

BEFORE THE  
OFFICE OF ADMINISTRATIVE HEARINGS  
STATE OF CALIFORNIA

---

CASE NO. 2022070678  
CASE NO. 2022060843

---

THE CONSOLIDATED MATTERS INVOLVING  
  
PARENTS ON BEHALF OF STUDENT, AND  
  
CARMEL UNIFIED SCHOOL DISTRICT.

---

DECISION

November 30, 2022

On June 28, 2022, Carmel Unified School District filed with the Office of Administrative Hearings, referred to as OAH, a Request for Due Process Hearing in OAH Case No. 2022060843, Carmel's Case, naming Student. On July 6, 2022, OAH granted the parties' joint request for mediation and continuance of the due process hearing.

On July 22, 2022, Student filed, a Request for Due Process Hearing in OAH Case No. 2022070678, Student's Case, naming Carmel.

On August 1, 2022, OAH granted Student's Motion to Consolidate Carmel's Case with Student's Case and set the due process hearing dates in the consolidated matter to the dates set in Student's Case. On September 6, 2022, OAH continued the due process hearing for good cause.

Administrative Law Judge Kara Hatfield heard this matter by videoconference on September 13, 14, 15, 20, 21, 22, 23, 27, 29, and 30, and October 4, 5, and 6, 2022.

Attorneys Henry Tovmassian and George Crook represented Student. One or both Parents attended all hearing days on Student's behalf. Attorney Amanda Johnston represented Carmel. Steven Gonzalez, Carmel's Director II of Special Education, attended all hearing days on Carmel's behalf except September 30 and October 6, 2022. Cassandra Ziskind, Carmel's Director of Student Services, attended on Carmel's behalf on September 30, 2022. No one attended on Carmel's behalf on October 6, 2022.

At the parties' request, OAH continued the matter to November 14, 2022, for written closing argument. The record was closed, and the matter was submitted on November 14, 2022.

## ISSUES

### STUDENT'S ISSUE

1. Did Carmel deny Student a free appropriate public education, called FAPE, from April 29, 2022, through the end of the 2021-2022 school year and extended school year, specifically by:
  - A. failing to assess Student in all areas of suspected disability;

- B. failing to provide Student with placement and services comparable to those in Student's October 21, 2021 individualized education program, called an IEP;
- C. failing to identify all of Student's educational needs;
- D. failing in the May 23, 2022 IEP to:
  - i. document appropriate present levels of performance;
  - ii. develop goals in all areas of need, specifically:
    - a. vision; and
    - b. communication with augmentative and alternative communication;
  - iii. offer appropriate accommodations; and
  - iv. offer appropriate placement and services in the least restrictive environment;
- E. predetermining the May 23, 2022 IEP offer;
- F. failing to consider the full continuum of placements;
- G. depriving Parents of an opportunity to meaningfully participate in the development of Student's educational program;
- H. failing to have necessary team members at the May 23, 2022 IEP team meeting; and
- I. failing to make a specific formal offer of FAPE in the May 23, 2022 IEP?

## CARMEL'S ISSUE

- 2. Did the IEP of May 23, 2022, offer Student a FAPE?

## 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.) All future references to the Code of Federal Regulations are to the 2006 version. The main purposes of the Individuals with Disabilities Education Act, referred to as the IDEA, are to ensure: all children with disabilities have available to them a FAPE that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment and independent living, and the rights of children with disabilities and their parents are protected. (20 U.S.C. 1400(d)(1); see Ed. Code, § 56000, subd. (a).)

The IDEA affords parents and local educational agencies the procedural protection of an impartial due process hearing with respect to any matter relating to the identification, assessment, or educational placement of the child, or the provision of FAPE, to the child. (20 U.S.C. § 1415(b)(6) & (f); 34 C.F.R. § 300.511; Ed. Code, §§ 56501, 56502, and 56505; Cal. Code Regs., tit. 5, § 3082.) The party requesting the hearing is limited to the issues alleged in the complaint, unless the other party consents, and has the burden of proof by a preponderance of the evidence. (20 U.S.C. § 1415(f)(3)(B); Ed. Code, § 56502, subd. (i); *Schaffer v. Weast* (2005) 546 U.S. 49, 57-58, 62 [126 S.Ct. 528, 163 L.Ed.2d 387]; and see 20 U.S.C. § 1415(i)(2)(C)(iii).) In this consolidated matter, Student bore the burden of proof on Student's issues, and Carmel bore the burden of proof on its issue. 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 five and a half years old at the time of the hearing. Student resided within Carmel's geographic boundaries at all relevant times. Student previously resided within San Lorenzo Valley Unified School District, which was a member of the North Santa Cruz County Special Education Local Plan Area, called a SELPA, in Santa Cruz County. After Student turned three years old in November 2019, he attended preschool in San Lorenzo Valley during the 2019-2020 and 2020-2021 school years, and transitional kindergarten for the 2021-2022 school year until the end of April 2022. At the end of April 2022, Student moved to Carmel and sought to enroll in transitional kindergarten there for the last month of the 2021-2022 school year.

San Lorenzo Valley initially determined Student was eligible for special education and related services in November 2019, under the eligibility categories of orthopedic impairment, visual impairment, and speech or language impairment. However, San Lorenzo Valley did not document the speech or language impairment eligibility in Student's initial IEP or subsequent annual IEPs. Student's delays in motor control, mobility, vision, and communication interfered with his ability to participate in the general preschool curriculum. As detailed below, the effects of Student's complex medical conditions made Student non-ambulatory, non-verbal, and legally blind. Student's global developmental delays were extreme and required intensive educational services by many specialists, in addition to the medical interventions and therapies provided by varied professionals.

## ISSUES 2 AND 1.A, 1.C, 1.D, 1.E, 1.F, 1.G, 1.H, AND 1.I: DID CARMEL OFFER STUDENT A FAPE IN THE MAY 23, 2022 IEP?

In Issue 2, Carmel asserts it complied with all procedural and substantive requirements in developing and offering the goals, placement, related services, supports,

and accommodations contained in the May 23, 2022 IEP, such that the IEP offered Student a FAPE. Accordingly, Carmel requests an order permitting the school district to implement the IEP without Parents' consent.

Student contends Carmel did not prove by a preponderance of the evidence that the May 23, 2022 IEP complied with all procedural and substantive requirements, so Carmel may not implement the IEP without Parents' consent. Additionally, Student contends the May 23, 2022 IEP was procedurally and substantively defective in specific ways and that Student therefore is entitled to remedies. Parents did not agree with the May 23, 2022 IEP, primarily due to Carmel's proposed placement at a special education center operated by the Monterey County Office of Education because it did not provide Student any exposure to typical peers. Student argues the least restrictive environment for him was to be placed a majority of the time in a general education kindergarten classroom at his local elementary school within the school district, with time outside the general education setting only for related services that cannot effectively be provided inside the general education kindergarten classroom. Parents refused to consent to any part of the IEP except the determination Student was eligible for special education and related services.

Student alleged in Issues 1.A, 1.C, 1.D, 1.E, 1.F, 1.G, 1.H, and 1.I that the May 23, 2022 IEP did not offer Student a FAPE because Carmel:

- failed to assess Student before proposing the IEP;
- did not have necessary team members at the May 23, 2022 IEP team meeting;
- did not identify all of Student's educational needs;
- did not document appropriate present levels of performance;

- did not develop goals in vision and communication with augmentative and alternative communication;
- did not consider the full continuum of placements;
- did not offer appropriate placement and services in the least restrictive environment; and
- did not offer appropriate accommodations.

In Issues 1.E, 1.G, and 1.I, Student also alleged Carmel predetermined the IEP offer, deprived Parents of an opportunity to meaningfully participate in the development of Student's educational program, and failed to make a specific formal offer of FAPE.

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

In general, a child eligible for special education must be provided access to specialized instruction and related services that 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 (*Rowley*); *Endrew F. v. Douglas County School Dist. RE-1* (2017) 580 U.S. 386, [137 S.Ct. 988, 1000] (*Endrew F.*).

Special education is instruction specially designed to meet the unique needs of a child with a disability. (20 U.S.C. § 1401(29); 34 C.F.R. § 300.39; Ed. Code, § 56031.)

Related services are transportation and other developmental, corrective, and supportive services that are required to assist the child in benefiting from special education. (20 U.S.C. § 1401(26); 34 C.F.R. § 300.34; Ed. Code, § 56363, subd. (a) [in California, related services are also called designated instruction and services].)

There are two parts to the legal analysis of a school district's compliance with the IDEA. First, the tribunal must determine whether the district has complied with the procedures set forth in the IDEA. (*Rowley*, supra, 458 U.S. at pp. 206-207.) Second, the tribunal must decide whether the IEP developed through those procedures was designed to meet the child's unique needs, and was reasonably calculated to enable the child to receive educational benefit appropriate in light of the child's circumstances. (*Ibid.*; *Endrew F.*, supra, 580 U.S. 386 [137 S.Ct. at p. 1000].)

If a district determines that a proposed special education program component to which a parent does not consent is necessary to provide a FAPE, the district shall initiate a due process hearing. (Ed. Code, § 56346, subd. (f); *I.R. ex rel. E.N. v. Los Angeles Unified School Dist.* (9th Cir. 2015) 805 F.3d 1164, 1165 (*I.R.*).

*I.R.* clarified that Education Code section 56346, subdivision (f), requires a school district to "expeditiously" request a due process hearing when a district determines, for a student who is already receiving special education and related services, any portion of an IEP to which a parent does not consent is necessary to provide the student with a FAPE. (805 F.3d at p. 1169.) The Ninth Circuit explained,

"If, in the school district's judgment, the child is not receiving a FAPE, the district must act with reasonable promptness to correct that problem by adjudicating the differences with the parents. The reason for this urgency is that it is the child who suffers in the meantime." (*Id.* at p. 1170.)



Procedurally, the parents of a child with a disability must be afforded an opportunity to participate in meetings with respect to the identification, evaluation, and educational placement of the child, and the provision of FAPE to the child. (34 C.F.R. § 300.501B & (c); Ed. Code, §§ 56304, 56341.) States must establish and maintain certain procedural safeguards to ensure that each student with a disability receives the FAPE to which the student is entitled, and that parents are involved in the formulation of the student's educational program. (*W.G., et al. v. Board of Trustees of Target Range School Dist., etc.* (9th Cir. 1992) 960 F.2d 1479, 1483 (*Target Range*) [superseded by statute on other grounds, as stated in *R.B. v. Napa Valley Unified School Dist.* (9th Cir. 2007) 496 F.3d 932, 939].) To fulfill the goal of parental participation in the IEP process, the school district is required to conduct a meaningful IEP team meeting. (*Target Range, supra*, 960 F.2d at p. 1485.) A parent has meaningfully participated in the development of an IEP when he or she

- is informed of the child's problems,
- attends the IEP meeting,
- expresses disagreement regarding the IEP team's conclusions, and
- requests revisions in the IEP.

(*N.L. v. Knox County Schools* (6th Cir. 2003) 315 F.3d 688, 693; *Fuhrmann v. East Hanover Board of Education* (3d Cir. 1993) 993 F.2d 1031, 1036 [parent who has an opportunity to discuss a proposed IEP and whose concerns are considered by the IEP team has participated in the IEP process in a meaningful way].)

The IDEA's procedural safeguards are intended to protect the informed involvement of parents in the development of an education for their child. (*Winkelman v. Parma City School Dist.* (2007) 550 U.S. 516, 524 [127 S. Ct. 1994].) "[T]he informed

involvement of parents” is central to the IEP process. (*Ibid.*) Protection of parental participation is “[a]mong the most important procedural safeguards” in the IDEA. (*Amanda J. v. Clark County School Dist.* (9th Cir. 2001) 267 F.3d 877, 882 (*Amanda J.*).) “Procedural violations that interfere with parental participation in the IEP formulation process undermine the very essence of the IDEA.” (*Id.* at p. 892.)

In a student-filed case that alleges a procedural violation, a procedural violation results in a denial of a FAPE only if the violation

- impeded the child’s right to a FAPE,
- significantly impeded the parent’s opportunity to participate in the decisionmaking process regarding the provision of a FAPE to the child, or
- caused a deprivation of educational benefits.

(20 U.S.C. § 1415(f)(3)(E)(ii); 34 C.F.R. § 300.513(a)(2); Ed. Code, § 56505, subd. (f)(2); *Target Range, supra*, 960 F.2d at p. 1484; see *N.B. v. Hellgate Elementary School Dist., ex rel. Board of Directors, Missoula County, Mont.* (9th Cir. 2008) 541 F.3d 1202, 1208, quoting *Amanda J., supra*, 267 F.3d at p. 892 (a student is denied a FAPE if a procedural violation “seriously infringe[s] the parents’ opportunity to participate in the IEP formulation process”).) The Ninth Circuit Court of Appeals has confirmed that not all procedural violations deny the child a FAPE. (*Park v. Anaheim Union High School Dist.* (9th Cir. 2006) 464 F.3d 1025, 1033, fn.3; *Ford v. Long Beach Unified School Dist.* (9th Cir. 2002) 291 F.3d 1086, 1089.) The Ninth Circuit has also found that IDEA procedural errors may be harmless. (*M.L. v. Federal Way School Dist.* (9th Cir. 2005) 394 F.3d 634, 652.)

In a district-filed case, a hearing officer shall not base a decision solely on non-substantive procedural errors unless the ALJ finds the non-substantive procedural errors resulted in the loss of an educational opportunity to the student or interfered

with the opportunity of the parent to participate in the formulation process of the IEP. (Ed. Code, § 56505, subd. (j).) In district-filed cases in California, the interference with parental participation that will be tolerated is lower, and statutorily distinct from the “significantly impeded” standard applicable in student-filed cases. (Ed. Code, § 56505, subd. (f)(2).)

In resolving the question of whether a school district has offered a FAPE, the focus is on the adequacy of the school district’s proposed program. (*Gregory K. v. Longview School Dist.* (9th Cir. 1987) 811 F.2d 1307, 1314.) An IEP need not conform to a parent’s wishes to be sufficient or appropriate. (*Shaw v. District of Columbia* (D.D.C. 2002) 238 F. Supp. 2d 127, 139 [IDEA did not provide for an “education ... designed according to the parent’s desires.”].) A school district is not required to place a student in a program preferred by a parent, even if that program will result in greater educational benefit to the student. (*Ibid.*) A school district has the right to select the program offered, as long as the program is able to meet the student’s needs, and the district is ultimately responsible for ensuring a FAPE is offered. (*Letter to Richards* (OSEP January 7, 2010).) The Ninth Circuit has held that while the school district must allow for meaningful parental participation, it has no obligation to grant the parent a veto over any individual IEP provision. (*Ms. S. ex rel G. v. Vashon Island School Dist.* (9th Cir. 2003) 337 F.3d 1115, 1131, superseded by statute on other grounds by 20 U.S.C. § 1414(d)(1)(B) (*Ms. S.*)). Therefore, it is important to focus on and analyze whether a school district’s action or inaction “interfered with,” or “significantly impeded” a parent’s opportunity to participate in the development of the IEP, not solely on whether the parent disagreed with the ultimate recommendation of the district, reflected in the offer.

School districts are required to provide each special education student with a program in the least restrictive environment. To provide the least restrictive environment, school districts must ensure, to the maximum extent appropriate, that children with disabilities are educated with nondisabled peers; and that special classes or separate schooling occur only if the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily. (20 U.S.C. § 1412(a)(5)(A); 34 C.F.R. § 300.114(a); Ed. Code, § 56031.)

The continuum of program options includes, but is not necessarily limited to, in increasing order of restrictiveness:

- regular education;
- resource specialist programs;
- designated instruction and services;
- special classes;
- nonpublic, nonsectarian schools;
- state special schools;
- specially designed instruction in settings other than classrooms;
- itinerant instruction in settings other than classrooms; and
- instruction using telecommunication, and instruction in the home, in hospitals, or other institutions. (Ed. Code, § 56361.)

In determining the educational placement of a child with a disability, a school district must ensure that:

- the placement decision is made by a group of persons, including the parents, and other persons knowledgeable about the child, the meaning of the evaluation data, and the placement options, and takes into account the requirement that children be educated in the least restrictive environment;
- placement is determined annually, is based on the child's IEP, and is as close as possible to the child's home;
- unless the IEP specifies otherwise, the child attends the school that he or she would if non-disabled;
- in selecting the least restrictive environment, consideration is given to any potential harmful effect on the child or on the quality of services that he or she needs; and
- a child with a disability is not removed from education in age-appropriate regular classrooms solely because of needed modifications in the general education curriculum. (34 C.F.R. § 300.116.)

To determine whether a special education student could be satisfactorily educated in a regular education environment, the Ninth Circuit has balanced the following factors:

1. the educational benefits of placement full-time in a regular class;
2. the non-academic benefits of such placement;

3. the effect the student has on the teacher and children in the regular class;  
and
4. the costs of mainstreaming the student.

(*Sacramento City Unified School Dist. v. Rachel H.* (9th Cir. 1994) 14 F.3d 1398, 1404 (*Rachel H.*) [adopting factors identified in *Daniel R.R. v. State Board of Education* (5th Cir. 1989) 874 F.2d 1036, 1048-1050 (*Daniel R.R.*)]).

However, the Ninth Circuit has also found that a general education placement is not the least restrictive environment for every special-needs child. In *Poolaw v. Bishop* (9th Cir. 1995) 67 F.3d 830 (*Poolaw*), the Ninth Circuit considered the *Rachel H.* factors and determined that a general education classroom was not the least restrictive environment for the child in question. The Court acknowledged that there was a tension within the IDEA between the requirement that a district provide children with a FAPE to meet their unique needs and the preference for mainstreaming. The Court stated:

In some cases, such as where the child's handicap is particularly severe, it will be impossible to provide any meaningful education to the student in a mainstream environment. In these situations, continued mainstreaming would be inappropriate and educators may recommend placing the child in a special education environment. This allows educators to comply with the Act's main requirement – that the child receive a free appropriate public education. Thus, "the Act's mandate for a free appropriate public education qualifies and limits its mandate for education in the regular classroom." (*Poolaw, supra*, 67 F.3d at p. 834, citing *Daniel R.R., supra*, 874 F.2d at p. 1044.)

If a school district determines that a child cannot be educated in a general education environment, then the least restrictive environment analysis requires determining whether the child has been mainstreamed to the maximum extent that is appropriate in light of the continuum of program options. (*Daniel R.R.*, *supra*, 874 F.2d at p. 1050.)

A school district may have two or more equally appropriate locations that meet the child's special education and related service needs, and school administrators have the flexibility to assign the child to a particular school or classroom, provided that determination is consistent with the decision of the group determining placement. (71 Fed.Reg. 46588 (Aug.14, 2006).) The IDEA does not remove from school authorities control over decisions as to where to allocate resources and locate instructional facilities. (*Letter to Angelo* (OSEP September 13, 1988).) However, special classes that serve students with similar and more intensive educational needs must be made available. (Ed. Code, § 56364.2, subd. (a).)

While the law requires the IEP team to consider the specific school campus a student will attend with attention to how close the campus is to the child's home and what school the child would attend if he or she was nondisabled, the law does not require that a school district place a child at his neighborhood school if there is no program available there to meet his needs. (See, e.g. *McLaughlin v. Holt Public Schools Bd. of Educ.* (6th Cir. 2003) 320 F.3d 663, 672 [least restrictive environment provisions and regulations do not mandate placement in neighborhood school]; *Hudson v. Bloomfield Hills Public Schools* (6th Cir.1997) 108 F.3d 112 [IDEA does not require placement in neighborhood school]; *Urban by Urban v. Jefferson County School Dist.* (10th Cir. 1996) 89 F.3d 720, 727 [IDEA does not give student a right to placement at a neighborhood school]; *Wilson v. Marana Unified School Dist. No. 6 of Pima County*

(9th Cir. 1984) 735 F.2d 1178 [school district may assign the child to a school 30 minutes away because the teacher certified in the child's disability was assigned there, rather than move the service to the neighborhood school].) No one factor is determinative in placement, and parental preference cannot be either the sole or predominant factor in placement decisions. (See, e.g., *Letter to Burton* (OSERS March 20, 1991); *Letter to Anonymous* (OSEP April 20, 1994); *Letter to Bina* (OSERS November 5, 1991).)

## ISSUES 2, 1.F AND 1.G: CARMEL'S FAILURE TO CONSIDER, AND DISCUSS WITH PARENTS DURING AN IEP TEAM MEETING, THE FULL CONTINUUM OF PLACEMENT OPTIONS, SIGNIFICANTLY IMPEDED PARENTS' PARTICIPATION IN THE DECISIONMAKING PROCESS

Carmel contends in Issue 2 that the IEP team meeting on May 23, 2022, included consideration and a discussion of the continuum of placement options, and that Parents were afforded the opportunity to participate in that conversation. Carmel contends Parents shared at the IEP team meeting their opinions about the benefits Student received from exposure to typical peers at school and their opposition to a placement outside general education.

Student contends in Issues 1.F and 1.G that Carmel failed to adequately consider the continuum of placement options by not considering modifications that might be made to the general education curriculum so Student could participate in regular education programs for any part of the school day. Student also contends Carmel did not consider whether any special day class programs operated by Carmel's partner districts nearby could provide Student a placement on a campus with typical peers to facilitate some time for interaction with them. Student contends Carmel's failure to



discuss affording Student opportunities for interaction with typical peers, at least during recess and lunch periods, was both a procedural violation that defeats Carmel's attempt to have OAH approve the May 23, 2022 IEP for implementation without Parents' consent, as well as a procedural violation that entitles him to some remedy.

## STUDENT'S EARLY INTERVENTIONS

Student developed a buildup of excess cerebrospinal fluid in his brain, called hydrocephalus, when he was two months old. He required brain surgery for improved circulation of the fluid, and eventually had a drain, called a ventriculoperitoneal shunt, surgically installed to prevent the fluid from building up and creating pressure within his head. The shunt later had to be surgically replaced before he turned one year old, and remained in his head behind his right ear through the time of the hearing. It was important to avoid direct, forceful contact with that area, which would require follow-up with Student's neurosurgeon. It was also important to avoid pressure on that area as it caused Student discomfort. When Student's shunt malfunctioned, Student displayed excessive sleepiness and inconsolable screaming or crying.

When Student was seven months old, he was hospitalized for seizures. He was diagnosed with epilepsy involving two different types of seizures, and prescribed varying medications over time. One side effect of the epilepsy medication was noted to be "breath-holding spells" during which Student held his breath for extended periods of time until he turned blue due to oxygen deprivation, called cyanosis. These episodes decreased after stopping one specific epilepsy medication, but approximately once per month Student held his breath when he was, according to Mother, upset or frustrated.

At approximately one year old, Student started to receive Early Start services from a teacher of the visual impaired through Santa Cruz County Office of Education due to

- medical diagnoses of optic nerve atrophy in which only 10 percent of Student's optic nerve was not damaged,
- cortical visual impairment, also called cerebral visual impairment, which is a neurological impairment caused by damage to the visual centers of the brain interfering with communication between the brain and the eyes, and
- involuntary eye movements called nystagmus.

He also was diagnosed with myopia, having progressively blurred vision of objects more than 13 inches away from his face, but glasses were not initially recommended for the nystagmus or myopia. Shortly before he turned two, Student was diagnosed as legally blind.

Student received services from the same teacher of the visually impaired for four and a half years, Ali Chapin Kele, from Early Start services in 2017 until he moved to Carmel in April 2022. In May 2019, Kele documented Student visually attended to lighted objects of a variety of sizes and colors in a dim or dark room. When he was in a familiar environment and things were calm, he was able to use his vision to focus and maintain attention on lights or lighted objects, usually using his peripheral vision. Student indicated he saw something by quieting his body, opening his eyes wide and sometimes his mouth, too, and vocalizing or smiling. Mother told Kele overhead lighting seemed to be the worst environment for Student to use his vision. Kele reported Student used his hearing as his main mode of learning and accessing the world around him, and he used his tactile sense to touch, hold, and activate new objects, textures, and toys with his hands and feet.

In May 2019, Kele administered the Oregon Project Skills Inventory, a method of measuring skills in a variety of domains of a young child with visual impairment. When Student was two and a half years old, he was gaining skills in the social and compensatory areas that were in the range for two-to-three-year-old children, and in the other domains of cognitive, language, vision, and self-help, he was increasing skills that were within the birth-to-one-year and one-to-two-year age ranges.

Shortly after Student turned two, he received bi-monthly, then weekly speech therapy as part of his individualized family service plan under Early Start education, to target joint attention skills and build receptive and expressive language development. When he was two and a half, the speech therapist evaluated Student using the Receptive-Expressive Emergent Language Test, Third Edition, which is for individuals from birth through age three, designed to assist in identifying infants and toddlers who have language impairments or who have other disabilities that affect language development. Results of this instrument are obtained from a caregiver interview. Based on Mother's responses to the inventory, Student demonstrated receptive language skills that were equivalent to a child 10 months old. When someone was talking, he usually listened without being easily distracted by other sounds or competing noises. He appeared to enjoy hearing words that named familiar objects. He often stopped what he was doing and seemed to listen to conversations between people. He regularly stopped if someone called his name. He showed interest when he heard music. And he showed signs he knew what words like daddy, mama, and bye-bye meant.

Based on Mother's responses to the inventory, Student demonstrated expressive language skills that were equivalent to a child eight months old. He made playful babbles and chatter, and when he sensed someone, he attempted to start babbling or

chattering to that person. He made sounds while his body was still, made combinations of sounds spontaneously, and sometimes made the same sound over and over again such as "aaa-aaa." He let caregivers know he was unhappy or angry making sounds other than crying. As of May 2019, he communicated preferences and protests using nonverbal communication skills including body tensing, moving his left hand intently to indicate "no" or "all done," and he used vocalizations to protest, explain, and engage, in addition to not protesting to communicate "yes." Student sometimes turned his head toward people who were speaking to him if they asked him to do so. Student started to reach for objects when they were placed near him or barely touching his hand, and he felt the object with assistance. This technique was being used to teach Student about everyday objects to assist in developing his receptive language vocabulary.

The speech therapist initially developed five goals in January 2019 and reported progress in May 2019. The first goal was for Student to say "dada" and "mama" consistently and with intent three times a day. This goal was not met. Student was "starting to attempt to imitate vowels on command with delayed processing of up to 30seconds to one minute." The speech therapist recommended that the goal continue and to target consistent vowel imitation, and once that was met to move to consonant-vowel and vowel-consonant imitation.

The second goal was for Student to use a variety of gestures with intent to communicate, including putting his arms up, clapping, or waving during familiar songs and games at least 10 times throughout the week. The speech therapist reported the goal was in progress, as Student used gestures and body language to communicate at times. The speech therapist was focusing on having Student reach when a toy or familiar object was placed barely touching his hand as well as hand-over-hand gestures.

The third goal was for Student to purposefully and consistently verbalize at least five words or word approximations to get his wants and needs met throughout his daily routines. This goal was not met. The speech therapist recommended that the first goal be focused on at that time so Student could find success in imitating on command, to work his way towards attempting more single-syllable words.

The fourth goal was for Student to indicate making a choice between two items by verbalizing and or making a gesture, or physical movement, or touching a preferred item at least 10 times throughout the week. This goal was not met. The speech therapist referred back to the second goal and stated once Student was able to begin reaching for preferred objects, the fourth goal would be appropriate to implement at that time.

The fifth goal was for Student to increase his ability to imitate an early developing speech sounds repertoire to produce a variety of consonant-vowel, vowel-consonant, consonant-vowel-consonant, and consonant-vowel-consonant-vowel "word shapes" at least five times a week. The goal was in progress. Student had started to imitate some vowels on command. Most of Student's vocalizations were uttered spontaneously and when observing Student's phonological repertoire in that fashion, Student had the ability to vocalize a variety of vowels and consonants. The speech therapist recommended adults imitate Student's vocalizations, teaching him how to imitate in addition to encouraging him to continue to make and repeat those vocalizations.

These early goals are significant in that they illustrate how long specialists have been working with Student to improve his abilities in very fundamental skills, which are

foundational to tasks and communication with higher complexity. By the time of the May 23, 2022 IEP team meeting in Carmel, Student still was not able to do some of the communication goals set out for him in January 2019.

At age two and a half, Student was diagnosed with cerebral palsy. He had very low muscle tone, called hypotonia, in his trunk and neck. Student had limited mobility. He was able to roll from his stomach to his back and from his back to his stomach without help, and moved from one place to another by repeatedly rolling, or creeping. He wore a back brace for trunk support.

Student's health care team included a

- pediatrician,
- neurologist,
- neurosurgeon,
- endocrinologist,
- ophthalmologist,
- orthopedist,
- developmental pediatrician,
- dietitian, and
- a specialized optometry clinic at UC Berkeley.

He also received physical and occupational therapy, in addition to the speech services and Early Start education with a teacher of the visually impaired.

## SAN LORENZO VALLEY'S NOVEMBER 2019 ASSESSMENTS

Just before Student turned three years old in November 2019, the San Lorenzo Valley conducted an initial assessment for eligibility for special education and related services. This was the only comprehensive educational evaluation that had been completed by the time of the due process hearing.

San Lorenzo Valley evaluated Student's cognitive and academic functioning. Based on Student's inability to perform the tasks required by the standardized instrument used, Student's scores on the four subtests and the two composite score categories were all in the very low range, below the first percentile. According to his performance on this instrument, the best estimate of Student's cognitive functioning was in the very low range.

San Lorenzo Valley evaluated Student's self-help and adaptive skills. Based on Mother's responses on the rating scale about Student's adaptive skills in the home environment, Student was functioning within the extremely low range relative to individuals of comparable age, both overall and within almost every category.

On the communication subscale, Mother reported Student was able to listen closely for at least one minute when people talked, and raised or lowered his voice to express different feelings or needs. Mother reported Student was "never or almost never" able to shake his head yes or no in response to a simple question.

On the leisure subscale, Mother reported Student was functioning in the average range and that it was a relative area of strength. Mother reported Student "always or almost always" was able to wait his turn in games and other fun activities, and play

simple games with playmates without adult supervision. Student had three older sisters he frequently played with, and also cousins he had opportunities to roll around on the floor with.

On the social subscale, although Mother's rating showed Student functioned in the extremely low range, it was also a relative strength for Student. Mother reported Student was "always or almost always" able to seek friendships with others in his age group. Mother reported Student could not lift his arms to express a desire to be picked up, or show respect for people in authority by following rules and directions.

On the safety subscale, Mother reported Student was "always or almost always" able to swallow liquid medicines as needed, without fussing, and to sit still in a high chair without climbing or sliding off. Student could not show, point to, or tell another person about a cut, bruise, or other minor injury. He also could not refrain from putting non-edible objects in his mouth.

On the self-care subscale, Mother reported Student was "always or almost always" able to open his mouth when offered food on a spoon and swallow, or manage soft food such as baby food or applesauce.

To assess Student's development and functioning in five key areas of development – physical, adaptive behavior, social-emotional, cognitive, and communication – San Lorenzo Valley used the Developmental Profile, Third Edition. Mother completed the rating scale. Student's general development score was below the first percentile, in the very low range. When he was three years old, his age-equivalency scores in these domains were six months, four months, two years and four months, 12 months, and 12 months, respectively.



In areas that were significant to the debate between Parents and Carmel in May 2022, Mother reported in November 2019 Student could not hold things in both hands and bang them together or use pencils or crayons to make marks on any surface. Mother also reported Student could indicate he wanted "more" or "another" using words or gestures, could clearly understand what a person meant when they said "no," and could not imitate spoken words such as dada or mama.

When the San Lorenzo Valley IEP team met to review the results of the assessments, the IEP team considered eligibility for special education under the category of intellectual disability due to Student's low cognitive functioning score and low adaptive behavior score. However, the San Lorenzo Valley IEP team believed it was too early to conclude Student met eligibility under the category of intellectual disability because the current standardized assessments might not have accurately reflected Student's abilities at his early age, especially in light of his other impairments.

San Lorenzo Valley assessed Student's communication by a speech-language pathologist who administered the same instrument the Early Start speech therapist administered six months earlier, using parent interview. Student's ability scores remained the same.

Additionally, San Lorenzo Valley's speech-language pathologist administered another instrument that also relies on parent responses as well as observation of a child. Student's auditory comprehension and expressive communication standard scores were in the first percentile.

As related to the later debate between Parents and Carmel about Student's abilities and the progress he made in the years before he arrived in Carmel, the initial

eligibility evaluation included the following information. In receptive language, regarding how Student understood auditory and nonverbal communication or information, Mother reported Student demonstrated the following skills:

- glancing momentarily at a person who spoke to him;
- enjoying caregivers' attention;
- reacting to sounds other than voices in the environment;
- turning his head to locate the source of sound;
- responding to a new sound;
- actively searching to find a person who was talking;
- mouthing objects;
- shaking and banging objects in play;
- anticipating what would happen next;
- looking for an object that fell out of sight; and
- sometimes kissing on cue.

The assessor observed Student responding to a person talking to him by shifting his head and vocalizing in response. Based on Student's nonverbal behavior in response to certain words, Mother was confident Student understood at least 20 words, including the names of his five immediate family members, the names for different locations in which he was placed at home such as his bed, stander, sensory room of toys, and outside. Mother was also confident Student understood the names of his favorite foods and the names of several other objects or activities such as his nose, the television, and singing songs.

In expressive language, regarding how Student communicated verbally and nonverbally with others, Mother reported Student had the following skills:

- a suck and swallow reflex;
- vocalizing soft throaty sounds;
- vocalizing pleasure and displeasure sounds using vocal intonation;
- protests by vocalizing in a negative tone and bringing his left arm down;
- vocalizing when talked to and moving his arms and legs during vocalizations;
- attempting to imitate facial expressions and movements;
- seeking attention from others by vocalizing with a rising intonation;
- vocalizing two different vowel sounds of the A in cat and the O in hot, and the OI in boy;
- combining sounds for "mo" and "ba";
- taking multiple turns vocalizing;
- vocalizing two different consonant sounds of "mmm" and "guh"; and
- babbling two syllables together of bubu and gaga.

The assessor observed Student vocalizing using single syllables and vowel cooing sounds with varying intonations. Mother interpreted the intent behind the sounds as either negative or positive. Student's early intervention services providers reported Student made choices that were presented verbally by being quiet around the time that he heard the preferred choice, adjusted for some processing delays. Student indicated he did not want something by fussing, crying, and/or moving one hand down and away from his body like a single-sided sign for "all done." The early intervention services providers also reported Student verbalized word approximations in specific contexts for

"more," "no," "hi," and "yeah," sometimes with a correct consonant but a different vowel, such as "nuh" for no, and spontaneously produced vowel sounds of uh, oh, ah, oi, and ee to vocalize pleasure or displeasure. During a familiar song, Student sometimes imitated a head shake for "no," but did not spontaneously use a head nod for "yes."

In exploring augmentative and alternative communication, Mother and the early intervention services providers were working with Student on recognizing objects and pictures and understanding that by looking at the pictures, people would know what Student wanted. He looked at objects or pictures on a full-size piece of paper when asked to do so, but did it with fleeting eye gaze. He was working on activating switches of two different sizes and styles. Both had songs recorded on them and when he was "in the mood," he moved his arm and activated them. Different songs were recorded to see if he had preferences. He also had a few ready-made switches that made different sounds such as a horn, space sounds, and music, and he demonstrated a preference for one or more of those sounds. Although Student was able to activate a type of switch called a Big Mac, he was not using it to communicate.

San Lorenzo Valley's physical and occupational therapists evaluated Student's gross and fine motor development using the Michigan Early Intervention Profile. Student's gross motor development was at approximately the three-to-five-months-old level. Mother reported Student could pivot on his tummy and was starting to scoot forward on his belly a little. Student's head generally rested to the right and dropped forward. He could not get himself into a sitting position and needed maximum assistance to sit on the floor in any posture, but with that level of assistance he held his head more in midline briefly. He had more success with head control, and needed less assistance, when he wore a trunk support. Student could not stand on his own and required adult assistance for supported standing. In the supported standing position,

Student could support the majority of his weight through his lower extremities. His head control appeared best in a standing position, during which he maintained his head more in midline, but his head primarily rested to the right with a forward drop. Mother reported Student was beginning to take some steps when supported and facilitated to step, but was not initiating steps when in the supported standing position. The physical therapist recommended school-based physical therapy to address

- floor sitting at circle time,
- standing at a support surface,
- transitioning from a sitting to standing position at a support surface,
- integration of equipment,
- encouraging independent mobility, and
- positioning within the classroom.

The San Lorenzo Valley occupational therapist attempted to administer a particular standardized instrument in November 2019, and found it was not appropriate at that time. She therefore relied on the Battelle Developmental Inventory from the May 2019 report by the early intervention services occupational therapist, as well as her own observation of Student. Student's development was at the stage of a four-month-old child. San Lorenzo Valley's occupational therapist had Mother complete the Sensory Processing Measure rating scale. Mother's ratings indicated Student had some tactile defensiveness to touch. The occupational therapist recommended school-based occupational therapy with a focus on fine motor and sensory processing skills.

Teacher of the visually impaired Kele prepared a functional vision assessment for Student's initial special education evaluation. After Kele's report in May 2019, Student was examined at the UC Berkeley Special Visual Assessment Clinic in June 2019. The doctor recommended

- minimizing clutter and crowding when presenting educational materials,
- using tactile and real objects before using pictures,
- keeping pictures simple and using the primary colors to increase visibility and contrast, and
- to present items between six and 12 inches high within one to two inches of Student's central vision.

Mother reported Student saw best in low lighting and natural lighting, with items illuminated by direct lighting as opposed to overhead lighting.

On the Oregon Project Skills Inventory in November 2019, Student's relative strengths were still in the social and compensatory areas, where he still was gaining skills in the two-to-three-year age ranges, and in other domains had almost met all skills in the zero-to-one and one-to-two-year age ranges. Kele noted Student benefited from breaks after therapy sessions because he could be engaged in activity for 60 to 90 minutes, including eating, and then needed at least 30 minutes of time without activity. Kele stated Student was eligible to receive direct services from a teacher of the visually impaired due to his visual diagnoses, specifying services would be no longer be provided at home but instead in Student's classroom, working with Student, his teachers, and his aide to adapt and modify the curriculum for him to best visually engage with his environment. Kele recommended direct service to Student

once per week for 60 minutes, with additional consult time as needed with his teachers and Parents. She did not recommend braille instruction due to his age and fine motor issues.

The San Lorenzo Valley school psychologist who prepared the integrated initial assessment opined in the November 13, 2019 report that Student “would be best served in an environment that is highly structured and routine oriented,” specifically the special day class at the district’s preschool, called Ludlow Preschool. Ludlow was located on property adjacent and interconnected to the San Lorenzo Valley Elementary School, San Lorenzo Valley Middle School, and San Lorenzo Valley High School campuses, which were all situated on one large plot. The school psychologist also recommended a one-to-one aide in that special day class environment to meet Student’s needs.

### SAN LORENZO VALLEY’S INITIAL IEP NOVEMBER 2019

The San Lorenzo Valley IEP team met on November 13, 2019, just before Student’s third birthday. After reviewing the assessment reports, the IEP team determined Student’s primary disabling condition impacting his access to education was orthopedic impairment, and his secondary disability impacting his learning was visual impairment. Student also met eligibility criteria as a student with a receptive and expressive language delay constituting a language disorder, but the IEP team did not add a third eligibility to his IEP.

The IEP team determined Student required goals in the areas of fine motor skills, sensory stimulation, social skills, initiative and learning, group participation, expressive

and receptive language, mobility, sitting, and vision to receive educational benefit. The IEP team discussed Student's present levels of performance in those areas and developed 10 goals to be achieved by November 2020.

Parents requested Student be placed in a general education preschool with supplemental supports. San Lorenzo Valley IEP team members shared their perspectives, questioning whether Student would be able to access the general curriculum in a general education preschool, and opining that the general education preschool was not set up to allow the structure and modifications necessary to accommodate Student's needs. Teacher of the visually impaired Kele opined that in the general education environment, at times there was too much responsibility placed on an instructional aide to do the work of the preschool teacher. A representative from the Santa Cruz County Office of Education stated a special day class could allow for multiple supports Student needed to be built into that classroom. The IEP team discussed the placement that would serve Student's needs and considered all options up to and including specialized academic services for the majority of the day in a preschool program run by the Santa Cruz County Office of Education with or without related services supports, for students challenged by "severe handicaps."

Because Student's global delays, including orthopedic and visual impairments, required specialized equipment and instruction for him to access the curriculum, San Lorenzo Valley offered specialized academic services for the majority of the day in the district's preschool program at Ludlow Preschool with related services and supports, including a dedicated one-to-one aide for the duration of his school day including any time with general education peers, called mainstreaming or inclusion.



San Lorenzo Valley did not provide preschool to students who did not have disabilities. Therefore, mainstreaming opportunities did not exist in their preschool program. A general education Head Start program, not operated by San Lorenzo Valley, was held in the Ludlow building classroom next to San Lorenzo Valley's special day class preschool. The Head Start program shared the playground with the San Lorenzo Valley special education preschool students, and that was the only mainstreaming opportunity the San Lorenzo Valley preschool students had. At Mother's request, San Lorenzo Valley agreed to start a conversation with the general education preschool program to allow some students to have general education inclusion time, in addition to the shared playground.

San Lorenzo Valley placed Student 85 percent of the time in special education, and 15 percent of the time in the regular class, extracurricular, and nonacademic activities. The outbreak of the novel coronavirus, known as COVID-19, closed schools before San Lorenzo Valley achieved any general education time for Student apart from the shared playground at recess.

In March 2020, San Lorenzo Valley closed school campuses due to the COVID-19 pandemic and Student began receiving instruction and related services at home through videoconferences with his teachers and therapists, supported by Mother to access the sessions through videoconferencing for the remainder of the 2019-2020 school year.

The 2020-2021 school year started in distance learning, until March 2021.

## STUDENT'S OCTOBER 2020 ANNUAL IEP IN SAN LORENZO VALLEY

Student's San Lorenzo Valley IEP team met on October 29, 2020, for his annual IEP team meeting. Final reports on Student's progress on the November 2019 IEP's goals were not included in evidence. The provider reports, summaries of his present levels of performance, and new goals indicated Student's progress in all areas was very slow and did not match the level of skills the IEP team had anticipated Student could achieve in one year. For example, in the area of fine motor skills, Mother reported Student sustained a right-handed grasp on three of four occasions for at least two minutes, so Mother stated he doubled his grasp time from one year before but did not achieve the goal to hold an object for five minutes. Further, his baseline the year before had been that he already could hold a soft object like a washcloth for two minutes.

The physical therapist reported Student's gross motor skills in floor mobility, sitting, supported standing, transition, and mobility were basically unchanged from the prior report. The level of assistance Student needed while sitting decreased from maximum to moderate assistance at his upper trunk to sit in ring sit – which is the posture in which most infants and toddlers sit, with their legs bent in front of their bodies –, criss-cross, or heel sit. Also, whereas a year before he could not get into a sitting position by himself, he had begun to assist with pushing to sit up using his arms, with his best ability when pushing with his left arm. He still was not taking steps when supported and facilitated to step. In a device called a Kidwalk gait trainer, he was

beginning to take steps forward with encouragement, and pushed back with both legs. Before the pandemic closure, he was standing in a Kidwalk at school about 20 minutes per day.

In the domain of communication, Student expressed displeasure using facial expressions, moving his body away from an item, vocalizing a "ng" sound, crying, and putting his hand in his mouth. Context and a combination of cues had to be considered as some of the signals alone did not indicate displeasure. He made six specific speech sounds. He smacked his lips to approximate the M in "more," approximated the "ah" in "all done," and had verbal approximations for "hi" and "hug." His gestures included a one-sided left "all done" approximation and goodbye wave, both of which were inconsistent.

Student imitated sounds and word approximations in his repertoire in approximately two out of five opportunities when given a 15 to 30 second wait time and a facial tactile prompt. He was not yet imitating gestures. Student activated a switch with either hand to indicate he wanted more of a preferred activity such as a song or book, but had not expanded that to mealtimes, during which he indicated he wanted more by opening his mouth or smacking his lips. Student also had a "touch chat" device with a grid size of two to participate in group activities to verbalize choices throughout the day, but he required modeling and hand-over-hand assistance to activate a button on the device.

Student's special day class teacher reported Student enjoyed being around other children. Student especially liked receiving the undivided attention of his teachers and therapists. He communicated his feelings with happy vocalizations and cried when he was frustrated. Mother previously told the teacher Student would hold his breath when

he was very upset and that it was his version of having a tantrum. The teacher reported this occurred at school one time during snack. The teacher concluded Student was trying to get the undivided attention of the adults and he stopped holding his breath once he received the attention he sought. Mother reported the biggest challenge was interpreting Student's attempts to communicate and express his wants, needs, and feelings. The teacher agreed it was difficult to know what Student was trying to communicate with his crying in the classroom.

While homebound during the pandemic, Parents worked with Student on toilet training. He used an adaptive toilet seat that fit over the toilet and had many guides and supports to stabilize Student's body in a seated position. Student voided in the toilet approximately once per day, and practiced sitting on the toilet three to four times per day. San Lorenzo Valley ordered an adaptive toilet seat to have at school and planned to create and continue a toileting schedule similar to what Parents were following at home when on-campus learning resumed.

Teacher of the visually impaired Kele reported Student visually engaged with a computer screen showing cortical/cerebral visual impairment-adapted pictures and stories, given the correct positioning and dependent on his mood and health. As Kele had twice previously reported, when Student was in a familiar environment and things were calm, he was able to use his vision to focus and maintain attention, usually using his peripheral vision, at lights and/or lighted objects, as well as brightly colored objects with directional lighting. Student continued to show he saw something by quieting his body and opening his eyes and sometimes mouth wide, often vocalizing and/or smiling. Mother reported Student continued to see best in low lighting and natural lighting, with items illuminated by direct lighting. Student's ophthalmologist explicitly did not

recommend using visual gaze for choice-making, so Kele continued to use auditory scanning and partner-facilitated scanning to present options to Student and assist him in making choices.

The San Lorenzo Valley IEP team determined Student required goals in the areas of fine motor skills, sensory stimulation, transitions, group participation, expressive and receptive language, mobility, sitting, and vision to receive educational benefit. The IEP team discussed Student's present levels of performance in those areas and developed nine goals to be achieved by October 2021.

Although all students were receiving distance learning at home due to the COVID-19 pandemic at the time of the October 29, 2020 IEP team meeting, the San Lorenzo Valley IEP team continued to offer Student placement in a special day class at the same preschool campus, with 80 percent of his time in special education, and 20 percent of the time in general education.

Student had three seizures before it was identified that his shunt was not working correctly. He had a shunt revision surgery at the end of February 2021.

Student's preschool reopened in March 2021, at first only two days a week for the remainder of the 2020-2021 school year. Student attended in-person instruction for his special education and related services on campus the two days a week it was open, with videoconferencing services the rest of the time, until he had major surgery on his right leg on April 6, 2021, and was recovering after that.

## STUDENT'S OCTOBER 2021 ANNUAL IEP IN SAN LORENZO VALLEY

Student's preschool re-opened for on-campus learning full time in August 2021. At the start of the 2021-2022 school year, San Lorenzo Valley arranged for Student to spend his 20 percent general education time participating in a transitional kindergarten class on San Lorenzo Valley's elementary school campus, adjacent to Student's preschool. Student started each morning in the transitional kindergarten classroom with his one-to-one aide for 45 to 60 minutes, and then the aide pushed Student in his wheelchair to his special day classroom. The 10- to 15-minutes travel time served as a break for Student. Student spent the remainder of his day in the special day class receiving special education and related services.

San Lorenzo Valley held an annual IEP team meeting for Student on October 21, 2021, when Student was one month away from turning five years old. Of Student's nine goals in the October 2020 IEP, he met only two. Student met his transition goal, having smooth transitions over at least three school activities daily. His preferred position at school was lying down. He tended to protest most when being transferred from the floor back into his wheelchair, and it took him time to settle in. He typically signed "all done" right away. He also met his goal to contribute to a small group activity by activating a switch, using a vocalization, or a sign to greet peers or teachers, or otherwise engage in a conversational exchange frequently. Student used a lip-smack sound to indicate choices for songs during circle time and to contribute or participate in conversational exchanges with teachers and peers. Classroom staff interpreted his head

shake as a “no” and responded accordingly. There were several instances where Student was upset and cried. However, by using partner-assisted scanning, staff was able to help Student communicate what the problem was.

Student made some progress toward other goals. In expressing his choice between two familiar objects and something different, during speech therapy sessions Student used a kissing or lip popping sound to indicate “yes,” and an arm movement down to indicate “no.” His answer response time was sometimes beyond 30 seconds or was delayed due to extra environmental stimuli or illness. He responded best with highly motivating activities and when placed on the floor instead of in his wheelchair. Similarly, with his goal to take a communicative turn by either imitating a sound, word, or gesture, or by sharing his own novel expression, Student took his turn using a kissing sound or arm swipe to participate. Auditory scanning in his communication book of choices helped him make choices. He used sounds to voice happiness and displeasure. He was inconsistent, due to illness, motivation, and external as well as internal stimuli.

For his goal to verify a decision made by auditory or partner-assisted scanning by looking or holding his gaze at a preferred item, person, or direction when asked to confirm his choice, teacher of the visually impaired Kele indicated Student had not been as successful or responsive using his lip smack for “yes,” or head shaking or just no response to indicate “no.” Student also had not been able to verify a choice using eye gaze.

For his goal to shift his visual gaze toward a voice, person, or object of interest, or area of activity, Kele noted Student’s ability depended on his mood, alertness, positioning, comfort, and interest. If he was alert, rested, and in a supportive position, Student sometimes shifted his gaze toward a brightly lit screen or object with multiple

prompts, sometimes taking up to 30 seconds to move his head. As of October 2021, Student's control of his gaze was not strong enough to shift his gaze upon request.

In the arts and crafts goal aimed at developing Student's ability to use two hands for activities, he made progress in that he was willing to leave his hands in the positions the occupational therapist placed them in during table-top activities instead of removing and hiding them. He also tolerated grasping craft tools and supplies when those items were placed in his hands and the occupational therapist or one-to-one aide provided hand-over-hand support for grasp and aim.

For transfers into and out of his wheelchair, Student sometimes participated by flexing his hips and knees to sit, and extending his legs to stand, with verbal cues and moderate assistance in one out of three trials. Student was not repeating the skill on multiple trials.

Student's goal to activate switches seemed stalled, as the teacher of the orthopedically impaired was still working on identifying switch locations or placements that worked for Student. Student required physical and verbal prompting, but was able to reach, touch, feel, and activate the switch with assistance.

The general education transitional kindergarten teacher reported Student enjoyed being laid on the floor near activities during "choice time" and showed pleasure with the train area. Other students spoke to him and his aide. Three days per week the class rotated through activity centers, rotating every eight to 10 minutes through four centers. Sometimes Student participated in these activities in or out of his wheelchair, with his aide's assistance. Other times Student fell asleep during the rotations. And sometimes he cried in protest and repeatedly approximated the sign for "all done" by bringing his hand up to his chest and then pushing it down by his side



before the activity has even started when he was told it was time for centers. The general education transitional kindergarten teacher recommended Student be present daily in the special day class for the table activities there, so Student could work on the fine motor skills at his ability level to develop the prerequisite skills needed to participate more fully in the general education classroom curriculum.

The physical therapist reported Student was working on his endurance with engaging in group classroom activities. He had difficulty maintaining his attention and comfort when sitting in his wheelchair and attending to group lessons and activities. He frequently fell asleep or needed to be repositioned on a caregiver's lap for more engagement, or be placed on the floor to roll around and have free time. Other reports were the same as a year before, such as Student needing moderate assistance at his upper trunk to sit in ring sit, criss-cross, or heel sit, and he was still beginning to assist with pushing to sit up using his arm, with his left arm having the best ability. Mother reported Student on rare occasions took steps when supported and facilitated to step, but the physical therapist had not observed that skill.

San Lorenzo Valley used the adaptive toilet seat it acquired for Student, but he did not void in the toilet at school and was only practicing semi-regularly. He remained diapered.

Kele continued to report, same as before, that when Student was in a familiar environment and things were calm and quiet, he was able to use his vision to focus and maintain attention, usually using his peripheral vision, at lights and/or lighted objects, as well as brightly colored objects with directional lighting. Student continued to show he saw something by quieting his body and opening his eyes and sometimes mouth wide, often vocalizing and/or smiling. Mother reported Student continued to see best in low

lighting and natural lighting, with items illuminated by direct lighting. Student's ophthalmologist explicitly did not recommend using visual gaze for choice making, so Kele continued to use auditory scanning and partner-facilitated scanning to present Student options and assist him in making choices.

Kele noted that as she had previously reported, Student required longer processing time between verbal instructions and his response, up to 30 seconds; if he still didn't respond, one should give the same verbal instructions and wait again. Kele cautioned that new words would reset the request and Student would have to begin processing all over again. In the past, Student had shown that when given enough time, he would respond in some way, either with his version of a yes or no response, a cry if he was upset or not interested, a smile, lip-smack sound, or a body alerting motion. However, close in time to the October 2021 IEP team meeting, there were times he did not respond at all.

### OCTOBER 2021 IEP GOALS

The San Lorenzo Valley IEP team proposed and adopted eight new goals in the areas of group participation, expressive and receptive language, fine motor skills, mobility, sitting, and vision.

In the area of positioning in the classroom, Student had difficulty sitting in his wheelchair and engaging in school activities for prolonged periods of time. He required being taken out of his wheelchair and placed on the floor to roll and play to calm himself. He sometimes fell asleep during school activity. The goal was for Student to be given verbal cuing to prepare him, and then, for him to tolerate sitting in his wheelchair for 30 minutes while engaging in school activity three out of five days per week.

With vision, listening, and comprehension, Student attended very closely to conversations about areas of interest, and added “yes” or “no” to the conversation in his own ways. He was not yet responding accurately to questions based on a story he heard. The goal was for Student to listen to a short story of interest, either read aloud or on an audio device, and correctly answer three comprehension questions asked immediately after that portion of the story, in three out of four trials over four days.

In the area of assisted walking for transfers/transitions, Student did not take steps when held in a supported standing position, with verbal cuing. The goal was for Student to assist with supported walking by reciprocally stepping once when supported in a standing position with assistance to shift his weight and unweight the swing limb, with continual verbal cuing in two out of three trials.

For activating a switch, the teacher of the orthopedically impaired was focused on identifying switch locations that worked for Student. Student continued to require physical and verbal prompting a majority of the time. He had the ability to reach, touch, feel, and activate a switch with assistance, but not on two out of three occasions. The goal was for Student to be provided appropriate switch placement during play, leisure, or other activities of interest, and with verbal and physical prompting, for Student to activate a switch on three out of five occasions over three trial sessions.

In the area of vision, Student’s ability to use his vision depended on his mood, interest, positioning, comfort, and alertness. The goal was for Student to look at and sustain gaze with central and peripheral viewing of familiar images, adapted for his vision loss, in a variety of environments. The goal would first be attempted in a quiet, calm, and dark learning environment with a brightly lit image. Then, the goal would be attempted in his special day class environment with slightly more visual clutter, auditory

noise, and task lighting. Finally, the goal would be attempted in his general education classroom with typical levels of noise and lighting, sustaining gaze for up to 10 seconds in three out of four trials over four test dates.

In fine motor skills for tabletop tasks, Student required maximal assistance to hold objects in his right hand without left-handed involvement. The goal was for Student to receive maximal assistance, positioning support, and set up of adaptive tools such as an EazyHold and adaptive scissors, and for Student to display improvement in fine motor skills. The improvement would be evidenced by his ability to display the following skills as measured by observation on 80 percent of occasions: participate in three or more aspects of a modified tabletop activity alongside classmates to the expected level of completion, and use both hands during participation.

During the partner-assisted scanning, Student continued to require cues to imitate a sound or to kiss or lip pop to indicate "yes" or make his arm gesture to indicate "no," both within the speech therapy and the classroom setting. One goal was for Student to take a communicative turn through sound or an established gesture in four out of five structured opportunities with less than 30 seconds for response time. Also in partner-assisted scanning, Student required moderate prompts to use his gestures such as his arm movement and lip popping sound to indicate a "yes" or "no" for wants and needs. Another goal was for Student to answer basic yes or no questions using auditory assisted scanning, with less than 30 seconds delay, in four out of five sessions.

## OCTOBER 2021 IEP PLACEMENT

At the October 21, 2021 annual IEP team meeting, Mother requested for Student to attend the general education transitional kindergarten full time. The transitional kindergarten teacher, special day class teacher, and one-to-one aide responded that activity centers in the general education classroom were challenging for Student because he could not do what the other students were doing during that time. They reported that even with specialized equipment, Student could not independently participate in centers and needed hand-over-hand assistance to participate. This was problematic because Student became frustrated when adults provided hand-over-hand assistance. The IEP team agreed Student needed to have a quiet space to take a break after every 90 minutes of activity and have time out of his wheelchair. The IEP team discussed the question of where that space might be created on the elementary school campus, but did not determine a solution. There was a bathroom available where Student could have his adaptive toilet seat.

The transitional kindergarten teacher expressed her concerns of not having a special education credential or the expertise of the special education teacher and not knowing how to modify the curriculum for Student. She proposed a gradual transition so the IEP team would have time to prepare and plan. Mother wanted Student to attend the transitional kindergarten classroom full time as soon as possible. The special day class teacher was concerned she could not provide the support Student needed to be successful without seeing him directly in the classroom, and did not know how her services would be provided. Educating Student in the transitional kindergarten classroom full time would require related services providers to rearrange their schedules

and find places to work with Student on the elementary school campus. For example, Kele needed a quiet space where she could adjust lighting to work on Student's vision skills.

The IEP team agreed Student would participate in transitional kindergarten for 51 percent of his school day, with the eventual goal of moving to a full day. The IEP team planned to reconvene to discuss how things were going with the additional time in transitional kindergarten.

Parents consented to the October 21, 2021 IEP.

### NOVEMBER 2021 AMENDMENT IEP

On November 10, 2021, the San Lorenzo Valley IEP team reconvened to review Student's adjustment to increased time in the general education classroom on the elementary school campus. The general education teacher reported things were going well from her perspective, and credited Student's aide for providing Student what he needed in the transitional kindergarten classroom. At the hearing, Mother credited Student's success with increased time in the general education classroom in only a few weeks since the October 21, 2021 IEP team meeting to the experienced team, many of whom had been working with Student for multiple years and knew how to accommodate him in different environments.

The IEP team discussed remaining flexible about finding a variety of places Student could lie down and take a break so if one space on the elementary school campus was in use for another purpose when Student needed to lie down, other options could be accessed. The special day class teacher stated Student's preschool was still

available to use if he was crying and needed more down time. Due to the need for a quiet space with adjustable lighting, Kele proposed to continue providing her weekly direct service to Student at the preschool campus. Due to the schedules of the occupational therapist and speech-language pathologist, they proposed to continue providing their weekly direct services to Student at the preschool campus, too, until a timeslot opened up in their schedules on the elementary school campus. The IEP team agreed for the teacher of the visually impaired and the physical therapist to provide their direct services to Student inside the general education classroom as push-in services.

San Lorenzo Valley amended Student's October 21, 2021 IEP to place him in general education 75 percent of the time, with 25 percent of the time in special education.

After the amendment, Student's IEP documented the following program accommodations:

- ensure proper positioning for eating, drinking, fine motor tasks, and toileting;
- access to a switch for making choices and participating in classroom activities;
- "down time" between activities and therapies, with Student working and being "on" for 60 to 90 minutes, including eating, before needing at least 30 minutes of "down time" on the floor in a quieter space where lighting can be adjusted;
- access to adapted tools for fine motor tasks and arts and crafts activities: EazyHold or similar device and HARAC toddler scissors or similar portable table-top scissors;

- provide positioning support for two-handed engagement in tasks, such as placement of Student's left hand on paper to support stability;
- assistive technology of iPad Pro with protective case and stand with apps to support low vision, access to music, sensory input, and prewriting skills – and currently that device was being provided by Parents; and
- "chewelry" as a replacement strategy for Student when he attempted to bite his hand or grind his teeth.

Additionally, the IEP included the following program modifications as visual modifications:

- minimize visual clutter and crowding when presenting materials;
- keep items and pictures simple, high-contrast, and use primary colors against a black background;
- use tactile and real objects before introducing pictures;
- present items within one to two inches of Student's central viewing point, and use objects or pictures that are at least six to 12 inches;
- use objects that are multi-sensory visual, auditory, and tactile; and
- Student has a keen sense of hearing, so build on that with visual input.

Student's program of special education and related services consisted of:

- four 60-minute sessions per month of group instruction in a separate classroom;
- one 30-minute session per week of direct services with a teacher of the visually impaired in a separate classroom, as well as 30 minutes per week



of consultation by the teacher of the visually impaired with Student's aide, teachers, and other related services providers;

- one 30-minute session per week of occupational therapy in a separate classroom;
- one 45-minute session per week of physical therapy in the regular classroom but allowed to be in the special day class setting if needed;
- two 30-minute sessions per week of speech therapy in a separate classroom, either individually or in a group;
- one 60-minute session per week of specialized orthopedic service, with a teacher of the orthopedically impaired, in the regular classroom; and
- a dedicated one-to-one aide for the duration of his school day in the regular classroom.

Parents consented to the November 10, 2021 amendment IEP.

## FEBRUARY 2022 SWALLOW STUDY

Student experienced chronic congestion and at his pre-kindergarten well child check with his pediatrician in December 2021, so the doctor ordered a swallow study. A fluoroscopic swallowing evaluation was conducted in February 2022, identifying oral motor dysfunction and mistimed laryngeal closure, resulting in one instance of aspiration and five instances of penetration out of 23 swallows observed on camera. The doctor noted improved coordination with corrections to Student's head position for adequate airway protection. When Student became interested in the liquid feeding activity, the doctor recommended several feeding strategies to keep Student safe, involving specific liquid consistencies, solid consistency at puree, and delivery methods to slow the pace of flow, as well as feeding techniques for positioning and

pacing. The results of the study and its recommendations were significant to Student's educational program because Student was at school during mealtimes and his aide, or other school staff who might assist him, needed to follow these precautions when feeding Student.

## STUDENT'S MOVE TO CARMEL ON APRIL 29, 2022

On April 25, 2022, Parents notified Carmel by email that Student was a five-year-old boy moving to the district with an IEP. Mother informed Carmel Student's most recent IEP placed him 75 percent in general education transitional kindergarten and 25 percent in special education, including occupational therapy, physical therapy, speech therapy, teacher of the orthopedically impaired, teacher of the visually impaired, and a designated aide because "he doesn't talk, sit independently, or walk, but he has yes/no sounds, is mostly potty trained, and loves supported standing." In further email exchanges, Mother provided Student's name, date of birth, former district, email address for the special education director at San Lorenzo Valley, and a copy of Student's October 21, 2021 IEP, as amended in November 2021. The IEP document only had the date of October 21, 2021, and did not indicate, even by month or year, when the amendment increasing Student's general education time to 75 percent had been made.

Mother contacted Carmel about the residency and registration process because Parents also had three older children to enroll in Carmel. Mother provided the residency verification and on April 26, 2022, the office administrator at Tularcitos Elementary School provided Mother an internet link to complete the enrollment process for her three children who would attend elementary school at Tularcitos. But the transitional kindergarten classes were located at Carmel's preschool campus, called Carmelo Child Development Center. Carmelo had a different enrollment process.

Father moved earlier, and Mother and Student completed their move to Carmel on Friday, April 29, 2022. Student's older siblings started school at Tularcitos on Monday, May 2, 2022. Mother and Student went to the district office to see Director of Special Education Steve Gonzalez on the morning of May 2, 2022, to discuss Student's enrollment at Carmelo and an interim IEP because Student transferred into the district during the school year. Carmel's school year ended on June 3, 2022, so there was only one month remaining in the 2021-2022 regular school year.

Carmel had one preschool campus and three elementary schools. To serve all the students in the district, Carmel additionally had only one middle school, one high school, and one continuation high school. During the 2021-2022 school year, none of the schools in Carmel had a special day class. Gonzalez had to consider how to implement Student's IEP from San Lorenzo Valley when Carmel did not have the special day class environment the IEP required for 25 percent of his day.

Carmel made available to its students the continuum of placement options in partnership with other members of the Monterey County SELPA. Other districts had special day classes, and if a Carmel student required one, Carmel coordinated with the other districts for placement of the student in an appropriate special day class at one of the other districts' schools. For students with more significant needs the other districts did not have an appropriate special day class program to support, Carmel coordinated with Monterey County Office of Education for placement of the student at one of the several public programs the Office of Education operated around Monterey County.

Additionally, Carmel had limited staff in related services specialties, and contracted with the County Office of Education for assessments, consultation, and direct services from related services providers Carmel students required but which Carmel did

not employ. Access to specialists through the County was not immediate and there was some bureaucracy involved in requesting specialist assistance and waiting for approval and assignment of a necessary specialist.

In spring 2022, Carmel's occupational therapist was on maternity leave and despite its efforts to hire a substitute, Carmel did not have an occupational therapist to serve its students at that time. Carmel offered students compensatory education for any missed services due to the staffing shortage.

During her meeting with Gonzalez on May 2, 2022, Mother reviewed with Gonzalez Student's IEP placement and services. They discussed the challenge for Carmel to implement the placement because Carmelo did not have a special day class in which to place Student for the 25 percent special education time listed on the October 21, 2021 IEP. Gonzalez informed Mother he would talk to Carmelo and the County Office of Education regarding placement options for Student.

Further details about Student's enrollment are stated in the discussion of Issue 1B, below, regarding Carmel's implementation of his San Lorenzo Valley IEP upon Student's transfer into Carmel. Student attended his first day of school at Carmelo on Tuesday, May 10, 2022.

On May 10, 2022, Student and Mother spent 50 minutes with a speech therapist demonstrating his augmentative and alternative communication system on his iPad, how to verbally present the choices of his pragmatic organization dynamic display – referred to as a PODD and, when in physical paper form, a PODD book –, and how Student communicated "yes" and "no" responses. Mother and the speech therapist asked

questions to elicit yes and no responses from Student. Mother interpreted the meanings of Student's actions or inaction for the speech therapist, but the speech therapist did not recognize any of Student's actions as a yes or no.

Even though the speech therapist continued to work with Student for the remainder of the school year, she still did not interpret the subtle cues Mother recognized as having specific meaning to match what the speech therapist read in San Lorenzo Valley documents and had been told by Mother Student's noises and motions signified. Sometimes Student made the noises or motions the speech therapist had been told meant "yes" or "no," but they did not seem to come at a time when a yes or no choice or question had been asked. In those situations, the speech therapist did not find the noise or motion to have communicative intent. As the Early Start and San Lorenzo Valley speech therapists had noted, the Carmel speech therapist questioned whether Student's noises and motions were involuntary or intentional, and if intentional, whether they were at all reliable as true indicators of Student's wants and preferences or if they were just some response to an adult's presentation of options, without correspondence to how Student really felt.

On Friday, May 13, 2022, Carmel sent Parents an email inviting them to an in-person IEP team meeting on Monday, May 23, 2022, at 11:00 a.m. Carmel also sent Parents an IEP team meeting notice dated May 16, 2022, for the meeting. On May 18, 2022, Mother signed and returned the notice, indicating she would attend. The meeting notice informed Parents the meeting was to discuss development or revision of an IEP with a possible change in placement due to the need for a more restrictive placement. The notice also stated the meeting was for a 30-day IEP, referring to Carmel's obligation

to either adopt the prior IEP or develop a new one within 30 days of when a student with an IEP transferred in from another district within the state that was not in the same SELPA.

During the meet and greet on May 9, 2022, the school nurse asked about Student's feeding and swallowing. On Thursday, May 19, 2022, Mother obtained information from Student's former occupational therapy provider at the Santa Cruz County Office of Education and sent it to the school nurse, documenting that after the swallow study Student had at Stanford in February 2022, Student was orally fed pureed foods both with a bottle and a spoon, and that Mother facilitated spoon feeding by holding Student's top lip down to wipe the contents off the spoon into his mouth.

Elizabeth Erdelyi, teacher of the visually impaired employed by the Monterey County Office of Education, received the referral assignment on Friday, May 20, 2022, at 2:00 p.m., one hour before her work hours ended. Mother learned of that assignment and contacted Erdelyi by email after 5:00 p.m. that same date. Erdelyi replied before 8:00 a.m. on Monday, May 23, 2022. Their communication enabled Erdelyi to quickly review the information she had been provided about Student and attend the May 23, 2022 IEP team meeting by videoconference.

On Saturday, May 21, 2022, the Carmel special education teacher assigned as Student's case manager emailed Mother a draft of the IEP document, which had some information filled in as Carmel's suggestions and other information blank or with headings as placeholders to be filled in after the discussion during the IEP team meeting.

## MAY 23, 2022 IEP TEAM MEETING

The May 23, 2022 IEP team meeting in-person attendees were

- both Parents,
- Director of Special Education Gonzalez,
- the Director of Carmelo Child Development Center,
- Student's general education transitional kindergarten teacher at Carmelo,
- the Principal of Tularcitos Elementary School,
- a school nurse,
- a school psychologist,
- both speech-language pathologists,
- an occupational therapist, and
- a special education teacher/case manager.

A physical therapist and teacher of the visually impaired Erdelyi attended by videoconference.

As relevant to the ultimate outcome of this Decision on Carmel's Issue, Issue 2, the audio recording of the May 23, 2022 IEP team meeting, aided by the parties' attempts to transcribe it, revealed the following important discussions during the IEP team meeting. The general education transitional kindergarten teacher, Carmelo's Director, and related services providers who had met Student on and after May 9, 2022, and/or who had reviewed documents from San Lorenzo Valley regarding Student including but not limited to the October 21, 2021 IEP, as modified in November 2021, were of the same opinion as the initial IEP team from San Lorenzo Valley in November 2019. Specifically, they thought Student's medical diagnoses causing global delays required specialized

equipment and instruction that needed to be provided entirely in a special day class environment. The draft IEP described the need for a special day class as being due to Student requiring a highly structured, supervised setting, that was restricted for the safety of Student and others, with modified and/or intensive instruction not feasible in general education, and with an alternative life skills curriculum.

As described above, Carmel was a relatively small district with a relatively small student body, and it did not have any elementary school special day classes. Carmel's director of special education and staff were aware of the supports and services available within the special day classes operated by the other school districts within the SELPA. Carmel staff did not believe the programs operated in those partner districts' special day classes were sufficient to provide the intensive educational services and supports Student required. Carmel's director and staff were also aware of the supports and services available through the Monterey County Office of Education in classrooms it operated at several locations throughout the County, and they believed a special day class operated by the County, referred to as a regional program, was the appropriate placement for Student on the continuum of placement options.

Input from the Carmel members of the IEP team emphasized their perception of safety concerns for Student in a general education placement, including his needs for staff with specialized training regarding feeding him, responding to seizures, recognizing signs of a shunt malfunction, protecting him when he vomited, and protecting him from injury in a classroom of active peers when he was lying on the floor, as well as protecting other students from tripping on Student when he was lying on the floor. Carmel staff did not believe providers who functioned in the general education



setting had the medical training to support Student or the experience to ensure Student's safety. They believed the personnel at County programs did have that training and experience.

Additionally, Carmel staff believed Student required teachers, aides, and related services providers who were experts in the needs of and supports available to students with severe and overlapping disabilities. For example, Student required intervention from a speech-language pathologist who had significant experience with assistive technology and augmentative and alternative communication systems. But that speech-language pathologist needed to know not just about these kinds of assistive technologies, but to be expert in selecting and using accessible and effective technologies for students who had significant visual impairments, and, in addition, significant motor coordination deficits, as well as their receptive or expressive language delays. Carmel staff believed Student required special education and related services from personnel who worked with students with multiple disabilities.

Parents emphasized that Student started in San Lorenzo Valley in a special day class for 85 percent of his day, the next year it was decreased to 80 percent of his day, the next year it was decreased to 50 percent of his day, and shortly thereafter, he spent 75 percent of his day in general education transitional kindergarten, with the other 25 percent of the school day mainly used for pull-out related services or down time in a quiet environment. Although the San Lorenzo Valley providers did not initially know how to interact with and support Student, over time they became more comfortable with him and developed skills to successfully include him in the general education classroom.

Parents understood Carmel staff might not presently feel equipped to adequately support and serve Student, but wanted them to receive training and develop themselves to the comfort levels the San Lorenzo Valley general education classroom staff eventually did. Parents believed Student had been successful in that general education environment and wanted him to continue to be educated primarily in the general education environment. Parents expected Student to attend a general education kindergarten classroom at his neighborhood school, Tularcitos, with a full-time, one-to-one aide.

Although not emphasized in the discussion during the May 23, 2022 IEP team meeting, Carmel disputed at the hearing that Student was successful in the general education environment in San Lorenzo Valley, as Parents had asserted at the May 23, 2022 IEP team meeting. Carmel pointed out Student's goals from the 2020 and 2021 IEPs reflected Student's very slow progress across all domains since he began receiving special education and related services in November 2019. Although San Lorenzo Valley providers wrote encouraging statements about Student's development in their goal progress report notes, the descriptions of Student's abilities in the targeted areas did not reflect the progress anticipated when the goals were developed, much actual progress at all. Carmel argued, and as illustrated by the evidence described and factual findings stated above, year after year, Student did not achieve many more of his goals than he did meet. Carmel argued his skills in the identified areas of unique need were quite stagnant while Student attended more and more general education time year after year. Student may have experienced delays or setbacks due to distance learning and major orthopedic surgery, but by April 2022 Student was still working on some goals very similar to those he started with in November 2019.

One notable example of Parents' exaggerated claims of marked progress was an email from Mother to Gonzalez on the last day of the school year. Mother stated as an example of improvement what she observed at the graduation for the transitional kindergarten students that week:

"The Carmelo kids stood up to sing a choreographed song and [Student] turned away from his preferred right shoulder to visually observe them, showing off two of his hard earned skills this year. I was proud to observe his visual improvement as well as his head control in a loud and new setting."

However, Mother had reported on the Preschool Language Scale in November 2019 during San Lorenzo Valley's initial assessment that Student turned his head to locate the source of sound, and actively searched to find a person who was talking. Mother's characterization of Student's action as the result of him "working hard in a busy gen ed TK classroom" was not persuasive, as Mother said he could do that years earlier.

During the May 23, 2022 IEP team meeting, Parents encouraged the Carmel staff to find ways to, and requested that Carmel, place Student in general education kindergarten at Tularcitos. Carmel personnel were not persuaded and recommended placement in a special day class operated by the Monterey County Office of Education and informed Parents of their right to disagree. Parents stated they did not agree to a special day class placement and invoked their right to continue Student's placement as described in the San Lorenzo Valley October 21, 2021 IEP, as amended in November 2021. The draft IEP Carmel provided Parents before the IEP team meeting and all later drafts sent to Parents after the IEP team meeting reflected Carmel's continued recommendation and offer of placement 100 percent outside the general education environment.

Mother and Gonzalez exchanged many emails in the month after the IEP team meeting. Parents stated their questions about and disagreements with several aspects of the draft IEPs Carmel updated and circulated in response to the emailed questions and comments from Parents. Some of Mother's emails resulted in a formal prior written notice document from Carmel. Eventually, on the afternoon of June 28, 2022, a final draft of the May 23, 2022 IEP specifically identified a special day class operated by the Monterey County Office of Education at AB Ingham School in Salinas, formally known as the Arthur B. Ingham Center. That IEP offered Student specialized medical transportation to Salinas accompanied by an adult, called a shared rider. Gonzalez requested Parents consider consenting to certain portions of the IEP, indicate the areas they disagreed with, and return the consent page and IEP to Carmel. Mother emailed Gonzalez back an hour and a half later declining consent to the May 23, 2022 IEP as finalized by Carmel on June 28, 2022. By 5:00 p.m. that day, Carmel filed a request for due process with OAH seeking to obtain a determination the IEP offered Student a FAPE and authorization for Carmel to implement it without Parents' consent.

### CARMEL SIGNIFICANTLY IMPEDED PARENTS' OPPORTUNITY TO PARTICIPATE IN THE DECISIONMAKING PROCESS BY NOT CONSIDERING THE FULL CONTINUUM OF PLACEMENTS

This Decision does not resolve every disagreement between the parties and does not determine or analyze every element of FAPE on which Carmel had the burden of proof. For the reasons set forth below, this Decision concludes Carmel did not satisfy its burden of proof regarding a major procedural element of FAPE, parental participation. Apart from any other procedural or substantive requirement of the IDEA for an IEP to

offer Student a FAPE, Carmel's interference with Parents' opportunity to participate in the IEP formulation process was fatal to Carmel's effort to obtain OAH's authorization to implement the May 23, 2022 IEP without Parents' consent.

The May 23, 2022 IEP was procedurally defective because after the professional educators recommended Student could not be satisfactorily educated in a general education environment, the evidence established Carmel did not consider and discuss with Parents whether zero percent time in general education was mainstreaming Student to the maximum extent that is appropriate in light of the continuum of program options. (*Daniel R.R.*, *supra*, 874 F.2d at p. 1050.)

Carmel believed the nature or severity of Student's disabilities was such that education in regular classes with the use of supplementary aids and services could not be achieved satisfactorily, so Student required a special class or separate schooling. Still, Carmel was required to consider and include Parents in a discussion of whether Student required any time during the school day to have interaction with typical peers to receive educational benefit, and if so, what frequency and duration of inclusion was appropriate, as well as where and how inclusion could be achieved if Student attended the special day class operated by the Monterey County Office of Education that Carmel recommended. Additionally, if some inclusion would afford Student some educational benefit, Carmel was required to consider and discuss with Parents whether any other factors mitigated against including Student with typical peers for any time during any school day.

For example, the IEP team could have discussed whether it would be appropriate for Student to attend general education kindergarten at Tularcitos periodically, supported by the same one-to-one aide he had in the County program, or to again

attend the transitional kindergarten at Carmelo periodically to have a smaller class environment than kindergarten. The IEP team also could have next considered whether the loss of time and specialized services in the special class by attending, even infrequently, a general education classroom within Carmel would outweigh any potential benefit of inclusion.

But the evidence did not establish Carmel engaged in any consideration amongst its staff of whether, and how, to afford Student any mainstreaming at all. Further, and most importantly, the audio recording of the IEP team meeting established there was no discussion with Parents about this mandatory element of a least restrictive environment analysis.

It was clear from Parent's statements during the IEP team meeting and Mother's subsequent emails that Parents did not agree with and would not consent to placement 100 percent outside the general education environment. But that did not absolve Carmel of the need to consider and discuss with Parents the requirement of mainstreaming Student to the maximum extent appropriate. Even if, in the end, Carmel still would have concluded the least restrictive environment for Student included no exposure to typical peers during the school day, or any rare school day, the failure to consider mainstreaming possibilities and discuss such options at all interfered with Parents' opportunity to participate in the IEP formulation process. (Ed. Code, §. 56505, subd. (j).) Further, this interference rose to the level of significantly impeding the opportunity of Parents to participate in the decisionmaking process regarding the provision of a FAPE to Student. (Ed. Code, §. 56505, subd. (f)(2)(B).

The IEP team meeting was scheduled for one and a half hours. If the IEP team did not have enough time to discuss this inclusion topic on that date, Carmel needed to reconvene for the required discussion before making a final offer it would attempt to have OAH approve if Parents would not consent. The school year was ending in 11 calendar days, with only eight of them being school days due to the Memorial Day holiday. While it might have been difficult to reconvene all members of the IEP team before some were off work for the summer, Carmel did not even try. Nor did Carmel wait to reconvene at the start of the new school year. It declared the June 28, 2022 draft of the May 23, 2022 IEP final, and rushed to pursue an order from OAH to implement it.

By this procedural violation of the IDEA, Carmel did not meet its burden of proof to demonstrate the May 23, 2022 IEP, as made into a final offer on June 28, 2022, offered Student a FAPE. There are many other procedural and substantive requirements an IEP must satisfy to conclude that a district offered a student a FAPE in any particular IEP. Carmel's other obligations under the IDEA with respect to the May 23, 2022 IEP are irrelevant to the outcome and will not be addressed as they relate to Carmel's attempt to prove the May 23, 2022 IEP offered Student a FAPE, such that it may be implemented without Parents' consent.

Student met his burden of proof to demonstrate Carmel failed to consider the full continuum of placements, and because of that, significantly impeded Parents' participation in the decisionmaking process. Student prevailed on Issues 2, 1.F and 1.G.

## ISSUES 1.A, 1.C, 1.D.i-iv, 1.E, 1.H, AND 1.I: STUDENT'S OTHER PROCEDURAL AND SUBSTANTIVE CLAIMS REGARDING THE MAY 23, 2022 IEP

Student contends Carmel denied him a FAPE in the May 23, 2022 IEP in the enumerated procedural and substantive ways listed in Student's Issues 1.A, 1.C, 1.D.i-iv, 1.E, 1.H, and 1.I from the date Student became a resident of Carmel through the end of the 2021-2022 school year and extended school year.

Carmel contends it did not deny Student a FAPE in any of the ways Student alleged, because Carmel argues it proved it complied with all procedural and substantive requirements of the IDEA and California Education Code with respect to the May 23, 2022 IEP. Further, Carmel argues Student abandoned his claims under Issues 1.D.iii and 1.H by failing to argue what accommodations Student required but was not offered, and which required IEP team members were not present on May 23, 2022.

### TIME PERIOD AT STAKE IN STUDENT'S ISSUES

Student alleges he was denied a FAPE by Carmel's asserted procedural and substantive IDEA violations with respect to the May 23, 2022 IEP from April 29, 2022, through the end of the 2021-2022 school year and extended school year.

First, the IEP team meeting was held on May 23, 2022, and no denial of FAPE in connection with the IEP team meeting could have occurred before that date. Second, Mother emailed Monterey County Office of Education's employee, teacher of the visually impaired Erdelyi, on the morning of May 23, 2022, approximately two hours



before the IEP team meeting started, stating Student “is not doing ESY, so he’ll be at Carmelo until June 3rd.” During the IEP team meeting, Mother again stated Student “is not doing extended school year.”

Any claim that Student was denied FAPE during extended school year is not supported by the evidence. Student qualified for extended school year services due to his likelihood of regression in critical skills and/or difficulty in recovering those skills within a reasonable period of time. But Parents elected not to have Student participate in extended school year services, not because they disagreed with Carmel’s offer of placement and services for extended school year in the May 23, 2022 IEP, but because they had already decided for their own reasons that Student would not participate in an extended school year program. Student did not attend extended school year in 2022.

Ultimately, there were a total of 11 days between the May 23, 2022 IEP team meeting and the end of the 2021-2022 school year on June 3, 2022. Student’s claims addressed in this section will be considered in view of whether Carmel’s actions or inactions in the alleged ways denied Student a FAPE for those 11 days.

Furthermore, Student’s entire position in the consolidated matter was that the October 21, 2021 IEP, as amended on November 10, 2021, was developed by an IEP team who had known and worked with Student for two years at the time they developed it, and the October 21, 2021 IEP reflected the goals, placement, related services, supports, accommodations, and equipment Student required to receive a FAPE. Student argued Carmel tried to take that away from him by not adopting that IEP as written, which it had the statutory option to do, and instead proposing a new IEP with different goals, placement, and related services quantities, all recommended by people in Carmel who had limited knowledge of Student and his abilities.

Parents did not consent to the May 23, 2022 IEP as developed and proposed at the IEP team meeting. Parents continued to discuss with Carmel their objections, concerns, and requests after they received another draft of the IEP on Friday, May 27, 2022. Carmel sent Parents another draft IEP on Thursday, June 2, 2022. After more communication between Parents and Carmel, Carmel sent yet another draft IEP on Monday, June 27, 2022, before sending a final IEP draft on Tuesday, June 28, 2022.

During the time after the May 23, 2022 IEP team meeting, while Parents had not consented to any new IEP from Carmel, Student's operative IEP remained the October 21, 2021 IEP from San Lorenzo Valley.

Student's October 21, 2021 IEP's annual goals were not expected to be achieved until October 2022. Therefore, the October 21, 2021 IEP, from Student's perspective, afforded him FAPE in all respects while Parents and Carmel discussed and revised the May 23, 2022 IEP. The October 21, 2021 IEP covered more than the time period at stake in Student's Issues 1.A, 1.C, 1.D.i-iv, 1.E, 1.H, and 1.I, and remained in effect during the 11 days Student put at issue in his complaint.

#### ISSUE 1.A: NO DENIAL OF FAPE FOR FAILING TO ASSESS

Student's Issue 1.A alleges he was denied a FAPE because Carmel did not assess him. Student's only school-based assessments were last conducted and reviewed in November 2019 when San Lorenzo Valley initially evaluated Student's eligibility for special education and related services when he turned three years old. Student was due for his triennial reassessment by November 13, 2022. Further, Student was due for an annual IEP by October 21, 2022.

In developing the IEP, the IEP team must consider the strengths of the child, the concerns of the parents for enhancing the child's education, the results of the most recent evaluations of the child, and the academic, developmental, and functional needs of the child. (20 U.S.C. § 1414(d)(3)(A); 34 C.F.R. §§ 300.324(a).)

Assessments are required to determine eligibility for special education, and what type, frequency, and duration of specialized instruction and related services are required. (20 U.S.C. § 1414(a); 34 C.F.R. § 300.303; Ed. Code, §§ 56043(k), 56381, subd. (a).) The IDEA uses the term "evaluation," while the California Education Code uses the term "assessment." In this Decision, the terms mean the same thing and are used interchangeably. A local educational agency must conduct a reassessment at least once every three years, called a triennial reassessment, unless the parent and the agency agree that it is unnecessary. (20 U.S.C. § 1414(a)(2)(B)(ii); 34 C.F.R. § 300.303(b)(2); Ed. Code, §§ 56043, subd. (k), 56381, subd. (a)(2).) The agency must also conduct a reassessment if it determines the educational or related service needs of the child, including improved academic achievement and functional performance, warrant a reassessment, or the parents or teacher of the child request a reassessment. (20 U.S.C. § 1414(a)(2)(A)(i) & (ii); 34 C.F.R. § 300.303(a)(1) & (2); Ed. Code, § 56381, subd. (a)(1).)

Carmel was well aware of the need to conduct Student's first triennial reassessment at the beginning of the 2022-2023 school year, to be completed by November 13, 2022, at the latest. The May 23, 2022 IEP team discussed that the deadline for Student's triennial reassessment was in fall 2022, and Carmel stated it planned to assess Student at that time.

Parents did not request Carmel assess Student at any time. During the IEP team meeting, Mother acknowledged Student was due for his triennial reassessment

in November. Mother's comments during the May 23, 2022 IEP team meeting indicated Parents agreed to Carmel conducting a comprehensive, triennial reassessment in the 2022-2023 school year.

Carmel was not required by the IDEA or its implementing regulations in 34 Code of Federal Regulations part 300 et. seq, or by the Education Code or its implementing regulations in California Code of Regulations, title 5, section 3000 et seq., to assess Student within the time it had to decide whether to adopt the October 21, 2021 IEP, as amended on November 10, 2021, or to develop, offer, and implement a new IEP – not more than 30 days. (Ed. Code, § 56325(a)(1).)

Because Parents did not request assessment in advance of the comprehensive triennial reassessment due by November 13, 2022, Carmel was not required to assess Student under Education Code section 56381, subdivision (a)(1) based on parental request.

Carmel provided Parents an assessment plan for a comprehensive triennial reassessment on August 12, 2022, at the end of the first week of the 2022-2023 school year. Mother signed consent on August 25, 2022, and returned it to Carmel by email and hard copy on Friday, August 26, 2022. Carmel was conducting the comprehensive triennial reassessments during the due process hearing.

Student did not establish Carmel was required to assess Student within 30 days after Student moved to and began the enrollment process in Carmel. Student did not offer any evidence to support, and therefore failed to prove, how any purported delay in compliance with a procedure significantly impeded Parents' opportunity to participate in the decisionmaking process, denied Student educational benefit, or otherwise impeded Student's right to a FAPE. Therefore, Carmel prevailed on Issue 1.A.

ISSUES 1C. AND 1D.I AND II: NO DENIAL OF FAPE FOR FAILING  
TO IDENTIFY ALL OF STUDENT'S EDUCATIONAL NEEDS, AND  
NO DENIAL OF FAPE FOR 11 DAYS FOR FAILING TO  
DOCUMENT APPROPRIATE PRESENT LEVELS OF PERFORMANCE  
OR DEVELOP GOALS IN VISION AND COMMUNICATION

Student's Issue 1.C alleges he was denied a FAPE because Carmel did not identify all of his educational needs. Student's Issue 1.D.i and ii alleges Student was denied a FAPE by Carmel's failure to document appropriate present levels of performance in the areas of need Carmel listed, and to develop goals in vision and communication with augmentative and alternative communication.

California Education Code section 56345 is a statutory framework for the IEP, and provides a nearly step-by-step analytical approach to developing an individualized program of instruction and services for a student who requires special education. An IEP must include

- a statement of the child's present levels of academic achievement and functional performance, including how the child's disability affects the child's involvement and progress in the general education curriculum, and
- a statement of measurable annual goals, including academic and functional goals, designed to
  - meet the child's needs that result from the child's disability to enable the child to be involved in and make progress in the general education curriculum, and

- meet each of the child's other educational needs that result from the child's disability. (20 U.S.C. § 1414(d)(1)(A); 34 C.F.R. §§ 300.320; Ed. Code, § 56345, subd. (a)(1) & (2).)

An IEP must include a description of how progress towards the goals developed will be measured and reported. (Ed Code, § 56345, subd. (a)(3).)

The purpose of annual goals is to permit the IEP team to determine whether the pupil is making progress in an area of need. (Ed. Code, § 56345, subd. (a).) For each area in which a special education student has an identified need, the IEP team must develop measurable annual goals that are based upon the child's present levels of academic achievement and functional performance, and which the child has a reasonable chance of attaining within a year. (Ed. Code, § 56345; *Letter to Butler* (OSERS March 25, 1988); Notice of Interpretation, Appendix A to 34 C.F.R., part 300, Question 4 (1999 regulations); but see *Capistrano Unified School Dist. v. S.W., et al.* (9th Cir. 2021) 21 F.4th 1125, 1133 ["[A]n IEP is not required to contain every goal from which a student might benefit." (Citations omitted.)].) The IEP team need not draft IEP goals in a manner that the parents find optimal, as long as the goals are objectively measurable. (*Bridges ex rel. F.B. v. Spartanburg County School Dist. Two* (D.S.C., Sept. 2, 2011, No. 7:10-CV-01873-JMC) 2011 WL 3882850 [the use of percentages tied to the completion of discrete tasks was an appropriate way to measure student progress].)

The IEP must include appropriate objective criteria, evaluation procedures, and schedules for determining, on at least an annual basis, whether the annual goals are being achieved, and a statement of how the student's progress toward the goals will be

measured. (*Jessica E. v. Compton Unified School Dist.* (C.D.Cal., May 2, 2017, No. CV16-04356-BRO (MRWx)) 2017 WL 2864945; see also 20 U.S.C. § 1414(d)(1)(A)(i)(II) & (III); Ed. Code, § 56345, subd. (a)(2) & (3).) An examination of the goals in an IEP is central to the determination of whether a student received a FAPE: “[W]e look to the [IEP] goals and goal achieving methods at the time the plan was implemented and ask whether these methods were reasonably calculated to confer ... a meaningful benefit.” (*Adams v. State of Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149.)

Student failed to prove what educational needs Student had that Carmel did not identify or did not identify in the May 23, 2022 IEP, and also failed to prove how any alleged procedural violation in failing to identify all of Student’s educational needs significantly impeded Parents’ opportunity to participate in the decisionmaking process, denied Student educational benefit, or otherwise impeded Student’s right to a FAPE. Therefore, Carmel prevailed on Issue 1.C.

Even if Carmel failed to document appropriate present levels of performance in the areas of need Carmel listed in the May 23, 2022 IEP, and to develop goals in vision and communication with augmentative and alternative communication, Student failed to prove how any purported 11-day procedural violation by not documenting appropriate present levels of performance, and not developing goals in vision and communication with augmentative and alternative communication, significantly impeded Parents’ opportunity to participate in the decisionmaking process, denied Student educational benefit, or otherwise impeded Student’s right to a FAPE.

Student failed to prove he was denied a FAPE by any failure in the May 23, 2022 IEP to document appropriate present levels of performance, and develop goals in vision and communication with augmentative and alternative communication. Therefore, Carmel prevailed on Issues 1.D.i and 1.D.ii.

### ISSUE 1E: NO PREDETERMINATION OF MAY 23, 2022 IEP

In Issue 1.E, Student contends Carmel predetermined the May 23, 2022 IEP offer by deciding among its staff before the IEP team meeting that Carmel would offer Student placement in a Monterey County regional program, and “rebuffed [Parents’] repeated efforts to direct discussion on how [Student’s] needs could be met at Tularcitos Elementary School,” thereby significantly impeding Parents’ opportunity to participate in the decisionmaking process regarding providing Student a FAPE. Carmel contends it considered Parents’ concerns regarding placement and Parents were afforded the opportunity for meaningful participation in the May 23, 2022 IEP team meeting.

A school district is required to conduct not just an IEP team meeting, but a meaningful IEP team meeting. (*Target Range, supra*, 960 F.2d at p.1485.) “Participation must be more than mere form; it must be meaningful.” (*Deal v. Hamilton County Board of Educ.* (6th Cir. 2004) 392 F.3d 840, 858 [citations omitted] (“*Deal*”).) A school cannot independently develop an IEP, without meaningful participation, and then present the IEP to the parent for ratification. (*Target Range, supra*, 960 F.2d at p. 1484.) A school district that predetermines the child’s program, and does not consider parents’ requests with an open mind, has denied the parents’ right to participate in the IEP process. (*Deal, supra*, 392 F.3d at p. 858; *Ms. S., supra*, 337 F.3d at p. 1131.)



For IEP team meetings, predetermination occurs when an educational agency has decided on its offer prior to the meeting and is unwilling to consider other alternatives. (*Deal, supra*, 392 F.3d at p. 857-858; *H.B. v. Las Virgenes Unified School Dist.* (July 3, 2007, No. 05-56486) (9th Cir. 2007) 239 Fed. Appx. 342, 344-345 [nonpub. opn.].) A district may not arrive at an IEP team meeting with a “take it or leave it” offer. (*JG v. Douglas County School Dist.* (9th Cir. 2008) 552 F.3d 786, 801, fn.10.) Although school district personnel may bring a draft of the IEP to the meeting, the parents are entitled to bring to an IEP team meeting their questions, concerns, and recommendations as part of a full discussion of a child’s needs and the services to be provided to meet those needs before the IEP is finalized. (*Assistance to States for the Education of Children Disabilities* (March 12, 1999) 64 Fed. Reg. 12478-12479.) School officials may permissibly form opinions prior to IEP team meetings. However, if the district goes beyond forming opinions and becomes “impermissibly and deeply wedded to a single course of action,” this amounts to predetermination. (*P.C. v. Milford Exempted Village Schools* (S.D. Ohio, January 17, 2013, No. 1:11-CV-398) 2013 WL 209478, \*7.)

Some Carmel staff, including at a minimum the Tularcitos principal, a physical therapist, and one speech-language pathologist, met by videoconference on May 16, 2022, to discuss their impressions of Student and ideas about his placement. Someone mentioned, and the speech-language pathologist who attended the staffing noted, “Our rec. will be a regional program that can meet his orthopedic needs life functioning.” Additionally, either someone mentioned one specific program, or the speech-language pathologist on her own thought of and wrote down in her own notes “Ingham – CCS are there,” meaning California Children’s Services delivered the therapies it provides onsite at the Arthur B. Ingham Center campus. The physical therapist separately took notes for

herself and recorded, "Team is recommending placement with MCOE [meaning Monterey County Office of Education] or special day class program, which would be outside of this district."

Carmel staff were not prohibited from having opinions, as professional educators, about what placement a student might require. And Carmel staff were not prohibited from talking to each other before the IEP team meeting to discuss their opinions or ideas. As a result of Carmel considering Student's records and presentation, and their perception of where he could be satisfactorily educated, Parents received a draft of the IEP before the meeting indicating to them Carmel's placement recommendation was a regional program operated by the Monterey County Office of Education. That recommendation does not amount to predetermination of an IEP offer. In fact, the physical therapist's notes reflect Carmel was also considering special day classes available at partner school districts' campuses, not only one with the County.

There was no persuasive evidence to support Student's assertion Carmel failed or refused to hold, or avoided, a discussion of Parents' concerns regarding placement at the May 23, 2022 IEP team meeting. The IEP team meeting audio recording reflected awkwardness in Carmel staff's tone and speech, and hesitation in their expression. It sounded like Carmel staff felt uncomfortable saying what they truly thought about Student's abilities and challenges, because Parents only wanted to see the best in Student, minimized or dismissed Carmel staff's statements about their concerns for how to work with and educate him, and viewed everything about Student as indicating the ability to be satisfactorily educated in full-time general education. Carmel staff did not argue, and sometimes, but not always, kept quiet.

Mother later emailed Gonzalez complaining the IEP team “had very little engagement with the strengths noted in [Student’s] current IEP from his previous district. The discussion primarily centered around negative observations that occurred in the nine days he had spent attending school in the district.” Mother felt Parents suggested solutions to some challenges Carmel staff pointed out, and then were “met by silence from you and your team.”

The audio recording suggested Carmel staff strongly disagreed with ideas Parents suggested but did not want to seem overly negative about Student or critical of Parents’ ideas. So they held their tongues to let Parents speak freely and not be shut down in their advocacy for their son. The recording reflected that Carmel staff did not believe Student had been satisfactorily educated in the past, and did not believe he could be satisfactorily educated and make real progress in his areas of need in a general education program.

One example of how Parents and Carmel had different perspectives, and Carmel allowed Parents to share their ideas, concerns physical equipment to provide Student different postures and access to environments, apart from sitting in his wheelchair or lying on a mat on the floor. The San Lorenzo Valley physical therapist recommended many different pieces of equipment for Student to develop his motor control and provide him different seating options and other postures across his school day. Carmel’s physical therapist recommended similar equipment, including some to keep him at the same height as his peers when working on floor activities so he could be engaged with them. Mother spoke to the Carmel physical therapist before the IEP team meeting and requested to limit the amount of equipment.

At the IEP team meeting, Mother stated she was concerned about the busy kindergarten classroom at Tularcitos and remarked, "Having extra equipment in the general education classroom is really difficult. So I think my concern was how do we minimize the amount of equipment around [Student] to be reasonable so that he can still participate in the general education environment?" Mother shared input from a conversation she had with the school nurse before the IEP team meeting, with the idea of only using the stander device when Student was outside, such as at recess. Mother requested the stander be stored in a "utility closet or somewhere" to keep it out of the classroom.

The occupational therapist shared that sometimes the children were outside and there were two water tables, and kids ran around from table to table. The occupational therapist thought the idea of using the stander outside would allow Student to be on his feet and at the same height as the other children. That activity would allow Student to spend time at one water table and then be pushed over to the other water table, which would help him interact with his peers. The physical therapist agreed to look at rewriting a goal to include potential use of a stander after the next school year started.

While the physical therapist was concerned about increasing Student's mobility and access to different environments by using equipment, Mother was concerned any equipment Student required would be a factor used against Student in considering whether Student could be satisfactorily educated in a general education classroom. Mother was concerned a general education classroom would be viewed as too small to accommodate the many pieces of equipment Student required and the IEP team would then recommend a different type of placement.

The IEP team moved on to discuss placements on the continuum of placement options and Mother directed the conversation back to discussing goals, which the IEP team members described and discussed. Parents had meaningful participation in the discussion about goals. Then the IEP team returned to the topic of the continuum of placement options. Carmel members of the IEP team shared their opinions about Student's significant challenges and needs, and what environment was appropriate to support him. Parents disagreed and emphasized ways in which they perceived Student as able to receive satisfactory educational benefit in a full-time general education setting. They believed Student was motivated to do more and try harder when he was in the company of his typical peers. Parents shared examples such as Student rejecting being fed by bottle and wanting only to eat off a spoon when other children were around, and also exhibiting much greater head control in the last year by lifting his otherwise "floppy" head up as a response when typical peers wanted to engage with him. Parents believed Student would make more progress on speech and language when there were children he was motivated to talk with than if he was in a quiet environment working with an adult one-on-one.

The analysis under Issue 1.E about "predetermination" is different than the questions presented in Issues 1.F and 1.G, which turned on how the May 23, 2022 IEP team failed to discuss, at all, the amount of inclusion that would be necessary for Student to receive educational benefit if Student attended the placement on the continuum of placement options Carmel recommended.

Here, the focus is on the Parents' opportunity to participate in the first analysis for a least restrictive environment determination, the balancing of the four factors stated in *Rachel H.*, before any second analysis under *Daniel R.R.*, if necessary. Parents attended the IEP team meeting and actively participated. They shared their perspectives

on how successful Student could be in a full-inclusion environment, and advocated for Student to attend general education kindergarten at his neighborhood elementary school. Carmel staff listened. In the end, Parents were not convinced Student required a more restrictive placement that would remove him from his neighborhood elementary school. And conversely, Carmel staff were not convinced they had the skills, expertise, or resources to provide Student a satisfactory education, and they did not believe Student could receive a satisfactory education at Tularcitos in the general education kindergarten.

The fact that Carmel personnel had an opinion before the IEP team meeting about what might be the appropriate placement for Student on the continuum of placement options, and did not ultimately change their minds after Parents shared their views, was not evidence Carmel predetermined the May 23, 2022 IEP offer. Student failed to prove Carmel predetermined the May 23, 2022 IEP offer, thereby denying Parents meaningful participation in the May 23, 2022 IEP team meeting. Carmel did not deny Student a FAPE by predetermining the May 23, 2022 IEP offer. Therefore, Carmel prevailed on Issue 1.E.

#### ISSUE 1.H: NO DENIAL OF FAPE FOR 11 DAYS FOR FAILING TO HAVE NECESSARY TEAM MEMBERS AT THE MAY 23, 2022 IEP TEAM MEETING

In Issue 1.H, Student contends Carmel denied him a FAPE by not having all necessary team members at the May 23, 2022 IEP team meeting. Carmel denies any required member was not present.

Unless excused in writing by the parent, the IEP team is required to include:

- one or both of the student's parents or their representative;
- a regular education teacher if a student is, or may be, participating in the regular education environment;
- a special education teacher;
- a representative of the school district who
  - is qualified to provide or supervise specially designed instruction to meet the unique needs of children with disabilities,
  - is knowledgeable about the general education curriculum, and
  - is knowledgeable about available resources;
- someone who can interpret the instructional implications of assessment results; and
- at the discretion of the parent or school district, other individuals who have knowledge or special expertise regarding the child.

(20 U.S.C. § 1414(d)(1)(B); 34 C.F.R. § 300.321A; Ed. Code, §§ 56341, subd. (b), 56342.5 [parents must be part of any group that makes placement decisions].) Finally, whenever appropriate, the child with the disability should be present. (20 U.S.C. § 1414(d)(1)(B)(vii); 34 C.F.R. § 300.321A; Ed. Code, §§ 56341, subd. (b)(7).)

Student's complaint did not specifically identify who, by category or individual identity, Student contends was required to attend but did not. Student's written closing argument failed to mention this issue at all. A vague allegation that Carmel did not have all necessary team members present at an IEP team meeting without supporting evidence was insufficient for Student to meet his burden of proof on this issue.

Student failed to prove by a preponderance of the evidence a required IEP team member did not attend the May 23, 2022 IEP. Further, Student failed to prove by a preponderance of the evidence

- that purported procedural violation of any missing IEP team member significantly impeded Parents' participation in the decisionmaking process,
- that Student was deprived of educational benefit, or
- that Student's right to a FAPE was otherwise impeded for the 11 days at issue.

Therefore, Carmel prevailed on Issue 1.H.

#### ISSUE 1.I: NO DENIAL OF FAPE FOR FAILING TO MAKE A SPECIFIC FORMAL OFFER OF FAPE IN THE MAY 23, 2022 IEP

In Issue 1.I, Student contends Carmel denied him a FAPE by failing to make a specific formal offer in the May 23, 2022 IEP. Carmel contends the May 23, 2022 IEP satisfied all requirements to be a clear, written offer.

An IEP must include

- a statement of the special education and related services, and supplementary aids and services, based on peer-reviewed research to the extent practicable, that will be provided to the student), and
- program modifications or supports for school personnel, that will be provided to enable the student to
  - advance appropriately toward attaining the annual goals,



- being involved in and making progress in the general education curriculum and
- participate in extracurricular and nonacademic activities, and to be educated and participate with other individuals with exceptional needs and nondisabled pupils. (20 U.S.C. § 1414(d)(1)(A)(i)(IV); 34 C.F.R. § 300.320(a)(4); Ed. Code, § 56345, subd. (a)(4).)

The IEP must include an explanation of any extent to which the student will not participate with nondisabled students in the regular class and extracurricular and nonacademic activities. (Ed. Code, § 56345, subd. (a)(5).)

The IEP must include a statement of individual appropriate accommodations that are necessary to measure academic achievement and functional performance of the student on state and districtwide assessments. (Ed. Code, § 56345, subd. (a)(6).)

The IEP must include a projected start date for services and modifications, as well as the anticipated frequency, location, and duration of services and modifications. (20 U.S.C. § 1414(d)(1)(A)(i)(VII); 34 C.F.R. § 300.320(a)(7); Ed. Code, § 56345, subd. (a)(7).) Only the information set forth in title 20 United States Code section 1414(d)(1)(A)(i) must be included, and the required information need only be set forth once. (20 U.S.C. § 1414(d)(1)(A)(ii); 34 C.F.R. § 300.320(d); Ed. Code § 56345, subds. (h) & (i).)

The Ninth Circuit has observed that the formal requirements of an IEP are not merely technical, and therefore should be enforced rigorously. A district has an obligation to make a formal, written offer in the IEP that clearly identifies the proposed program. The requirement of a coherent, formal, written offer creates a clear record that

helps eliminate factual disputes about when placements were offered, what placements were offered, and what additional assistance was offered to supplement a placement. It also assists parents in presenting complaints with respect to any matter relating to the educational placement of the child. (*Union School Dist. v. Smith* (9th Cir. 1994) 15 F.3d 1519, 1526 (*Union*); *J.W. v. Fresno Unified School Dist.* (9th Cir. 2010) 626 F.3d. 431, 459-460.)

Carmel's final version of the May 23, 2022 IEP offer was the version sent to Parents on June 28, 2022. The finality of that offer was evidenced by Carmel filing a request for due process hearing seeking a determination from OAH that the May 23, 2022 IEP complied with all procedural and substantive requirements of the IDEA and California Education Code, such that it could be implemented without Parents' consent.

Student argues many aspects of the process leading to the final draft of the May 23, 2022 IEP Carmel sent Parents on June 28, 2022, prevented Parents from meaningfully participating in the development of the May 23, 2022 IEP. But Student failed to prove by a preponderance of the evidence any manner in which the May 23, 2022 IEP document, as made into a final offer by Carmel and provided to Parents on June 28, 2022, failed to state a coherent, formal, written offer as required by *Union*. (15 F.3d at p. 1526.) The June 28, 2022 final version of the May 23, 2022 IEP stated the goals Carmel proposed and how they would be measured. It stated the special education and related services, and supplementary aids and services, that would be provided to Student, and program modifications or supports for school personnel, that will be provided to enable Student to advance appropriately toward attaining the annual goals, being involved in and making progress in the general education curriculum and

participate in extracurricular and nonacademic activities, and to be educated and participate with other individuals with exceptional needs and nondisabled pupils. It stated Student would not participate with any nondisabled students in the regular class and extracurricular and nonacademic activities. Finally, the June 28, 2022 final version of the May 23, 2022 IEP stated a projected start date for services and modifications, as well as the anticipated frequency, location, and duration of services and modifications.

Student failed to prove Carmel denied him a FAPE by failing to make a specific formal offer in the May 23, 2022 IEP. Therefore, Carmel prevailed on Issue 1.I.

#### ISSUE 1.D.iii: NO DENIAL OF FAPE FOR FAILING TO OFFER APPROPRIATE ACCOMMODATIONS

Issue 1.D.iii alleges a substantive, rather than procedural, denial of FAPE. Student contends Carmel failed in the May 23, 2022 IEP to offer appropriate accommodations. Student's complaint did not specifically identify any accommodations Student contends he required but was not offered in the May 23, 2022 IEP. Student's written closing argument failed to mention this issue at all. A vague allegation that Carmel did not offer appropriate accommodations without supporting evidence was insufficient for Student to meet his burden of proof on this issue.

Student failed to prove by a preponderance of the evidence that Carmel failed to offer any specific accommodation he required in the May 23, 2022 IEP. Therefore, Carmel prevailed on Issue 1.D.iii.

ISSUE 1.D.iv: STUDENT FAILED TO SATISFY HIS BURDEN OF  
PROOF REGARDING DENIAL OF FAPE FOR FAILING TO OFFER  
APPROPRIATE PLACEMENT AND SERVICES IN THE LEAST  
RESTRICTIVE ENVIRONMENT IN THE MAY 23, 2022 IEP

Issue 1.D.iv also alleges a substantive, rather than procedural, denial of FAPE. In Issue 1.D.iv, Student contends Carmel denied him a FAPE in the May 23, 2022 IEP by failing to offer appropriate placement and services in the least restrictive environment for the 11 days he put at issue. During those 11 days, Parents and Carmel continued to discuss and make changes to the May 23, 2022 IEP, and the final draft of the May 23, 2022 IEP had not yet been presented to Parents.

The question of what constituted the least restrictive environment for Student remained the largest disagreement between Parents and Carmel. For additional context and a general discussion of the “fundamental disagreement as to the proper approach to education” of children with moderate-to-severe disabilities, see *Smith v. Los Angeles Unified School District*, 830 F.3d 843, 847 (9th Cir. 2016). In *Smith*, parents of children with moderate-to-severe disabilities who preferred their children be placed at special education centers and disagreed with closing those centers in Los Angeles Unified School District were allowed to intervene in a long-standing class action lawsuit brought by other parents who had sued Los Angeles Unified School District to, in effect, force the school district to close special education centers and include their children with moderate-to-severe disabilities on general education campuses and in general education classes.

At the time of the due process hearing, Carmel was conducting the comprehensive triennial reassessment of Student. The assessments were not yet done, reports had not yet been written, and an IEP team meeting had not yet been held to review the results and consider their implications for Student's education. Upon completion of the reassessment, Parents and Carmel would meet to consider the least restrictive environment through the lens of the assessment results.

Student failed to present sufficient evidence to allow the necessary analysis of what, as of May 23, 2022, at the IEP team meeting, or even as of June 28, 2022, when Carmel sent its final IEP draft to Parents, was the least restrictive environment for Student under *Rachel H.*, specifically the costs of mainstreaming Student. Student argues it was possible for Carmel to bring "every service or equipment [Student] needed to [Tularcitos], including any necessary training of staff," but did not address the cost of this approach. Student made no argument at all regarding cost. Carmel argues it would be "costly" to create a "program within a program" to maintain Student in general education and would require Carmel to purchase numerous pieces of equipment already at Arthur B. Ingham Center. Carmel asserts the costs weigh in favor of Carmel's proposed placement in a special day class at AB Ingham.

Student had the burden of production and persuasion – together the burden of proof – in Issue 1.D.iv. But Student did not prove how much Carmel would pay the Monterey County Office of Education for providing Student with the proposed placement and embedded related services in the special day class at Arthur B. Ingham Center, where equipment for students with severe orthopedic impairments, visual impairments, and communication impairments was abundant. Student also did not prove, in contrast, how much Carmel would pay to obtain itinerant services from specialists contracted through the Monterey County Office of Education or other

contractors to fill gaps in Carmel's staff for related services in the highly expert specialties Student required, and to acquire specialized equipment or devices for Student. Student could have produced this necessary information through documentary evidence such as contracts and financial information, or through testimony of appropriate witnesses with relevant information.

Without this information, it is not possible to assess the impact of the fourth factor under *Rachel H.* In other cases, OAH has acknowledged the lack of evidence about the costs of mainstreaming a student and eliminated cost as a factor in the least restrictive environment analysis under *Rachel H.* But in those cases, neither party argued cost was relevant, in effect conceding under the facts of those cases that cost did not matter to the least restrictive environment analysis. In this case, Carmel argues cost is not only relevant, but potentially determinative.

Furthermore, as explained in the analysis of Issues 2, 1.F, and 1.G, critical information regarding options for affording Student any inclusion with typical peers, and reasons the burdens of inclusion, including logistics or cost, might outweigh any benefits, was missing in the discussion at the May 23, 2022 IEP team meeting. As relevant to Issue 1.D.iv, that information also was not produced as evidence through the due process hearing., although it was necessary for the least restrictive environment analysis under *Daniel R.R.*

Therefore, on Student's affirmative claim that Carmel failed to offer him appropriate placement and services in the least restrictive environment, Student failed to satisfy his burden of producing all evidence necessary for a full, four-factor analysis under *Rachel H.* of the least restrictive environment for Student, and if Student could

not be educated in a general education environment full time, then analysis under *Daniel R.R.* of whether he was offered mainstreaming to the maximum extent that was appropriate in light of the continuum of program options.

On Student's affirmative claim that Carmel failed to offer him appropriate placement and services in the least restrictive environment, Student failed to meet his burden of proof necessary for a full consideration of the least restrictive environment and therefore did not prove Carmel denied him a FAPE for the 11 days at issue by failing to offer appropriate placement and services in the least restrictive environment. Carmel prevailed on Issue 1.D.iv.

In sum, Student failed to meet his burden of proof on Issues 1.A, 1.C, 1.D.i, 1.D.ii, 1.D.iii, 1.D.iv, 1.E, 1.H, and 1.I. However, Student's success on his affirmative claims in Issues 1.F and 1.G, are addressed in the Remedies section, below.

## ISSUE 1B: 30-DAY INTERIM SERVICES

In Issue 1.B, Student contends Carmel denied him a FAPE by failing to provide him placement and services comparable to those in Student's October 21, 2022 IEP, as amended on November 10, 2022. Carmel contends it followed all obligations for transfer students.

When a student with an IEP transfers to a school district during the school year from within the state but from a district not operating programs under the same special education local plan area, the new district must provide the student special education and related services that are "comparable" to those in the previous IEP for up to 30 days after the student enrolls in the new district, until the new district either adopts the IEP

developed by the previous school district or develops, adopts, and implements a new IEP. (20 U.S.C. § 1414(d)(2)(C)(i)(1); 34 C.F.R., § 300.323(e); Ed. Code, § 56325, subd. (a)(1).)

To facilitate the transition for a student with an IEP who transfers from another school district, the new school in which the student enrolls shall take reasonable steps to promptly obtain the student's records, including the IEPs and supporting documents and any other records relating to the provision of special education and related services to the student, from the district in which the pupil was previously enrolled. (Ed. Code, § 56325, subd. (b)(1).) The previous school district must take reasonable steps to promptly respond to the request from the new district. (Ed. Code, § 56325, subd. (b)(2).)

It would be unreasonable to expect the transferee district to provide exactly the same services as the prior district. (*Ms. S.*, *supra*, 337 F.3d at pp. 1133-1134; and see *Johnson v. Special Educ. Hearing Office, State of California* (9th Cir. 2002) 287 F.3d 1176, 1181 ["The new agency need not, and probably could not, provide the exact same educational program"].)

On May 2 or 3, 2022, Carmel sent a written request to San Lorenzo Valley for Student's educational record. On May 4, 2022, San Lorenzo Valley emailed Carmel the October 21, 2022 IEP as amended on November 10, 2022. Carmel then requested San Lorenzo Valley also email the most recent assessment report and mail the complete special education file. On Monday May 9, 2022, San Lorenzo Valley emailed the IEP again and the evaluation documents from 2019 by the physical therapist and teacher of the orthopedically impaired. San Lorenzo Valley said hard copy records would be



mailed to Carmel the next day. Also on May 9, 2022, Gonzalez forwarded the IEP and those two evaluation reports to the school nurse, physical therapist, speech-language pathologist, and special education case carrier.

On May 2, 2022, Gonzalez completed a form Request for Specialist Assessment for a Visually Impaired Specialist and submitted it to the Monterey County SELPA, which received it on May 3, 2022. Someone at the SELPA determined some required information was missing and returned it to Carmel for additional documentation. Carmel returned the form and additional documents on May 18, 2022.

In the final month of the 2021-2022 school year, Carmel did not have a spare instructional aide to accompany Student during the three-and-a-half-hour day of transitional kindergarten at Carmelo. The transitional kindergarten program had two groupings of students. One came in the early morning and stayed through lunch that ended at 12:20 p.m. and a recess after that until approximately 12:30 p.m. The other group arrived around 11:00 a.m. and stayed through 2:50 p.m., with an overlapping lunch with the morning group. There was one special education aide who was assigned to a student in the morning group, who would only be available to support Student after lunch. Therefore, Carmel offered Student attendance in the second group, but with one-to-one aide support starting at 12:20 p.m. The second group had a classroom aide to support the entire class of approximately six students for the duration of the class, but Carmel did not have a dedicated one-to-one special education aide available for Student until almost half the second group's transitional kindergarten school day was over.

On May 3, 2022, Gonzalez emailed Mother proposing a schedule of transitional kindergarten for Student from 12:20 to 2:50 p.m. daily. Gonzalez also informed Mother

who would assist her with the enrollment process, and suggested a “meet and greet” at Carmelo on Monday, May 9, 2022, for Mother and Student to meet the Director of the preschool and the special education staff who would work with Student. Gonzalez offered this meeting as an opportunity for staff to better understand Student’s needs and the equipment needed to support him. Carmel’s physical therapist, with whom Mother already had contact, would meet Student and start planning for training of the special education aide and obtain the necessary equipment.

Gonzalez stated Student’s start date at Carmelo would be dependent on the equipment and training provided to staff, but he hoped Student could start the day after the meet and greet, on Tuesday, May 10, 2022. Gonzalez provided the names of the school nurse, two speech-language pathologists who would work with Student, and informed Mother he had put in a referral to the County Office of Education for a teacher of the visually impaired. Gonzalez also shared that Carmel did not have an occupational therapist and was trying to hire a substitute, so would arrange for compensatory occupational therapy services during the summer.

After the meet and greet on May 9, 2022, Mother completed the online enrollment for Carmelo. The school secretary verified Student’s immunizations were current based on the online enrollment information and requested a school physical, suggesting Student probably had one around the time he turned five years old. Mother transmitted Student’s pre-kindergarten well child check after-visit summary. The secretary told Mother about one more online requirement of a data confirmation, which Mother promptly completed. By the end of the day on May 9, 2022, Student’s enrollment at Carmelo was accomplished.

Student attended his first day of school at Carmelo on Tuesday, May 10, 2022. The equipment the physical therapist had requested from the SELPA storage the day before were delivered and ready to trial. Mother coordinated to bring Student to school at 11:00 a.m. and stay to demonstrate how to assist him with the morning, lunch, and during time with any of the specialists. She planned to leave at 1:00 p.m. when the one-to-one special education aide was available to support Student for the rest of the day. This schedule was proposed to continue until the following week Tuesday, May 17, 2022, when the physical therapist could start to work with Student consistently on Tuesdays. The classroom aide would support Student when Student was not with another therapist or specialist until the special education aide finished his work with the morning student.

On May 10, 2022, the physical therapist trialed some equipment for Student with Mother and with the special education aide, and had more equipment still to trial the next day. She planned to return to work with Student the following Tuesday but was not yet sure if she could work that into her established schedule.

Also on May 10, 2022, Mother provided Carmel a seizure action plan and medication administration order from Student's neurologist. It indicated Student experienced generalized tonic-clonic seizures lasting from five to 30 minutes, once per month. These seizures were described as whole body rhythmic, pulsing movements with Student being non-responsive. Student might appear tired, sleepy, or confused after a seizure. The doctor defined a "seizure emergency" for Student as any convulsive seizure lasting longer than three minutes, or three or more seizure clusters within 60 minutes. The doctor ordered that if Student had a seizure lasting three minutes or longer, Carmel personnel, who included the school nurse or a "trained, non-medical school employee under the supervision of the School Nurse," should administer rectally

the prescribed medication. The doctor's order stated during a tonic-clonic seizure it was important to keep Student's airway open and watch his breathing. The doctor warned administration of the emergency medication could cause, among other effects, drowsiness, incoordination, and shallow breathing. The school nurse's cell phone number was written onto the form so the seizure emergency protocol to contact the school nurse and call 911 could be followed.

In May 2022, none of Carmel's campuses had a special day class, and specifically the child development center where transitional kindergarten was provided. Student's IEP specified he was to spend 25 percent of his day in a special day class. Student's IEP specified his school day was 240 minutes, but the transitional kindergarten program in Carmel was only 210 minutes per day. Student's IEP specified he required a one-to-one aide at all times, but Carmel did not immediately have a special education aide available to support an additional student on a one-to-one basis during the last month of the school year.

Carmel saw in Student's October 21, 2022 IEP that in addition to orthopedic and visual impairments, he had significant medical diagnoses and precautions needed to be taken regarding seizures, Student holding his breath until he turned blue when he was very upset or frustrated, monitoring a ventriculoperitoneal shunt for malfunction, and needing assistive staff for feedings of semi-solid foods to ensure proper positioning for eating and drinking.

The one-week delay in providing Student special education and related services was due to Student's complex needs and Carmel's attempts to determine how, and with whom, to deliver to Student an educational program that was comparable to the unique program described in the October 21, 2022 IEP, as amended on November 10, 2022. It

was appropriate for Carmel to take some time and care in identifying and marshalling the resources it needed to safely receive a student with significant needs, especially because Carmel, and staff at Carmelo, were not accustomed to serving such students. It was reasonable for Carmel to spend one week after Student's residency had been verified to review information as it became available from Student's prior district and medical team to develop a plan to safely educate Student, obtain necessary equipment, and coordinate staff who could implement Student's general education, special education, and related services.

Gonzalez prepared an interim IEP on May 9, 2022. The document received in evidence was stamped "draft" and no other document was provided. The interim IEP had some inconsistencies written on it, such as indicating the previous district provided Student 75 percent general education, but also stated in a box for notes or additional information that Student was 51 percent general education, and then stated Student's participation in general education was zero percent. But the evidence established Carmel attempted to include Student in its general education transitional kindergarten for as much time as it could, either with Mother serving as Student's one-to-one aide during the first week he attended, and then with a Carmel special education aide supporting Student one-to-one as much time as Carmel had one available to do so. In addition, a general education classroom aide served as Student's one-to-one aide earlier in the day before the special education aide was available.

Carmel had significant difficulty staffing Student's program of special education and related services in the final weeks of the school year. Carmel's staff occupational therapist was on leave and Carmel unsuccessfully attempted to find a substitute so was offering all students compensatory education for the sessions Carmel was unable to deliver while it had no provider. Mother inquired about services from an

occupational therapist and a teacher of the visually impaired before the upcoming IEP team meeting. Gonzalez informed Mother he had submitted a referral to the County for the teacher of the visually impaired, had left a message inquiring about the status, and would follow up. A later email from Mother to the teacher of the visually impaired indicated Student was scheduled for occupational therapy at Carmelo on an upcoming Thursday at 9:30 a.m.

The evidence suggested despite the earlier email indicating Carmel did not have an occupational therapist and was still attempting to obtain a substitute, an occupational therapist met Student once before the IEP team meeting. But there was no evidence about other occupational therapy being provided as required by his amended October 21, 2021 IEP. There was no evidence Carmel later provided or even offered Student compensatory education for the 90 minutes of service by an occupational therapist Student did not receive in the last three weeks of the school year.

Carmel immediately contacted the County Office of Education to obtain services from a teacher of the visually impaired, but the referral was delayed for lack of some information the County wanted in the original May 3, 2022 request. Student did not receive any service from a teacher of the visually impaired, either directly or for consultation with his general and special education teachers, required by his amended October 21, 2021 IEP. There was no evidence Carmel later provided or even offered Student compensatory education for the 180 minutes of service by a teacher of the visually impaired Student did not receive in the last three weeks of the school year.

Carmel's physical therapist initially met Student and attempted to arrange necessary equipment and training for Carmel staff, then worked directly with Student

weekly for the remaining three weeks of the school year. Student failed to prove he did not receive the weekly physical therapy services required by his amended October 21, 2021 IEP.

Carmel's two speech-language pathologists together were responsible for providing speech therapy and services related to augmentative and alternative communication, including things like the visual display of choices whether on Student's iPad Pro or paper, and devices the teacher of the orthopedically impaired in San Lorenzo Valley was attempting to teach Student how to use, switches. Student's amended October 21, 2021 IEP required 60 minutes per week of speech therapy and 60 minutes per week of service San Lorenzo Valley and the Santa Cruz County Office of Education called specialized orthopedic services.

After May 10, 2022, the speech therapist saw Student two times that same week, because a regularly scheduled student was absent. The speech therapist scheduled to see Student the following week during a time that was scheduled as her lunch break. In a later email, the speech therapist described to Mother that the speech therapists, meaning herself and another speech therapist who was Carmel's augmentative and alternative communication specialist, also referred to as an assistive technology specialist, had established schedules with other students and it was a challenge at the end of the school year to find a perfect time for a new student. The two therapists were working together to coordinate times to provide the related services required by Student's October 21, 2021 IEP.

Carmel's assistive technology specialist emailed Mother on Monday, May 1, 2022, stating she had planned to see Student at Carmelo that day to introduce herself to Student and his team at Carmelo, and observe Student's use of his augmentative and

alternative communication system of the PODD, but had a cold and could not go to school. She planned to work with the director at Carmelo to reschedule, indicating the next time she was available to come was that Friday, May 20, 2022, before 11:30 a.m. She then proposed that Friday from 12:15 to 12:45 p.m., but later indicated she rearranged her schedule to be available at the same time the other speech therapist was available, and could come anytime between 11:00 a.m. and 1:00 p.m. that date.

Mother objected to the times both speech therapists proposed to see Student because it was a "crucial point of transition for the [transitional kindergarten] class as a whole and it's important to [Student's] success in the rest of the class time to participate in that transitional time if possible." Mother requested service before 12:15 or after 2:30 p.m. but acknowledged the speech therapist already had a fully booked schedule.

Service logs demonstrate Carmel provided Student some speech therapy, but it does not appear he received what would total 180 minutes in the last three weeks of the school year, or the additional 180 minutes, specifically for augmentative and alternative communication. Student, however, did not calculate the amount of time he contends was the shortfall.

The physical therapist proposed a schedule for the remaining weeks of the school year regarding both training of Student's aides on transfers for Student into and out of his wheelchair to other seating and reclining on the floor, and for direct service to Student.

Finally, Student's October 21, 2022 IEP, as amended on November 10, 2021, included, ambiguously, "individual and small group instruction" provided in "grp" meaning group, in a "separate classroom in public integrated facility" for 240 minutes



per month, as well as “consult with general education teacher 15 minutes weekly or as needed.” Mother represented to Carmel the 25 percent time Student was outside the general education environment was only for pull-out related services and resting time in a separate, quiet environment. Gonzalez wrote on Student’s interim IEP the service of individual and small group instruction by a resource specialist in a separate class for 240 minutes per month, resembling what was in the October 21, 2021 IEP. The evidence did not reflect Student received special education from a resource specialist at Carmelo, but the evidence also did not establish it was required under the model of education San Lorenzo Valley had employed. Student did not calculate the amount of time he contends was the shortfall of any specialized academic instruction.

Student proved by a preponderance of the evidence Carmel implemented an interim program that on paper was comparable to the October 21, 2021 IEP, as amended on November 10, 2021, but in effect, did not afford Student 75 percent of general education time within the 210-minute school day of Carmel’s transitional kindergarten. The offered time, 12:45 to 2:50 p.m., was approximately 30 minutes per day short of the opportunity for general education a comparable program would have afforded Student.

Thus, Carmel denied Student a FAPE by failing to provide Student with placement and services comparable to those in his October 21, 2021 IEP, as amended on November 10, 2021, from May 10, through June 3, 2022. Therefore, Student prevailed on Issue 1B. Remedies for this denial of FAPE are addressed below.

## CONCLUSIONS AND PREVAILING PARTY

As required by California Education Code section 56507, subdivision (d), the hearing decision must indicate the extent to which each party has prevailed on each issue heard and decided.

### ISSUE 1.A:

Carmel did not deny Student a FAPE from April 29, 2022, through the end of the 2021-2022 school year and extended school year by failing to assess Student in all areas of suspected disability.

Carmel prevailed on Issue 1.A.

### ISSUE 1.B:

Carmel denied Student a FAPE from April 29, 2022, through the end of the 2021-2022 school year and extended school year by failing to provide Student with placement and services comparable to those in Student's October 21, 2021 IEP.

Student prevailed on Issue 1.B.

### ISSUE 1.C:

Carmel did not deny Student a FAPE from April 29, 2022, through the end of the 2021-2022 school year and extended school year by failing to identify all of Student's educational needs.

Carmel prevailed on Issue 1.C.

ISSUE 1.D.i:

Carmel did not deny Student a FAPE from April 29, 2022, through the end of the 2021-2022 school year and extended school year by failing in the May 23, 2022 IEP to document appropriate present levels of performance.

Carmel prevailed on Issue 1.D.i.

ISSUE 1.D.ii:

Carmel did not deny Student a FAPE from April 29, 2022, through the end of the 2021-2022 school year and extended school year by failing in the May 23, 2022 IEP to develop goals in all areas of need, specifically vision and communication with augmentative and alternative communication.

Carmel prevailed on Issue 1.D.ii.

ISSUE 1.D.iii:

Carmel did not deny Student a FAPE from April 29, 2022, through the end of the 2021-2022 school year and extended school year by failing in the May 23, 2022 IEP to offer appropriate accommodations.

Carmel prevailed on Issue 1.D.iii.

#### ISSUE 1.D.iv:

Carmel did not deny Student a FAPE from April 29, 2022, through the end of the 2021-2022 school year and extended school year by failing in the May 23, 2022 IEP to offer appropriate placement and services in the least restrictive environment.

Carmel prevailed on Issue 1.D.iv.

#### ISSUE 1.E:

Carmel did not deny Student a FAPE from April 29, 2022, through the end of the 2021-2022 school year and extended school year by predetermining the May 23, 2022 IEP offer.

Carmel prevailed on Issue 1.E.

#### ISSUE 1.F:

Carmel denied Student a FAPE from April 29, 2022, through the end of the 2021-2022 school year and extended school year by failing to consider the full continuum of placements.

Student prevailed on Issue 1.F.

#### ISSUE 1G:

Carmel denied Student a FAPE from April 29, 2022, through the end of the 2021-2022 school year and extended school year by depriving Parents of an opportunity to meaningfully participate in the development of Student's educational program.

Student prevailed on Issue 1.G.

#### ISSUE 1.H:

Carmel did not deny Student a FAPE from April 29, 2022, through the end of the 2021-2022 school year and extended school year by failing to have necessary team members at the May 23, 2022 IEP team meeting.

Carmel prevailed on Issue 1.H.

#### ISSUE 1.I:

Carmel did not deny Student a FAPE from April 29, 2022, through the end of the 2021-2022 school year and extended school year by failing to make a specific formal offer of FAPE in the May 23, 2022 IEP.

Carmel prevailed on Issue 1.I.

#### ISSUE 2:

The IEP of May 23, 2022 did not offer Student a FAPE.

Student prevailed on Issue 2.

## REMEDIES

Student prevailed on his affirmative claims in Issues 1.B, 1.F, and 1.G. Student proved Carmel failed to provide Student with placement and services comparable to those in Student's October 21, 2021 IEP from May 10 through June 3, 2022. Student also proved Carmel failed to consider the full continuum of placements and thereby significantly impeded Parents' opportunity to participate in the decisionmaking process. As remedies, Student requested: 50 hours of compensatory education services in the areas of a one-to-one aide, speech and language services, occupational therapy services, academic services, physical therapy services, augmentative and alternative communication and assistive technology devices, and/or vision therapy services to compensate Student for Carmel's failure to offer Student FAPE during the relevant period.

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); 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].) 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, n. 11 [129 S.Ct. 2484, 174 L.Ed.2d 168].)

An administrative law judge can award compensatory education as a form of equitable relief. (*Park v. Anaheim Union High School Dist.*, *supra*, 464 F.3d at p. 1033.) Compensatory education is a prospective award of educational services designed to catch the student up 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.) The award must be fact-specific and be “reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place.” (*Reid v. Dist. of Columbia* (D.C. Cir. 2005) 401 F.3d 516, 524.) Compensatory education awards depend upon the needs of the disabled child, and can take different forms. (*R.P. v. Prescott Unified School Dist.* (9th Cir. 2011) 631 F.3d 1117, 1126.) Typically, an award of compensatory education involves extra schooling, in which case “generalized awards” are not appropriate. (*Parents of Student W. v. Puyallup School Dist. No. 3* (9th Cir. 1994) 31 F.3d 1489, 1497.) “There is no obligation to provide a day-for-day compensation for time missed. Appropriate relief is relief designed to ensure that the student is appropriately educated within the meaning of the IDEA.” (*Ibid.*)

Student failed to introduce any evidence supporting his request for specific special education services or for compensatory services. No evidence indicated the type, frequency, or duration of services that would be appropriate to enable Student to make progress addressing his unique needs or to compensate Student for services he was denied from May 10 through June 3, 2022. While Student has requested compensatory services, no person qualified to recommend such services testified any of them were appropriate for Student.

However, Student’s failure to present expert testimony does not mean he should not receive any remedy for the denial of FAPE caused by Carmel’s failure to provide Student with placement and services comparable to those in Student’s October 21, 2021 IEP from May 10 through June 3, 2022. It is equitable to award Student remedies arising from Carmel’s denial of FAPE.

As a remedy for Carmel's failure to provide Student with placement and services comparable to those in Student's October 21, 2021 IEP from May 10 through June 3, 2022, Student is awarded a total of 20 hours of compensatory services to be provided by the same educators or related services providers who are serving Student in the 2022-2023 school year, to the maximum extent possible.

The evidence established Student had difficulty adjusting to new adults placing task demands on him, and was slow to adapt to interactions with them. However, over extended time, Student became more participatory, and providers developed a better understanding of his needs and preferences, such that their educational or therapeutic activities could benefit Student. Therefore, rather than award Student services to be provided by a nonpublic agency certified by the California Department of Education, with providers Student would spend time getting to know and who themselves would not likely provide Student benefit with the limited period of interactions, familiar providers will afford Student educational benefit within their compensatory interactions with Student.

Parents shall inform Carmel what quantities of which educational and related services they want Carmel to provide in compensatory education, totaling 20 hours. Carmel shall propose to Parents a schedule for delivery of the compensatory education to be completed by April 28, 2023.

The evidence in this case warrants the further remedy of an order for special education training of Carmel personnel. Special education and general education personnel failed to consider and discuss with Parents during the May 23, 2022 IEP team meeting whether Student required any time during the school day to have interaction with typical peers to receive educational benefit, and if so, what frequency and duration



of inclusion was appropriate, as well as where and how inclusion could be achieved if Student attended the special day class operated by Monterey County Office of Education.

Also, there was no discussion of, if some inclusion would afford Student some educational benefit, whether any other factors mitigated against including Student with typical peers for any time during any school day. Therefore, as a remedy, Carmel shall provide at least four hours of special education training from an independent institution specializing in special education training to school districts.

The training shall be given to all employees of Carmel who are general education teachers and school principals, assistant principals, or other similar administrator titles, who as part of their regular job duties attend IEP team meetings, and also all special education teachers, administrators, related services providers, and school nurses.

Training shall include instruction on factors to consider in identifying the least restrictive environment in which a student can be satisfactorily educated and considerations for inclusion to the maximum extent that is appropriate in light of the continuum of program options, consistent with *Sacramento City Unified School Dist. v. Rachel H. and Daniel R.R. v. State Board of Education*. The training may not be provided by the law firm that represented Carmel in this due process hearing.

The training shall be completed by April 28, 2023.

## ORDER

1. Carmel's request to implement the May 23, 2022 IEP as offered on June 28, 2022, over the objection of Student's Parents, is denied.

2. Within 10 days of this Decision, Parents shall inform Carmel what quantities of which educational and related services they want Carmel to provide in compensatory education, totaling 20 hours. Parents shall also inform Carmel whether they request the compensatory education services be delivered during the regular school day, with no right to make up any other classroom time missed due to the delivery of these compensatory education hours, or prefer service after regular school hours but only on days school is regularly in session.
3. By the end of the first full week school after the winter break, Carmel shall propose to Parents a schedule for delivery of the compensatory education. The compensatory education shall be provided by Carmel personnel or the providers Carmel has contracted with for current services for Student in the 2022-2023 school year. These personnel may include employees of the Monterey County Office of Education through the SELPA or other contractors Carmel selected to fill temporary vacancies in its employee roster, who are serving Student in the 2022-2023 school year, to the maximum extent possible. In the delivery of compensatory education, if the provider cancels a session, the time will be credited back to Student. If Student cancels a session with a least 48 hours' notice, the hours shall be credited back to Student. If Student cancels a session with less than 48 hours' notice, Student will forfeit the hour or hours for the session. Carmel's proposed schedule shall allow the total 20 hours to be completed by April 28, 2023, affording the opportunity for any rescheduled time to be completed by June 2, 2023.
4. Carmel shall provide at least four hours of special education training to all employees of Carmel who are general education teachers and school

principals, assistant principals, or other similar administrator titles, who as part of their regular job duties attend IEP team meetings, and also all special education teachers, administrators, related services providers, and school nurses. Training shall include instruction on factors to consider in identifying the least restrictive environment in which a student can be satisfactorily educated, including evaluating whether a student who cannot be educated in a general education environment has been mainstreamed to the maximum extent that is appropriate in light of the continuum of program options. The training shall be provided by an independent agency or institution not affiliated with Carmel and which specializes in education training to school districts, and may not be provided by the law firm that represented Carmel in the due process hearing. The training shall be completed by April 28, 2023.

5. All Student's requests for other 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/

Kara Hatfield

Administrative Law Judge

Office of Administrative Hearings