to offer appropriate accommodations to address his individualized needs and the differences in instruction created by the modality change.

SPEECH AND LANGUAGE

Speech Therapist Kelsey Gouveia confirmed Riverside offered no synchronous speech and language services from April 6, 2020, to May 28, 2020. As a result, Student had no opportunity to work directly with a speech therapist on his communication goals. Student's IEP provided for two 15-minute sessions of group speech and language services each week. Gouveia's experience was that Student was unable to be productive for longer than 15 minutes at a time.

Gouveia created some packets with speech and language exercises that were available to Student online in the weeks between April and May of 2020; but she did not know if he accessed them. This was not an adequate substitute for the two 15-minute sessions of group speech and language per week provided by Student's operative IEP. Riverside had an obligation to provide the in-person speech therapy required by Student's IEP or provide a distance learning alternative that met Student's needs. The

evidence established that Riverside did neither. Riverside's failure to implement Student's speech therapy services during the distance learning program offered from April 6, 2020, to May 28, 2020, was a material failure to implement the IEP. Student established that Riverside denied him a FAPE by failing to implement his IEP, and by failing to provide necessary accommodations from April 6, 2020, to May 28, 2020.

ISSUE 2a: DID RIVERSIDE UNIFIED SCHOOL DISTRICT DENY STUDENT A FAPE DURING THE 2020-2021 SCHOOL YEAR THROUGH MARCH 31, 2021, BY ASSIGNING STUDENT TO DISTANCE LEARNING WITHOUT ASSESSING STUDENT

Student's last day of distance learning instruction was March 31, 2021. This issue, while originally pled through the time of filing, only extends through the time he was enrolled in Riverside's distance learning program. Student again asserts that Riverside should have assessed him before allowing him to participate in distance learning during the 2020-2021 school year. Riverside generally argued that Student failed to meet his burden of proof on this issue.

Towards the beginning of the 2020-2021 school year, Riverside began creating "cohorts" to provide in-person educational opportunities for some students receiving special education and related services. Cohorts were created by assigning Students, teachers, and aides to a particular class and then ensuring that they attended school together in that group, eating lunch, and having recess only with their own cohort. This allowed Riverside to control the number of people the cohort was exposed to while at

school in an effort to minimize the potential for contracting Covid-19. Cohorts also created a means of expedited contact tracing and quarantine should an exposure be reported.

The evidence established that Riverside gave Parents options of the home-schooling program, distance learning, or joining a cohort and returning to the classroom. The first cohorts returned to the classroom in October of 2020. Cohorts were eased back into in-person instruction, beginning with two days a week in-person and three days per week distance learning, ultimately increasing to full time in-person learning by the end of the 2020-2021 school year.

Parents chose to have Student participate in the distance learning program, with its use of a combination of synchronous and asynchronous learning, instead of joining a cohort. Student participated in Brianna Cardenas' fourth grade distance learning class from August of 2020, through March 7, 2021. Parents' decision was based on their concerns that all of the transitions and schedule changes required of cohort participants would be difficult for Student. Parents were also concerned about Student's possible exposure to Covid-19 by returning to in-person instruction. Parents did not think Student would consistently wear a mask.

Riverside staff agreed with Parents that Student did best with a set routine and that changes in the routine were difficult for him to manage. Interruptions to Student's routine, along with requests that Student engage in non-preferred activities, were generally the cause of Student's behavior issues while at school. However, contrary to assertions in his closing brief, Student failed to prove that Riverside recommended that Student continue in distance learning. Student was continually offered opportunities to join newly forming cohorts from the time students began returning to campus.

Regardless, once Parents were offered the option to enroll Student in the distance learning program, Riverside had an obligation to provide FAPE in the alternative program provided.

FAILURE TO ASSESS PRIOR TO DISTANCE LEARNING IN THE 2020-2021 SCHOOL YEAR

Student asserts, without legal authority, that prior to placing Student in distance learning during the 2020-2021 school year, Riverside had a legal obligation to assess him, either formally or informally. Riverside generally argues that Student did not meet his burden of proof in this case.

Student's triennial assessments were completed in 2020. Assessments are only required to be conducted every three years absent a request from a Parent or teacher or a district's knowledge of a need to reassess. (20 U.S.C. § 1414(a)(2)(A); see also Ed. Code, § 56381(a).)

Student presented no evidence that assessments were requested by either Parents or a teacher prior to returning to distance learning in the 2020-2021 school year. Nor did Student present evidence that Riverside had information warranting the need for further assessments to address concerns about Student's ability to function in the distance learning program in the 2020-2021 school year. Student argues in closing that Riverside should have assessed due to its knowledge of Student's inability to access distance learning during the 2019-2020 school year without an aide. However, Student presented no witnesses who testified that assessments were needed to identify Student's needs, even during distance learning. While the evidence established Riverside knew Student was not accessing his education via distance learning, no

evidence established this knowledge warranted an assessment. Nor did Student present evidence of any other assessments that should have been completed prior to Student returning to distance learning education.

As previously discussed, the failure to assess is a procedural violation. Solely technical defects do not rise to the level of a denial of FAPE. (*Amanda J. v. Clark County School District, supra*, 267 F.3d at p. 892; 34 C.F.R. § 300.510(a)(2).) Even had Student demonstrated a need for assessment, which he did not, Student did not present evidence establishing that the lack of assessment resulted in either a denial of educational benefit or a deprivation of Parent's right to participate in the IEP development process. Student failed to prove that Riverside denied him a FAPE by assigning him to distance learning without assessing Student during the 2020-2021 school year to March 31, 2021. Student did not continue in distance learning after March 31, 2021; thus, the applicable time frame for this issue ends on that date.

ISSUE 2a AND 2b: DID RIVERSIDE UNIFIED SCHOOL DISTRICT DENY STUDENT A FAPE DURING THE 2020-2021 SCHOOL YEAR, THROUGH MARCH 31, 2021, BY FAILING TO IMPLEMENT STUDENT'S IEP, SPECIFICALLY IN-PERSON SERVICES AND BY FAILING TO PROVIDE NECESSARY ACCOMMODATIONS TO ENSURE STUDENT COULD OBTAIN A FAPE THROUGH DISTANCE LEARNING?

Student attended distance learning from August 10, 2021, to March 7, 2021 and two additional days on March 17 and March 31, 2021 after returning to the classroom. Therefore, the time frame encompassed by this issue ends on March 31, 2021.

Student contends, that the implementation of his IEP in a distance learning setting “lessened the ability of Student to benefit from his educational curriculum and materially violated the offer of FAPE agreed to by both Parent and District.” Student asserts that Student did not receive his full SAI minutes each day. Student also argues in his closing brief that Riverside’s failure to provide an opportunity for interaction with general education peers was a material failure to implement his IEP. Riverside generally argues that Student did not meet his burden of proof in this case.

As previously discussed, the U.S. DOE and CDE advised districts of their ability to offer alternative means of providing instruction to special education Students during the Covid-19 pandemic, so long as the methods provided FAPE. (*Supplemental Fact Sheet Addressing the Risk of COVID-19 in Preschool, Elementary and Secondary Schools While Serving Children with Disabilities, supra* at p. 2; *Special Education Guidance for COVID-19, supra*, at p. 1, § 2.)

Riverside was aware of Student’s developmental and academic capabilities and needs. Based on information from the 2019-2020 school year, Riverside knew Student was unable to operate or attend to a computer without constant adult assistance; and also knew Student had relied on a Parent or his private ABA therapist to participate in distance learning.

Riverside refined its approach to distance learning beginning in the 2020-2021 school year. Students were offered a full day of classes and different options for asynchronous learning. However, Riverside failed to address the elements of the distance learning program that did not meet Student’s needs. Student has the adaptive

abilities of a toddler. He lacks the ability to log on to distance learning, finds using a mouse difficult, and has a very limited attention span, particularly for non-preferred tasks, such as schoolwork.

Brianna Cardenas, Student's fourth grade distance learning teacher, worked on Student's goals in small groups and individually. She created individualized asynchronous learning materials for Student. However, Cardenas confirmed that Student needed constant assistance to access distance learning and emphasized that he was never by himself when he was participating in her distance learning classes. Riverside knew that Student was not consistently completing asynchronous work. Still, Riverside made no adjustments to Student's IEP to address his inability to access his education.

Cardenas testified that she relied on "service providers" to deescalate Student's behavior when he became frustrated and to implement Student's behavior intervention plan. Cardenas knew that Riverside did not provide Student with in-home adult support; and acknowledged that Student was assisted by either his Mother, or an in-home aide during distance learning. The family had some assistance from an applied behavior analysis aide in the home, which was not provided by Riverside or associated with Student's IEP. The "service provider" support upon which Cardenas relied was outside the IEP process. Cardenas was not able to measure the behavior intervention plan's success or need for modification because it was not implemented within the purview of Student's IEP team.

Nor could Cardenas adequately assess Student's work. Cardenas could monitor Student's online work. However, Student rarely worked online as he found it difficult to use the mouse. Parents had Student do the amount of asynchronous work he could;

and showed that work to Cardenas via the computer's camera, but it was not submitted, nor assessed for progress. Parent informed Cardenas they did not want to push Student too much. They had difficulties with behaviors when Student was asked to complete asynchronous work. Cardenas observed Student's challenges which were consistent with Parents' reports. Yet, no IEP team meeting was called to modify Student's IEP and address Student's inability to access his education.

Student also received no additional support during his final two distance learning days of March 17 and March 31, 2021 while in Jennifer Wilson's fourth grade classroom. Student was unable to access the distance learning instruction without adult support on his final two distance learning days of March 17 and March 31, 2021, due to his lack of attention span, lack of computer skills and lack of support for daily living and behavioral assistance.

The evidence was clear that Student required adult support to access distance learning, which was the method of instruction Riverside offered as an alternative to in-person instruction during the 2020-2021 school year through March 31, 2021. Student required constant adult supervision to access the computer and manage transitions. He could not work on his writing goal without "soft touch" assistance, that is gently placing a hand on Student's hand without guiding it. He required assistance with all basic care needs during synchronous instruction, including toileting.

During the January 27, 2021 IEP team meeting, the team discussed adding Student to a cohort to return to the classroom. The IEP team did not offer that as Student's placement. Rather, Parents were given the option and again decided against it. However, Parents reported that Student needed one-to-one assistance during the day. Parents also informed the IEP team that the parental prompting necessary during

distance learning was “too much.” Despite this information, at no time during the 2020-2021 school year, through March 31 2021, was Student offered any additional supports at home despite Parents’ reports of Student’s struggles with the distance learning platform. The distance learning program, even as adjusted, did not meet Student’s needs.

SPEECH AND LANGUAGE

Adjustments were also made in the distance learning speech and language services Student received. Kelleigh Valdez provided Student two 25-minute group, online, synchronous, speech therapy sessions weekly. Valdez used multiple types of visuals during the speech sessions such as Boom Cards and saw Student making progress on his goals. However, the evidence established that Student was unable to access the computer without adult support. Just as with specialized academic instruction, state and federal guidance allowed Riverside to provide Student an alternative instruction method to in-person services during the Covid-19 pandemic. However, failing to provide adequate adult support to allow Student to access the alternate form of instruction constituted a material failure to implement the IEP.

Riverside’s failure to provide in-person services or, the needed supports for the alternative instructional methods provided due to the Covid-19 pandemic, from August 9, 2020, to March 31, 2021, was a material failure to implement Student’s IEP. As such, Riverside denied Student a FAPE.

Student’s argument that he was also denied a FAPE due to Riverside’s failure to implement the IEP to allow for general education inclusion is not separately addressed here for the same reasons stated previously. A substantive denial of FAPE has been found due to Riverside’s failure to implement a distance learning program that met

Student's needs. Accordingly, the claim that Student also did not have access to his general education peers is not analyzed separately. The FAPE denial found was significant and pervasive because Student did not receive educational benefit.

ACCOMMODATIONS

Riverside knew that Student could not access distance learning during the 2019-2020 school year for his specialized academic instruction and his speech and language services. Despite that knowledge, Riverside offered Student the option to continue in distance learning during the 2020-2021 school year, through March 31, 2021, without considering whether the accommodations in Student's IEP needed adjustment. The evidence established that Student was unable to access his academic, speech and language, or behavior instruction with the provisions of his operative IEP.

The IEP was required to include accommodations necessary to attain his academic goals and measure his academic and functional performance. (20 U.S.C. § 1414(d)(1)(A)(i)(IV), and (VI)(aa); Ed. Code, § 56345, subds. (a)(4), (6)(A).) While Riverside was given latitude to provide alternative methods of instruction during the ongoing Covid-19 pandemic, any alternatives offered had to provide FAPE. (Supplemental Fact Sheet Addressing the Risk of COVID-19 in Preschool, Elementary and Secondary Schools While Serving Children with Disabilities, *supra* at p. 2; Special Education Guidance for COVID-19, *supra*, at p. 1, § 2.) As a result of the COVID-19 pandemic, California Department of Education, also called CDE, issued guidance on March 20, 2020, that stated, when providing instruction through a distance learning model, local educational agencies must create access to the instruction for students with disabilities, including planning for appropriate modifications or accommodations based on the individualized

needs of each student and the differences created by the change in modality. (Cal. Dept. of Educ., Special Education Guidance for COVID-19, COVID-19 School Closures and Services to Students with Disabilities (March 20, 2020).)

Riverside made no efforts to consider Student's known barriers to accessing his education. Student's IEP was not adjusted to add accommodations specific to his needs in the remote educational environment. This failure denied Student a FAPE.

ISSUE 1c AND 2c: DID RIVERSIDE UNIFIED SCHOOL DISTRICT DENY STUDENT A FAPE FROM MARCH 2020 THROUGH THE END OF THE 2019-2020 SCHOOL YEAR, AND DURING THE 2020-2021 SCHOOL YEAR AND THE 2021-2022 SCHOOL YEAR THROUGH SEPTEMBER 28, 2021, WHICH WAS THE TIME OF FILING, BY FAILING TO ADDRESS REGRESSION FROM BEING ASSIGNED TO DISTANCE LEARNING?

Student contends Riverside failed to address signs of regression in his behavior resulting from being assigned to distance learning. Riverside generally argued that Student failed to meet his burden of proof on this issue.

There is no provision in the IDEA requiring that a school district "address regression." While evidence of regression might support an assertion that an IEP was not reasonably calculated to provide educational benefit, and therefore compensatory education is owed, this was not the issue pled.

When the U.S. DOE offered guidance regarding changes in instruction that might need to occur during shelter in place orders resulting from the Covid-19 pandemic, it also acknowledged that, when schools resumed normal operations, IEP teams would

need to evaluate whether, and to what extent, compensatory services would be required. (*Supplemental Fact Sheet Addressing the Risk of COVID-19 in Preschool, Elementary and Secondary Schools While Serving Children with Disabilities* (March 21, 2020, Office of Civil Rights and OSEP) at p. 2.) The California Department of Education advised districts that, if they were unable to mirror the operative IEP offer, they would be responsible for making individualized determinations, in collaboration with the IEP team, regarding whether compensatory education and services would be needed, taking into consideration the student's progress in the general education curriculum, progress towards goals, or evidence of regression. (*Special Education Guidance for COVID-19* (CA Dept. of Education, 3-31-2020) at. p. 2, §3.)

2020-2021 AND 2021-2022 SCHOOL YEARS THROUGH SEPTEMBER 28, 2021

Neither side presented evidence regarding when, or whether, Riverside returned to normal operations during the 2020-2021 school year or the 2021-2022 school year through the date of filing. Regardless, Student did not prove Riverside failed to address Parents' concerns about Student's regression. The evidence established that concerns about his distance learning related regression were discussed at two IEP team meetings: one on January 27, 2021, and one on May 14, 2021.

Prior to Student's return to the classroom, Riverside had held Student's annual IEP on January 27, 2021. The IEP team discussed Student's distance learning related regression at this IEP and options for handling it. Parents decided to continue Student's participation in distance learning due to continued concerns about Student being exposed to the Covid-19 virus and being unable to consistently wear a mask. However, a classroom return was being considered. Parents were to be kept informed of new

cohorts forming. The January 27, 2021 IEP included a behavior intervention plan. The team agreed the classroom teacher would implement the behavior plan when Student returned to school and would collect data. Then the team would meet to discuss any changes needed to the behavior plan.

Student returned to the classroom beginning March 8, 2021. The IEP team met again on May 14, 2021, and discussed Student's distance learning regression. The IEP team, including Parents, decided it would schedule another meeting to discuss Student's behaviors that included Student's at-home ABA therapist.

2019-2020 SCHOOL YEAR

Student also failed to prove that Riverside denied him a FAPE by failing to address regression during the period from March 16, 2020, to May 28, 2020, which was the end of the 2019-2020 school year. Student was not in distance learning until April 6, 2020. Furthermore, Student failed to provide any legal authority that Riverside was required to address regression resulting from distance learning during this time period. At that point, schools had recently closed due to the Covid-19 pandemic. Riverside had not returned to normal operations by the end of the 2019-2020 school year.

Student failed to prove that Riverside denied him a FAPE by failing to address distance learning related regression at any time from March 2020 to the time of filing. The evidence established that Student's IEP team specifically addressed distance learning related regression during two IEP team meetings between March 2020 and the time of filing.

ISSUE 2d: DID RIVERSIDE UNIFIED SCHOOL DISTRICT DENY STUDENT A FAPE DURING THE 2020-2021 AND 2021-2022 SCHOOL YEARS THROUGH THE TIME OF FILING BY FAILING TO OFFER ADEQUATE GOALS IN THE AREAS OF COMMUNICATION, BEHAVIOR, AND ACADEMICS INCLUDING READING, WRITING, AND MATH, FROM JANUARY 27, 2021?

Student asserts that the goals offered in his January 27, 2021 IEP were inadequate. In his closing brief, Student argued that the January 27, 2021 IEP goals were not appropriately written; and that his math goal was vague. Student did not offer any evidence challenging the adequacy of the May 14, 2021 IEP goals. Riverside generally argued that Student failed to meet his burden on this issue.

Student also challenged the lack of occupational therapy goals in the January 27, 2021 IEP. Whether Riverside failed to offer occupational therapy goals was not at issue in the complaint and will not be addressed in this decision.

IEPs must include a statement of measurable, annual goals, including academic and functional goals. Student argued the IEP goals were not adequate but provided no legal authority defining “adequate goals.” For the purposes of this decision, adequate is defined as legally compliant. Legally compliant annual goals must meet the child's needs that result from the child's disability to enable the child to be involved in and progress in the general education curriculum and meet each of the child's other educational needs that result from the child's disability. The goals must also be measureable. (20 U.S.C. § 1414(d)(1)(A)(II); 34 C.F.R 300.320; Ed. Code, § 56345, subd. (a)(2).) Student did not prove that the goals offered in the January 27, 2021 or May 14, 2021 IEPs were inadequate.

Student's January 27, 2021, annual IEP offered goals in the areas of communication, behavior, reading, writing, and math which were intended for use in both the distance learning and in-person environments. Student's communication goals included constructing a grammatically correct three-to-four-word sentence; turn-taking; and answering who, what and where questions. Student's behavior goal continued the effort to have Student consistently ask for a break by using a break card, or a request, rather than exhibiting the need for a break by demonstrating frustration or walking away from his work. Student's reading goal involved learning letter sounds when presented in random order. His writing goal was to independently write his first and last name. While Student could already write his first name, it was often written either too big or illegibly. Student's math goal involved building sets and combining them to total ten.

Student did not prove that the goals were inadequate. Student argued the goals were not appropriately written because they "allowed for non-specific variables to measure the skill level of Student which could possibly attribute Student with a higher or lower skill level than he actually possesses." According to Student, the method of writing the goals did not allow the teacher or speech pathologist to gather objective data on Student's progress.

Student offered the communication goal as an example of an inappropriately written goal. Communication Goal number 1 requires Student to construct either a grammatically correct three or four word sentence, or a coherent phrase, describing the action when shown a picture and asked "what is she doing?" The goal anticipates responses of "She/the girl is running" or "girl is running." Success is measured by Student achieving the goal in four out of five opportunities, with no more than two

verbal cues over three consecutive speech and language sessions. Student objects that the goal allows Student to either utter a coherent phrase or construct a grammatically correct sentence.

Student argues that the purpose of the goal is to assist Student in the ability to construct grammatically correct sentences. However, no evidence of the purpose of this goal was offered at hearing. Student is minimally verbal and currently speaks using one-word utterances when he uses words to communicate at all. At times, he might repeat the word for emphasis, for example, "headphones, headphones!" to get this sensory management tool; or "please, please, please, please!" to indicate he wants something. Student offered no evidence that the communication goal failed to meet Student's needs. The evidence established that the goal was written to expand the length of Student's utterances. Student was making progress towards the goal by May of 2021; however, when pushed too hard in speech therapy groups, he would turn his back and cease participating. Student's speech therapy goal was created to work towards more verbal communication as opposed to requiring Student to communicate with only grammatically correct sentences. This met Student's communication need.

Student also argued the behavior goal, created to teach Student to indicate a need to take a break by either exchanging a break card or requesting a break in place of escaping or avoiding work, was inadequate. Student argues that the goal does not clearly require Student to do one or the other to request a break and that the two methods require different skills. Additionally, Student expresses concern that escaping or avoiding work are "two different antecedents that can cause two different behavioral responses and two different skill levels on the part of Student. Student concludes, based on these arguments, that the goal is not measurable due to the ambiguities. This

argument is unpersuasive. The goal addressed a single need, to replace avoiding behavior to complete work, whether through escape or otherwise. Student provided no authority establishing that alternate tasks, such as exchanging a break card or requesting a break, to demonstrate a skill, such as replacing avoidance behavior, is impermissible. Nor did evidence establish the goal was not measurable.

Student's final example of inadequately written goals was Student's math goal. The goal stated that, given manipulatives, Student would build sets and combine them to sums of ten with 80% accuracy in four of five opportunities as shown by work samples and teacher collected data. Student argues that the use of the word "manipulatives" renders the goal ambiguous as different types of manipulatives would impact Student's ability to execute the skills. Again, Student's argument is unpersuasive. Student provided no legal authority establishing that using different manipulatives to demonstrate a single skill, here combining to sums of 10, is impermissible. Using different manipulates demonstrates Student's ability to generalize the skill. Student also objects that the wording of the goal, which he misquotes, ambiguously describes how the sets are to be built and combined. Student's arguments were unpersuasive and not supported by any evidence.

Student offered no evidence supporting any of his arguments that the goals, as written were inadequate. Nor did Student prove that the goals offered failed to meet his needs. No professional offered the opinion that these, or any other goals in the January 27, 2021 IEP, were inadequately written such that they impeded the teacher or speech pathologist from gathering objective data. No evidence supported the assertion that any goal was written ambiguously. Student's expert, Dr. Alberto Restori, a credentialed school psychologist, and former Board Certified Behavior Analyst, offered

the opinion that the behavior goal was adequate for Student. Parent did not testify as to any concerns he had about the goals offered in the January 27, 2021 IEP. Student failed to meet his burden of proving these claims.

Student failed to present any evidence regarding the lack of sufficiency of the May 14, 2021 IEP goals. Neither Parent, nor Dr. Restori, stated any concerns or offered any opinions regarding the adequacy of the goals. Nor did he argue the lack of sufficiency of the May 14, 2021 goals in his closing brief. Kelleigh Valdez, Student's speech therapist during the 2020-2021 school year, wrote the May 14, 2021 communication goals. Licensed speech pathologist, Valdez, reviewed the goals and persuasively established that the goals were measurable. Student failed to meet his burden of proving the goals offered in the May 14, 2021 IEP were insufficient.

Student failed to prove by a preponderance of the evidence that Riverside denied him a FAPE by failing to offer adequate goals in the areas of communication, behavior, or academics including reading, writing and math from January 27, 2021, to September 28, 2021, which was the date of filing.

ISSUE 2e: DID RIVERSIDE UNIFIED SCHOOL DISTRICT DENY STUDENT A FAPE DURING THE 2020-2021 AND 2021-2022 SCHOOL YEARS THROUGH THE TIME OF FILING BY FAILING TO OFFER SUFFICIENT SERVICES IN SPECIALIZED ACADEMIC INSTRUCTION, OCCUPATIONAL THERAPY, AND SPEECH AND LANGUAGE, FROM JANUARY 27, 2021?

Student asserts in closing that Riverside failed to offer him sufficient services in occupational therapy, from January 27, 2021, through the time of filing. Student

contends that his 2020 occupational therapy assessment demonstrated skill deficiencies in almost every area, thus, Riverside should have offered direct occupational therapy services. Student generally alleged the specialized academic instruction and speech and language services offered were insufficient. Riverside argued generally that Student failed to meet his burden of proof in this matter.

OCCUPATIONAL THERAPY

Tanya Miller, Riverside's occupational therapist, completed Student's occupational therapy needs assessment in February 2020, as part of Student's triennial evaluation. Despite numerous references in his closing brief to a 2021 occupational therapy assessment, Student submitted no evidence of an assessment completed after 2020. When Miller completed her evaluation in January and February of 2020, she observed Student in classes and during testing for three days.

Student was only minimally able to complete the assessments. He often did not understand the instructions and did not like paper and pencil activities. He could not draw shapes that he was asked to copy and traced them instead. He did not understand the concept of matching a picture, instead pointing to the prompt picture; and when asked to place pegs in holes he was unable to do the task with any speed.

In third grade, Student often missed directions or needed one step directions. Carlson established Student was distracted by items such as his headphones especially when asked to engage in a non-preferred activity. She did not have concerns that Student was overly sensitive to noise. However, Student had difficulty attending and paying attention when there was noise in the class or when transitions were necessary. He had poor eye contact and missed opportunities to participate or was not interested in participating in activities with others.

Miller recommended consultation services of 120 minutes yearly in February 2020. The uncontroverted evidence established that consultation was needed to allow Student to meet the goals in Student's then-operative IEP. Carlson was able to adjust the classroom using recommendations from Miller to meet Student's occupational therapy needs. Miller and Carlson persuasively testified that Student did not need direct occupational therapy services. The evidence established that Student had the gross and fine motor skills necessary to access his education without direct occupational therapy services.

Student offered no evidence that he required direct occupational therapy services beginning January 27, 2021, to benefit from his education. No expert testified that Student required direct occupational therapy services from January 27, 2021, forward.

However, the evidence did establish that Student required Occupational therapy consultation. Student's triennial assessment recommended occupational therapy consultation services, and data reported from the assessments, assessor observations and teacher ratings supported the recommendation. Despite this, no offer of occupational therapy consultation services was made in either the January 27, 2021 IEP or the May 14, 2021 IEP. Student proved that Riverside denied him a FAPE by failing to offer sufficient occupational therapy services from January 27, 2021, through the time of filing.

SPECIALIZED ACADEMIC INSTRUCTION AND SPEECH AND LANGUAGE

Student also alleges the failure to offer sufficient specialized academic instruction and speech and language services from January 27, 2021, to September 28, 2021, the date of filing. A substantive denial of FAPE for most of this time was established due to Riverside's failure to implement Student's IEP during distance learning. That failure

included findings that Student was not able to access his specialized academic instruction and speech and language throughout all distance learning. As a FAPE denial was established, it is unnecessary to analyze Riverside's specialized academic instruction and speech and language services offer covering that time. A remedy will be ordered from April 6, 2020, to March 7, 2021, and for the distance learning sessions on March 17 and 31, 2021, for the substantive denial of FAPE related to those areas.

Student did not prove that Riverside failed to offer sufficient specialized academic instruction and speech and language services when Student returned to in-person classes on March 8, 2021. No witness, including Student's expert, testified that the specialized academic instruction offered in the January 27, 2021 IEP was inadequate when student returned to the classroom. Although Dr. Restori initially opined that 30 minutes per week was an inadequate amount of speech and language, ultimately, he conceded he was not qualified to offer that opinion. Dr. Restori was not aware that the January 27, 2021 IEP offered 50 minutes per week of group speech and language services.

No evidence was offered questioning the specialized academic instruction, or speech and language services offered in the May 14, 2021 IEP. Therefore, Student failed to meet his burden of proof as to the sufficiency of the services offered in the May 14, 2021 IEP.

Student proved that Riverside denied him a FAPE during the 2020-2021 school year, beginning January 27, 2021, through the end of the 2020-2021 school year, and from August 9, 2021, through September 28, 2021, which was the date of filing, by failing to offer occupational therapy consultation services. Student's denial of FAPE in the areas of specialized academic instruction and speech and language during distance

learning, was addressed in issues 1b and 2b. Student did not prove that Riverside denied him a FAPE during the 2020-2021 school year beginning March 8, 2021, through September 28, 2021, the time of filing, by failing to offer sufficient services in specialized academic instruction, or speech and language.

ISSUE 2f: DID RIVERSIDE UNIFIED SCHOOL DISTRICT DENY STUDENT A FAPE DURING THE 2020-2021 AND 2021-2022 SCHOOL YEARS THROUGH THE TIME OF FILING BY FAILING TO OFFER SERVICES IN BEHAVIOR FROM JANUARY 27, 2021?

Student contends that the January 27, 2021 IEP failed to offer sufficient programs and services to allow Student to receive educational benefit, particularly due to a lack of services in behavior. Student contends that Riverside did nothing to assess or address Student's behavior outside the behavior intervention plan. Riverside argued generally that Student failed to meet his burden of proof in this matter.

When students with exceptional needs have significant behavioral challenges that have an adverse impact on their learning or the learning of other pupils, or both, the IEP team must consider the use of positive behavior intervention plans to address their learning and behavioral needs. (34 C.F.R. 300.324(a)(2)(i); Ed. Code § 56341.1, subd. (b)(1).) Student is entitled to related services needed to advance towards attaining his annual goal; to be involved in and make progress in the general education curriculum and to participate in extracurricular and non-academic activities; and to be educated to be educated with non-disabled individuals. (Ed. Code § 56345, subd. (a)(4).)

Student did not prove that Riverside failed to offer behavior services from January 27, 2021. The January 27, 2021 IEP offered Student a behavior intervention plan

coupled with a behavior goal, which was implemented through the date of filing. To implement the behavior goal, the special education teacher continually reinforced the “first-then” concept that allowed Student to understand that he would be able to do something he wanted to do after he completed the required academic task. The teacher was also responsible for teaching Student how to use substitute behaviors to demonstrate he needed a break. Instead of indicating frustration by throwing himself at the person working with him, he was being taught to use a break card to show he needed to take a break if something was frustrating him.

The behavior intervention plan specified that Student would be taught and modeled the First-Then concept with a verbal statement and follow-through; he would be taught to ask for a break using a break card and/or verbalization; and that he would be prompted to ask for a break using words or the break card, at which time he would immediately be given a break. Use of the break card was also accompanied by a break or chocolate. If Student hit his head with his hands, staff would block the action with a minimum of attention to the hitting. The behavior plan required that Staff also talked to Student about frustration and handling frustration or the need to do non-preferred tasks. Parent consented to the January 27, 2021 IEP at the time of the IEP.

Student offered no evidence challenging the quality of the behavior plan or the behavior goal offered in the January 27, 2021 IEP. Nor did Student prove that additional behavior services were necessary. No reliable witness testified that Student required additional behavior services. While Dr. Restori generally opined that Student required ABA services in the classroom to address his behaviors and would need them until the behaviors stopped, Dr. Restori’s opinions were not found to be credible.

Dr. Restori acknowledged during questioning that he could provide limited insight into Student's needs as he had limited knowledge of Student. He had never assessed Student or met him in person. His knowledge of Student was limited to a one-hour online observation of Student interacting with his ABA aide in Student's backyard while Parent followed him with a laptop, late on a Friday afternoon. Dr. Restori acknowledged during testimony that the observation was not ideal or optimal and provided only a sense of Student's behaviors. Dr. Restori had reviewed only limited documents pertaining to Student's educational history and could not identify the documents reviewed at hearing. Dr. Restori admitted he had only a "general sense" of Student's situation.

Dr. Restori had not observed Student in an educational setting and had no information regarding how the behavior intervention plan and behavior goal were implemented when Student was in a school setting. Nor did Dr. Restori address why Student's maladaptive behaviors continued, despite the fact that Student had been working with his home ABA therapist steadily during distance learning, since the school sites closed in March of 2020.

Student offered no evidence of specific types of services that should be considered for Student other than Dr. Restori's opinion that Student "needed an ABA to help him find alternative behavior to self-injurious behaviors in a school setting." Dr. Restori's opinion as to the duration of necessary ABA assistance was "it depends." Dr. Restori's opinions were given little weight. No evidence established what an ABA therapist would do in the school setting to augment, or in preference to, the steps being taken by Riverside staff when implementing the behavior intervention plan and behavior goal. Student did not prove that Riverside failed to offer behavior services from January 27, 2021, to the date of filing.

Student failed to meet his burden of proving that he was denied a FAPE because Riverside failed to offer him behavior services from January 27, 2021, to the date of filing.

ISSUE 2g: DID RIVERSIDE UNIFIED SCHOOL DISTRICT DENY STUDENT A FAPE DURING THE 2020-2021 AND 2021-2022 SCHOOL YEAR THROUGH THE TIME OF FILING BY FAILING TO OFFER A ONE-TO-ONE AIDE IN BEHAVIOR AND ACADEMICS FROM JANUARY 27, 2021?

Student asserts that Riverside should have offered him a one-to-one aide to assist him with his behavior, and with academics, from January 27, 2021, forward.

Student proved that he required an aide to assist him with accessing distance learning in the areas of specialized academic instruction, behavior and speech and language. His disability did not allow him to independently access the computer. However, Student failed to present any evidence establishing that he required a one-to-one aide upon return to in-person instruction.

No evidence was presented that the staffing in the special day classroom for students with moderate to severe disabilities was inadequate to provide Student with the needed assistance to access his education. The evidence established that Student's special day classes from March 8, 2021, to September 28, 2021, each had a teacher and three teacher's aides for classrooms that had a population of 10 or fewer students. No evidence was presented that Student received inadequate help to access his education from the existing staff in his special day classrooms. Nor was evidence offered that Student was denied educational benefit due to the lack of a one-to-one aide when he returned to in-person classes.

Student proved that Riverside denied Student a FAPE by failing to provide Student with a one-to-one aide during distance learning. Student failed to meet his burden of proving Riverside denied FAPE from March 8, 2021, to September 28, 2021, the date of filing, except for the two remaining distance learning days of March 17 and 31, 2021.

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 1a:

Riverside Unified School District DID NOT deny student a free appropriate public education, called a FAPE, from March 2020 through the end of the 2019-2020 school year by assigning student to distance learning without assessing student. However, Riverside DID deny Student a FAPE during distance learning, from April 6, 2020 to the end of the 2019-2020 school year, by failing to provide necessary accommodations during distance learning.

Riverside partially prevailed on Issue 1a, and Student partially prevailed on issue 1a.

Issue 1b:

Riverside Unified School District DID NOT deny student a FAPE, from March 16, 2020, to April 5, 2020, by failing to implement Student's IEP,

specifically in-person services. However, Riverside DID deny Student a FAPE from April 6, 2020, through May 28, 2020, the end of the 2019-2020 school year, by failing to implement student's IEP, specifically in-person services.

Riverside partially prevailed on Issue 1b, and Student partially prevailed on Issue 1b.

Issue 1c:

Riverside Unified School District DID NOT deny student a FAPE, from March 2020 through the end of the 2019-2020 school year by failing to address regression from being assigned to distance learning.

Riverside prevailed on Issue 1c.

Issue 2a:

Riverside Unified School District DID NOT deny student a FAPE during the 2020-2021 school year through March 31, 2021, by assigning student to distance learning without assessing student. Riverside DID deny Student a FAPE during the 2020-2021 school year through March 7, 2021, and on March 17 and March 31, 2021, the two remaining distance learning days, by failing to provide necessary accommodations to ensure Student could obtain a FAPE through distance learning.

Student partially prevailed on issue 2a and Riverside partially prevailed on Issue 2a.

Issue 2b:

Riverside Unified School District DID deny student a FAPE, during the 2020-2021 school year through March 7, 2021, and on March 17 and 31, 2021, the two remaining distance learning days, by failing to implement student's IEP, specifically in-person services. Riverside Unified School District DID NOT deny student a FAPE during the 2020-2021 and 2021-2022 school years from March 8, 2021, through September 28, 2021, the date of filing, when he returned to in-person classes. An exception to these dates applies to the last two distance learning days Student attended of March 17 and 31, 2021.

Student partially prevailed on Issue 2b, and Riverside partially prevailed on Issue 2b.

Issue 2c:

Riverside Unified School District DID NOT deny student a FAPE during the 2020-2021 or 2021-2022 school years through September 28, 2021, the time of filing by failing to address regression from being assigned to distance learning.

Riverside prevailed on Issue 2c.

Issue 2d:

Riverside Unified School District DID NOT deny student a FAPE during the 2020-2021 or 2021-2022 school years beginning January 27, 2021,

through September 28, 2021, the time of filing, by failing to offer adequate goals in the areas of communication, behavior, and academics including reading, writing, and math, from January 27, 2021.

Riverside prevailed on Issue 2d.

Issue 2e:

Riverside Unified School District DID deny Student a FAPE during the 2020-2021 and 2021-2022 school years, beginning January 27, 2021 through September 28, 2021, the time of filing, by failing to offer sufficient occupational therapy services.

Riverside Unified School District DID deny Student a FAPE by failing to offer sufficient SAI and speech and language services during distance learning during the 2020-2021 school year, from January 27, 2021, to March 7, 2021, and on March 17 and 31, 2021, the remaining distance learning days.

Riverside DID NOT deny student a FAPE during the 2020-2021 and 2021-2022 school years through the time of filing by failing to offer sufficient services in specialized academic instruction, and speech and language from March 8, 2021, to September 28, 2021, the time of filing, with the exception of March 17 and 31, 2021, the remaining distance learning days.

Student partially prevailed on Issue 2e and Riverside partially prevailed on Issue 2e.

Issue 2f:

Riverside Unified School District DID NOT deny student a FAPE during the 2020-2021 school year through the time of filing by failing to offer services in behavior from January 27, 2021.

Riverside prevailed on Issue 2f.

Issue 2g:

Riverside Unified School District DID deny Student a FAPE during distance learning from January 27, 2021, to March 7, 2021, and on March 17 and 31, 2021, the two remaining distance learning days, by failing to offer a one-to-one aide in behavior and academics. Riverside DID NOT deny student a FAPE during the 2020-2021 or 2021-2022 school years beginning March 8, 2021, through September 28, 2021, the time of filing, by failing to offer a one-to-one aide in behavior and academics when Student returned to the classroom, with the exception of the last two distance learning days of March 17 and 31, 2021.

Student partially prevailed on Issue 2g, and Riverside partially prevailed on Issue 2g.

REMEDIES

Administrative Law Judges have broad latitude to fashion appropriate equitable remedies for the denial of a FAPE. (*School Comm. of Burlington v. Department of Educ.* (1985) 471 U.S. 359, 370 [105 S. Ct. 1996, 85 L. Ed. 2d 385 (*Burlington*)]; *Parents of*

Student W. v. Puyallup School Dist., No. 3 (9th Cir. 1994) 31 F.3d 1489, 1496 (Puyallap.) In remedying a FAPE denial, the student is entitled to relief that is “appropriate” in light of the purposes of the IDEA, specifically providing Student with a FAPE which emphasizes special education and related services to meet Student’s unique needs. (20 U.S.C. § 1415(i)(2)(C)(iii); 34 C.F.R. § 300.516(c)(3); *Burlington, supra*, 471 U.S. 359, 374

School districts may be ordered to provide compensatory education or additional services to a student who has been denied a FAPE. (*Puyallup, supra*, 31 F.3d at pg. 1496.) The authority to order such relief extends to hearing officers. (*Forest Grove Sch. Dist. v. T.A.* (2009) 557 U.S. 230, 243-244, fn. 11 [129 S.Ct. 2484].) These are equitable remedies that courts and hearing officers may employ to craft “appropriate relief” for a party. (*Puyallup Sch. supra*, 31 F.3d at pg. 1496.) An award of compensatory education need not provide “day-for-day compensation.” (*Id.* at p.1497.) An award to compensate for past violations must rely on an individualized assessment, just as an IEP focuses on the individual student’s needs. (*Reid v. District of Columbia* (D.C. Cir. 2005) 401 F.3d 516, 524.) The award must be fact specific. (*Ibid.*)

The evidence established that from April 6, 2020, to May 28, 2020, Riverside failed to implement his IEP and the accommodations in the IEP. The evidence also established that Student was denied a FAPE when Student returned to distance learning during the 2020-2021 school year until March 8 when he returned to in-person classes; as well as on March 17 and 31, 2021, which were Student’s remaining distance learning days. This denial of FAPE was due to Riverside’s failure to provide adequate support for Student at home during distance learning. Riverside was not entitled to rely on Parents or their privately secured ABA therapist to provide the support it knew Student required to access distance learning.

Student failed to offer any evidence of the appropriate remedy for either Riverside's failure to offer Student any instruction from April 6, 2020, to May 28, 2020, or for Riverside's failure to provide adequate support when Student returned to distance learning in the 2020-2021 school year. However, neither was Riverside's staffs' conclusory testimony that Student did not need, and would not benefit from, any compensatory education, persuasive.

Riverside's assertion that it "did the best it could," does not relieve it of its obligation to compensate Student for the FAPE denials determined herein. Riverside presented no evidence that was prevented from inquiring when Student failed to log into the computer for distance learning when it was offered in April and May of 2020. Nor did Riverside presented evidence establishing that it was prevented from offering more support, despite notice that Student was unable to access distance learning without constant adult assistance in either the 2019-2020 or 2020-2021 school years. While the burden of proof to establish a denial of FAPE rested with Student, Riverside had the burden of proof to establish its own affirmative defenses. (Evid. Code § 500. [Except as otherwise provided by law, a party has the burden of proof as to each fact the existence or nonexistence of which is essential to the claim for relief or defense that he is asserting.])

Nor did Riverside offer legal authority for its assertion that, the fact that it did the best it could under the challenging conditions created by the global pandemic, satisfied its obligation to provide FAPE during distance learning. Guidance from both the U.S. DOE and CDE advised districts that failures to provide FAPE would require a remedy, and at least one district court has specifically declared districts are not relieved of their obligation to provide FAPE during the pandemic even if they are limited in their ability to provide in-person services. (*Marrero v. Puerto Rico*, *supra*, 2021 WL 219195, at p. 3.)

The remedies for the period Riverside provided no distance learning instruction and the period Riverside provided distance learning instruction relying on the Parent or Student's in-home aide will be different. Student failed to prove the appropriate remedy in either situation. Therefore, the undersigned will fashion an appropriate equitable remedy taking into consideration the differing circumstances.

Student received neither specialized academic instruction for academics or behavior, nor speech and language services between March 2020 and May 2020. In fashioning appropriate relief, Student's developmental abilities and needs have been considered in addition to the missed educational opportunity. Full consideration was given to the evidence and testimony presented in this case, taking into account that any compensatory education will result in additional work by Student outside school hours or during school breaks, as compensatory education is provided in addition to the educational program provided in Student's IEP.

Student's May 9, 2019 IEP as amended on September 13, 2019, stated Student needed five hours of specialized academic instruction per day in a moderate-severe special days class, and 30 minutes of group speech and language per week to provide FAPE. Hour for hour compensatory education is not a required award. However, it is a reasonable reference point for a period during which no instruction was provided.

As an equitable remedy, Student is awarded 189 hours of compensatory education in the areas of behavior, academics, and speech and language. This compensates Student for the total loss of specialized academic instruction and behavior intervention services that Student should have received from April 6, 2020, to May 28, 2020. Student's operative IEP provided for five hours per day of specialized academic

instruction, multiplied by the 37 days of school from April 6, 2020, to May 28, 2020, not counting minimum days. Student's IEPs all noted that Student would not receive make-up services due to school-wide activities. Added to the resulting 185 hours is an additional four hours Student should have received in speech and language services over the approximately eight weeks of that time period.

The evidence established that Student has significant needs in all areas in which compensatory education is being awarded. This is an equitable remedy. Therefore, the hours may be allocated among the areas of behavior, academics, and speech therapy at Parent's discretion. Due to the nature of Student's disability; his limited attention capacity; his developmental capabilities; and his difficulty adjusting to changes in routine, unfamiliar environments and unfamiliar people, the hours shall be available to Student through June 30, 2025. Parents shall be allowed to elect to access services during summer or other school breaks; or other times they deem best meet Student's needs outside his regular school schedule.

As to the denial of FAPE for failure to provide adequate support during distance learning during the 2020-2021 school year, Student established that he was entitled to aide support during distance learning and that one was not provided. Usually, the remedy provided when a student proves a lack of adequate support is additional support, that is, a one-to-one aide. However, Student failed to prove that he required a one-to-one aide upon return to the in-person setting.

As stated earlier, Riverside cannot evade its responsibility for providing FAPE by relying on Parents to supply needed supports. Therefore, as a remedy for failing to provide the required support, Riverside will require all Jackson Elementary special

education staff who participate in IEPs to attend a 90-minute training explaining how to identify the need for one-to-one support and Riverside's obligation to implement needed supports when a student must be provided instruction in an alternate format or location. This training shall not be provided by Riverside staff.

The totality of the circumstances established have been considered in determining that additional compensatory education for the distance learning program during the 2020-2021 school year will not be awarded. Considerations included the lack of evidence of any type or amount of compensatory education that would benefit Student due to the lack of a Riverside-provided support person for Student to rely on during distance learning; as well as the uncontroverted evidence that adding additional educational demands on top of Student's usual school day present unusual barriers to educational benefit for this particular Student, due to the nature of Student's attention limitations, easily triggered frustration, and the level of his disability.

The evidence also established that Student was not offered any occupational therapy services from January 27, 2021, through time of filing, September 28, 2021. Student failed to offer any evidence of the appropriate remedy for Riverside's failure to offer Student any occupational therapy consultation services. Student offered little evidence of Student's current occupational therapy needs. However, the evidence did establish that Student had occupational therapy needs.

Student lost approximately 22 weeks of occupational therapy consultation during this period. Had Student received consultation during this time, it would have provided his teachers with tools and techniques to help Student. Consultation is intended to help

the teacher be more aware of the options available to assist Student throughout his educational program. Therefore, in missing occupational therapy consultation, Student missed more than the minutes prescribed for the consultation. He missed the benefit of his teachers being more attuned to his needs and the means to address those needs by adjusting the classroom. Therefore, as an equitable remedy for the failure to offer occupational therapy services, Student shall be awarded 22 hours of occupational therapy.

All compensatory education services are to be provided by a certified non-public agency of Parents' choice. Student struggles to adjust to unfamiliar people and environments and has a limited attention span. Therefore, it is anticipated that he will only be able to access his compensatory education in sessions of limited duration. Based on the continuing uncertainty of access to services resulting from the Covid-19 pandemic and the nature of Student's disability, Student shall have until June 30, 2025, to use the compensatory services awarded.

ORDER

1. Riverside shall directly contract with the California certified nonpublic agencies of Parents' choice to provide 189 hours of compensatory academic and behavior instruction, and speech therapy, or reimburse Parents for the cost of securing the listed compensatory services from the California certified nonpublic agencies of Parents' choice, at Parents' election. Parents shall have the right to access these hours through June 30, 2025.

2. Riverside shall directly contract with the California certified nonpublic agencies of Parents' choice to provide 22 hours of occupational therapy; or reimburse Parents for the cost of securing occupational therapy from the California certified nonpublic agencies of their choice, at Parents' election. Parents shall have the right to access these hours through June 30, 2025.
3. Within 15 days of the date of this order, Riverside shall provide Parents with a list of certified non-public agencies that provide academic tutoring, behavior modification speech and language therapy and occupational therapy services to students with moderate to severe disabilities and autism. Parents are not limited to selecting services from the list of providers supplied by Riverside. However, any providers Parents select must be California certified non-public agencies.
4. Within 10 days of receipt of notification that Parents have selected a certified compensatory education provider(s), Riverside shall contact the provider to arrange for direct contract billing or shall provide necessary information to Parents regarding how to submit proof of expenses and attendance for purposes of expense reimbursement, depending on Parents' election of payment method.
5. Riverside shall complete the required 90-minute training detailed in the remedies section of this Decision. This training shall not be provided by Riverside staff. The training must be completed by the start of the 2022-2023 school year.

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/

Penelope S. Pahl

Administrative Law Judge

Office of Administrative Hearings