

BEFORE THE  
OFFICE OF ADMINISTRATIVE HEARINGS  
STATE OF CALIFORNIA

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CASE NO. 2021090530

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PARENT ON BEHALF OF STUDENT,

v.

MADERA UNIFIED SCHOOL DISTRICT.

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DECISION

February 14, 2022

On September 14, 2021, the Office of Administrative Hearings, called OAH, received a due process hearing request from Parent on behalf of Student, collectively Student, naming Madera Unified School District, referred to as Madera Unified. Administrative Law Judge Elsa H. Jones heard this matter by videoconference on November 9, 10, and 30, and December 1, 2, 3, and 8, 2021.

Sandra Robinson, Attorney at Law, represented Student. Mother attended all hearing days on Student's behalf. Kidd P. Crawford, Attorney at Law, represented Madera Unified. Rebecca McHaney, Director of Special Services for Madera Unified,

attended all hearing days on Madera Unified's behalf. The hearing was interpreted from English to Spanish and Spanish to English for Mother. The interpreter also orally translated parts of documents from Spanish to English and English to Spanish when necessary. Some of the documents offered by Student and admitted into evidence were originally written in Spanish, and Madera Unified did not object to admitting the documents on the grounds that they were in Spanish. English translations of some of those documents were offered by Student and admitted into evidence, and Madera Unified did not object to admitting those documents on the grounds they were translated, or dispute the accuracy of the translations.

Sworn testimony and documentary evidence were received at the hearing. At the parties' request, the matter was continued to January 18, 2022, for the filing of written closing briefs, and thereafter continued to February 1, 2022, for the filing of replies to each other's written closing briefs. The parties' reply briefs were timely filed on February 1, 2022. The record was closed, and the matter was submitted on February 1, 2022.

## ISSUES

1. Did Madera Unified deprive Student of a free appropriate public education, referred to as a FAPE, by failing to provide Student with a statutorily required prior written notice in response to Parents' May 26, 2021, notice disagreeing with aspects of the April 15, 2021 individualized education program, referred to as an IEP?

2. Did Madera Unified deny Student a FAPE by:
  - A. Failing to appropriately assess Student in all areas of suspected disability, specifically, autism, speech and language, occupational therapy, attention and focus, executive functioning skills, mental health, adaptive behavior, social/emotional/behavioral functioning, and transition from September 14, 2019 until his 2021 triennial assessment; and
  - B. Failing to offer Student a sufficient level of specialized academic instruction, including extended school year services, from September 14, 2019, to March 2020?
3. Did the October 2019 amendment IEP deny Student a FAPE by:
  - A. Failing to offer counseling services that were based on an educationally related mental health assessment; and
  - B. Failing to follow the required procedures to excuse the general education teacher's attendance at the IEP team meeting?
4. Did Madera Unified deny Student a FAPE in developing the March 12, 2020 IEP by:
  - A. Failing to follow the required procedures to excuse the general education teacher from attending the IEP team meeting;
  - B. Failing to include accurate present levels of performance in the area of academics;
  - C. Failing to include a clear offer of FAPE regarding when the offered services would begin;
  - D. Failing to include objectively measurable and appropriate goals;

- E. Failing to include goals in the areas of mental health, attention and focus, social, emotional, and behavioral functioning, speech and language, adaptive daily living, visual motor integration, executive functioning, and occupational skills; and
  - F. Failing to include appropriate levels and types of services, including transition and extended school year services?
- 5. Did Madera Unified deprive Student of a FAPE in the development of the April 2020 amendment IEP by unilaterally reducing Student's level of specialized academic instruction?
- 6. Was Madera Unified's 2021 triennial assessment inappropriate because:
  - A. The assessment was not bilingual; and
  - B. Madera Unified failed to assess Student, or appropriately assess Student, or both, in the areas of academics, autism, attention and focus, mental health, speech and language, occupational therapy, behavior and emotional functioning, and transition?
- 7. Did the April 15, 2021 triennial IEP deprive Student of a FAPE by
  - A. Failing to include accurate present levels of performance in academics.
  - B. Failing to include objectively measurable and appropriate goals;
  - C. Failing to include goals in the areas of reading skills, reading fluency, math, written expression, adaptive living skills, attention and focus, mental health, transition, social/emotional/behavioral functioning, occupational therapy, and speech and language;
  - D. Failing to include a clear offer as to when services would start;

- E. Failing to include a clear offer as to how much of Student's specialized academic instruction and services would be delivered on an individual basis and how much would be delivered on a group basis;
- F. Predetermining the decision not to offer Student group social skills services;
- G. Failing to offer an appropriate level and type of services, including transition services;
- H. Failing to offer group social skills services; and
- I. Failing to offer extended school year services?

In his reply to Madera Unified's closing brief, filed on February 1, 2022, Student withdrew Issue 3A, and therefore that Issue will not be discussed in this Decision. However, in his closing brief, filed on January 18, 2022, Student improperly added an entirely new and separate issue regarding the mental health goals in the October 2019 amendment IEP. In so doing, Student violated the ALJ's instructions, given throughout the hearing, that the only issues in the hearing were the issues that were alleged in the due process complaint that were discussed with and agreed upon by the parties at the outset of the hearing. The new issue Student raised under heading 4B at page 27 of his closing brief which, as noted elsewhere in this Decision, was one of several new issues Student improperly raised in his closing brief, was not alleged in Student's due process complaint, was not discussed at the prehearing conference, and was not discussed at hearing as an issue or agreed to be added as an issue by Madera Unified. Therefore, this new issue will not be discussed or determined in this Decision. (Ed. Code, § 56502, subd. (i).)

## 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.) Unless otherwise noted, all 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 a 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).) Student requested the hearing;

therefore, Student has the burden of proof. The factual statements in this Decision constitute the written findings of fact required by the IDEA and state law. (20 U.S.C. § 1415(h)(4); Ed. Code, § 56505, subd. (e)(5).)

## GENERAL BACKGROUND AND JURISDICTION

Student, who was 17 years old and a high school senior at the time of hearing, resided within the boundaries of Madera Unified and attended Madera South High School at all relevant times. He was initially found eligible for special education under the category of specific learning disability in 2016, when he was 11 years old. In March 2018, when Student was 13 years old, his primary disability category was changed to other health impairment, based largely upon his diagnosis of attention deficit hyperactivity disorder. At that time, he also qualified for special education as a student with an emotional disturbance. On May 1, 2019, when Student was 14 years old, the IEP team changed Student's primary eligibility to emotional disturbance, and designated other health impaired as his secondary eligibility.

At all relevant times, Madera Unified placed Student in general education inclusion classes for academic subjects. These classes, also referred to as co-lab classes, were co-taught by a general education teacher and a special education teacher. Madera Unified characterized Student as an English language learner. All of his instruction throughout his high school career was in English, except when he was in the Spanish classes that he took to meet his foreign language requirement. At the time of hearing, Student was on a diploma-track, and Madera Unified expected him to graduate with a high school diploma at the end of the 2021-2022 school year.

## ISSUE 1: DEPRIVATION OF A FAPE BY FAILING TO PROVIDE A PRIOR WRITTEN NOTICE

Student contends Madera Unified should have provided Student with a prior written notice in response to Parents' May 26, 2021, note expressing disagreement with aspects of Student's April 15, 2021 IEP.

District contends that Parents' May 26, 2021, note did not trigger an obligation by Madera Unified to provide prior written notice.

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

In general, a child eligible for special education must be provided access to specialized instruction and related services which are individually designed to provide educational benefit through an IEP reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances. (*Board of Education of the Hendrick Hudson Central School Dist. v. Rowley* (1982) 458 U.S. 176, 201-204; *Endrew F. v. Douglas County School Dist. RE-1* (2017) 580 U.S. \_\_\_\_ [137 S.Ct. 988, 1000].)

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. v. Board of Trustees of Target Range School Dist.* (9th Cir. 1992) 960 F.2d 1479, 1483)



(*Target Range*).) Citing *Rowley, supra*, the court also recognized the importance of adherence to the procedural requirements of the IDEA, but noted that procedural flaws do not automatically require a finding of a denial of a FAPE. (*Id.* at 1484.) Procedural violations may constitute a denial of a FAPE if they result in the loss of educational opportunity to the student or seriously infringe on the parent's opportunity to participate in the IEP process. (*Ibid.*) These requirements are also found in the IDEA and California Education Code, both of which provide that a procedural violation only constitutes a denial of FAPE if it:

- 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); Ed. Code, § 56505, subd. (f)(2).)

## PRIOR WRITTEN NOTICE

A local educational agency must provide parents with prior written notice whenever it proposes to initiate or change, or refuses to initiate or change, the identification, evaluation, or educational placement of the child, or the provision of a FAPE to the child. (20 U.S.C. § 1415(b)(3).) The IDEA prescribes the content of the prior written notice, which must include a description of the subject action and an explanation of why the local educational agency proposed or refused to take the action. It must also include a description of each evaluation procedure, assessment, record, or report used as a basis for the subject action. Further, it must include a statement referring parents to the procedural safeguards; sources for parents to contact to obtain assistance; a

description of other options the IEP team considered and the reasons those options were rejected; and a description of other facts relevant to the local educational agency's proposal or refusal to act. (34 C.F.R. § 300.503(b).) An IEP may serve to provide prior written notice if it contains all of the information required by 34 Code of Federal Regulations part 300.503(b). (Office of Special Education Programs, *Letter to Lieberman* (August 15, 2008) 52 IDELR 18; 71 Fed. Reg. 46450, 46691 (Aug. 14, 2006).)

Student's triennial IEP team meeting was held on April 15, 2021. Parents wrote a note to Madera Unified in Spanish, dated May 26, 2021. The note was translated into English for the hearing. The note was delivered to Madera Unified on or about the end of May 2021. The note stated that Parents did not agree with "the nurse's report" that Mother had said "everything is o.k." The note identified this as page 2 of the nurse's report, but it may also be referring to page 2 of the psychoeducational assessment report by Jordan Ambers, which cites the nurse's report. The nurse's report itself was not offered into evidence. Parents' note also stated they did not agree with "page 3" which stated that Student was not "sick with autism." The statement that Student was not a student with autism appeared on page 3 of Ambers's psychoeducational assessment report, as part of his description of Student's 2018 triennial psychoeducational report. Finally, Parents' note inquired as to what happened with the 2020-2021 semester, during which Student failed a few subjects, but the IEP team "marked that everything was o.k." Parents requested proof because Student was "not what you are rating him, he is not smart as you say he is." Parents asserted the IEP team was "guessing if he is bad and that he is not bad."

There was no evidence that Madera Unified responded to the note. However, Student presented no legal authority Madera Unified was required to send Parents a prior written notice in response to the note. In the note, Parents ostensibly objected to the accuracy of two portions of the psychoeducational assessment report. First, they stated that they did not agree with the nurse's report of communications with Mother, but did not ask that the report be changed. Therefore, this was not a matter involving a proposal by Madera Unified to initiate or change, or a refusal to initiate or change, the identification, evaluation, or educational placement of the child, or the provision of a FAPE to the child so as to require a prior written notice. Parents may attach their note as an attachment to the IEP stating their version of what Mother told the school nurse.

Second, Parents did not agree with the statement that the 2018 psychoeducational assessment of Student ruled out autism. Again, this was not a matter involving a proposal by Madera Unified to initiate or change, or a refusal to initiate or change, the identification, evaluation, or educational placement of the child, or the provision of a FAPE to the child so as to require a prior written notice. (34 C.F.R. § 300.503.) Rather, it is a statement of disagreement with Ambers's summary of the 2018 psychoeducational assessment. Parents did not request that either of the psychoeducational assessments be changed, or that Student's eligibility be changed.

To the extent that Parents' note challenged the validity or accuracy of the finding of the 2018 psychoeducational assessment that Student was not eligible for special education as a student with autism, any such challenge is barred by the two-year statute of limitations. Parents cannot now circumvent the bar of the statute of limitations by criticizing, in May 2021, a factual statement in the spring 2021 triennial psychoeducational report that referred to a conclusion of the 2018 triennial

psychoeducational assessment report. Special education law does not recognize the doctrine of continuing violations as an exception to the two-year statute of limitations. (20 U.S.C. §§ 1415(b)(6)(B), (f)(3)(D); see also *E.F. v. Newport Mesa Unified School Dist.* (C.D. Cal., June 23, 2015, No. SACV 14-00455-CJC (RNBx) 2015 WL 3867982,\* 8, fn. 6, *affd. on remand E.F. by and through Fulsang v. Newport Mesa Unified School District* (9th Cir. 2018) 726 Fed.Appx. 535) In short, this portion of Parents' note is also not an item that, as a matter of law, required a prior written notice as of spring 2021.

Finally, Parents' note took exception to Madera Unified's IEP team members' statements pertaining to the present levels of Student's performance in the April 15, 2021 IEP, and asked for "proof" to support their statements. Again, this is not a matter of Madera Unified's proposing or refusing to initiate or change the identification, evaluation, or educational placement of the child or the provision of a FAPE to the child such that Madera Unified was required to respond with a prior written notice. Parents' note did not request that Student's identification, evaluation, educational placement of the child, or that the FAPE offer in the IEP be changed, or even that the IEP be changed. Rather, Parents disagreed with the IEP team's perception of Student's performance and asked for proof. (*See, e.g., M.S. v. Lake Elsinore Unified Sch. Dist.* (9th Cir. 2017) 678 Fed.Appx. 543, 544 [when the statute requires that Parents request a reassessment, they have to actually request it or they are not entitled to it].)

If a prior written notice were required in response to all or any part of Parents' note, the failure to send such a notice would constitute a procedural violation of the IDEA. Such a procedural violation is only actionable if it impeded Student's right to a FAPE, significantly impeded Parent's opportunity to participate in the decisionmaking process regarding the provision of a FAPE, or caused a deprivation of educational

benefits. Student did not demonstrate that the failure of Madera Unified to send a prior written notice in response to Parents' May 26, 2021, note resulted in any of these consequences. In particular, Parents did not demonstrate that they were prevented from participating meaningfully at the April 15, 2021 IEP team meeting.

Student did not show that Madera Unified committed a procedural violation for not responding to Parents' note with prior written notice, or that the lack of a prior written notice deprived Student of a FAPE.

## ISSUE 2A: FAILURE TO APPROPRIATELY ASSESS STUDENT BETWEEN SEPTEMBER 14, 2019, AND THE APRIL 2021 TRIENNIAL ASSESSMENT

Student contends Madera Unified should have assessed Student in the areas of

- autism,
- speech and language,
- occupational therapy,
- attention and focus,
- executive functioning skills,
- mental health,
- adaptive behavior,
- social/emotional/behavioral functioning, and transition

between September 14, 2019, the beginning of the two-year statute of limitations period, and the spring 2021 triennial assessment. Student's closing brief did not address the areas of autism, executive functioning, or mental health. However, at the prehearing conference and at hearing, those areas were determined to be included in

this issue for hearing, and Student's closing brief did not specifically withdraw or dismiss the issue as to those areas. Therefore, those areas will be addressed in this Decision.

Madera Unified contends that Student did not produce any evidence to support that Student required assessment in any area other than those already assessed as part of Student's 2018 triennial psychoeducational assessment, a transition assessment in early 2019, and an educationally related mental health assessment conducted in September 2019. It asserts that these assessments were sufficient, and Student was assessed in all areas of suspected disability.

The IDEA distinguishes between initial evaluations, which occur before a child is found eligible for special education (34 C.F.R. § 300.301), and reevaluations of students, such as Student, who already are receiving special education and related services under the IDEA. (34 CFR § 300.303). A district must ensure that a reevaluation of each child with a disability is conducted if the district determines that the educational or related services needs, including improved academic achievement and functional performance, of the child warrant a reevaluation, or if the child's parent or teacher requests a reevaluation. (34 CFR § 300.303(b).) Such a reevaluation may occur not more than once a year, unless the parent and the district agree otherwise, and must occur at least once every three years, unless that parent and the public agency agree that a reevaluation is unnecessary. (20 USC §1414(a)(2).) The latter is referred to as a triennial evaluation or assessment.

A district must honor a parent's or teacher's request for a reevaluation if it has not reevaluated the student in the previous 12 months, but this obligation hinges on the parent or teacher making an evaluation request. A parent's expressions of concern about a student's progress or behavior do not meet this threshold. (*M.S. v. Lake Elsinore*

*Unified Sch. Dist.* (9th Cir. 2017) *supra*, 678 Fed.Appx. 543, 544.) Reevaluations may be warranted under a variety of conditions, such as a substantial change in the student's academic performance or disabling condition or a significant escalation in the child's behavior. (20 USC § 1414(a)(2)(A); *West Linn Wilsonville Sch. Dist. v. Student* (D. Ore. July 30, 2014, No. 3:12-CV-02634-ST) 2014 WL 3778571, \*22-\*23; *Student v. San Marino Unified Sch. Dist.* (2017) OAH Case No. 2016110067.)

Additionally, aside from the requirements with respect to reevaluations, the IDEA requires that each school district ensures that a child is assessed in all areas of suspected disability. (20 U.S.C. § 1414(b)(3)(B).) This provision imposes a continuing obligation upon school districts to identify and evaluate all students who are reasonably suspected of having a disability. (34 C.F.R. 300.111(a)(1)(i).)

## TRANSITION ASSESSMENT AND SERVICES

For each student, beginning with the first IEP to be in effect when the student is 16 years old, the IEP must include a transition plan which reflects the transition service needs of the student. (20 U.S.C. § 1414(d)(1)(A)(i)(VIII).) The IDEA defines transition services to require a focus "on improving the academic and functional achievement of the disabled child to facilitate the child's movement from school to post-school activities," which is based upon the child's needs, and considers the child's strengths, preferences, and interests. (20 U.S.C. §1401(34).) The transition plan, which must be updated annually, must include appropriate measurable postsecondary goals based upon an age-appropriate transition assessment related to training, education, employment, and, where appropriate, independent living skills. (34 C.F.R. § 300.320(b).)

A transition assessment may be informal, or may not even be required to support a transition plan. (*M.M. v. New York City Dept. of Education* (2d Cir. 2016) 655 Fed. Appx. 868.)

A transition plan is not required to include goals pertaining to independent living skills. It is up to the IEP team to determine whether IEP goals related to the development of independent living skills are appropriate and necessary for the child to receive a FAPE. (71 Fed. Reg. 46668 (Aug. 14, 2006).) The requirement for postsecondary IEP goals in a transition plan apply regardless of whether the student's skill levels related to training, education, and employment are age-appropriate. (Office of Special Education and Rehabilitative Services, *Questions and Answers on Individualized Education Programs (IEPs), Evaluations, and Reevaluations* (September 1, 2011) *Question F-1* (111 LRP 63322).) Training and education goals can be the same. (*Ibid.*)

Unlike the IEP, a transition plan is not a strictly academic plan, but relates to several post-secondary skills, including employment and, when necessary, independent living skills. (*K.C. v. Nazareth Area Sch. Dist.* (3rd Cir. 2011) 806 F.Supp.2d 806, 822, citing *High v. Exeter Twp. Sch. Dist.* (E.D. PA 2010) 2010 WL 363832, at \*6.) A school district is not required to ensure a student is successful in fulfilling all desired goals, including transition plan goals. The IDEA is meant to create opportunities for disabled children, not to guarantee a specific result. (*K.C. v. Nazareth Area School Dist., supra*, at 822; see also Ed. Code, §56345, subd. (c).)

The test in evaluating a transition plan is whether the IEP, taken in its entirety, is reasonably calculated to enable the particular child to garner educational benefits.



(*Lessard v. Wilton-Lyndeborough Coop. School Dist.* (1st Cir. 2008) 518 F.3d 18, 30.) The *Lessard* court noted that were the law otherwise, “parents could endlessly parse IEPs into highly particularized components, and circumvent the general rule that parents cannot unilaterally dictate the content of their child’s IEP.” (*Ibid.*)

The failure of an IEP team to comply with the requirements for transition planning is a procedural violation of the IDEA. (*Virginia S., et al. v. Dept. of Ed., State of Hawaii* (D. Hawaii, January 8, 2007, Civ. No. 06-00128) 2007 WL 80814, \*10.)

## STUDENT’S RELEVANT ASSESSMENT HISTORY

Madera Unified conducted a triennial assessment of Student from January through March 2018, when Student was 13 years old and in eighth grade. This was the last psychoeducational assessment Madera Unified conducted of Student prior to September 2019. On March 20, 2018, Madera Unified generated a written report of this assessment. There was no evidence that Student formally challenged this assessment.

The assessment, which was not bilingual, included a review of Student’s educational history and prior assessment, a developmental medical history, student interview, parent interview, teacher interview, observations of Student on campus both in and out of class, intellectual assessments, using the Kaufman Assessment Battery for Children, 2nd Edition, a processing assessment, two academic assessments, a behavioral, emotional, and social assessment, and academic achievement assessments. The March 2018 triennial assessment also included an autism assessment, using the Autism Spectrum Rating Scales and the Autism Diagnostic Observation Schedule, 2nd Edition. The assessment report noted that Student’s executive functioning was assessed by way of the simultaneous processing subtests of the Kaufman, and his attention and focus

was measured by the learning scale subtests of the Kaufman. His attention, adaptive behaviors, executive functioning, activities of daily living, behaviors characteristic of attention deficit hyperactivity disorder, and autism, among other aspects of social, emotional, and behavioral functioning were assessed by various subtests of the Behavior Assessment System for Children, 3d Edition. Student's attention and focus were also assessed using as part of the Autism Spectrum Rating Scales.

Overall, the assessment results reflected, among other things, that Student's gross and fine motor skills were intact, and he did not meet criteria for an autism spectrum disorder, or for eligibility for special education under the eligibility category of autism. The assessment results showed Student was eligible for special education and related services under the category of other health impaired, due to attention problems and a County Behavioral Health diagnosis of attention deficit hyperactivity disorder. The assessment results also showed Student met eligibility criteria for emotional disturbance, due to an inability to build or maintain satisfactory relationships with peers and teachers to a marked degree, over a long period of time, all of which adversely affected his educational performance.

On April 9, 2018, shortly after Madera Unified issued the assessment report, Mother wrote to the principal of Student's elementary school requesting a behavioral assessment related to socialization and a speech and language evaluation. There was no documentary evidence as to Madera Unified's response to the letter. Any legal claims directed at Madera Unified's response or failure to respond to the letter would be barred by the two year statute of limitations of Education Code section 56505, subdivision (l).

On September 9, 2019, Kathi Henderson, a licensed marriage and family therapist, wrote a report of an educationally related mental health services assessment of Student she conducted on behalf of the Madera County Superintendent of Schools, and recommended Student receive educationally related mental health services. This assessment was discussed at an amendment IEP team meeting held on October 30, 2019, which Mother attended. Mother signed her consent to that IEP. Student presented no evidence challenging Henderson's educationally related mental health assessment.

Also on September 9, 2019, Madera Unified received a letter from Student's pediatric neurologist, Timothy Foster, M.D., and Parent purportedly requesting a special education evaluation and recommendation of special education services. The letter was not offered into evidence, and there was no evidence that it was a request for a reevaluation of Student. The prior written notice Madera Unified sent to Parent in response to the letter was admitted into evidence, and provided the only documentation as to the form and content of Dr. Foster's and Parent's letter. Based on the prior written notice, Madera Unified interpreted Dr. Foster's and Parent's letter as a request for an initial assessment for services. The prior written notice explained that assessment was not appropriate at the time, as Student already had an IEP and was receiving special education because he met the eligibility criteria for emotional disturbance and other health impairment. The prior written notice also explained Student had last been assessed during a complete psychoeducational evaluation in March 2018, which ruled out eligibility under the categories of specific learning disability and autism. Madera Unified's prior written notice also suggested that Parent's concerns be discussed at an IEP team meeting to be held on October 16, 2019. The sufficiency of Madera Unified's prior written notice is not at issue in this action.

Student contends that the failure of Madera Unified to reassess Student based on the evaluation request in Mother's and Dr. Foster's September 9 letter violates the IDEA, but that contention is based on a misstatement of the facts. The only documentation of the contents of the September 9 letter was the prior written notice letter, and the contents of the prior written notice letter do not reflect that Mother and Dr. Foster were asking for a reassessment. Rather, the contents of Madera Unified's prior written notice letter suggested that, as far as Madera Unified could determine, Mother and Dr. Foster were asking for an initial special education assessment so that Student could obtain special education services. Madera Unified responded that Student already had an IEP and was receiving services. If Madera Unified's impression as to what the never-introduced-into-evidence September 9, 2019, letter stated was wrong, it was up to Mother or Dr. Foster to point that out to Madera Unified. That comports with one of the policies underlying the requirement that school districts send prior written notice letters, so that there is clear communication as to what the district understands whatever it is being asked to do, and its reasons for declining the request.

The only evidence that Mother was requesting a reassessment in the September 9, 2019, letter was Mother's testimony, which was elicited through leading questions. Mother's testimony as to the contents of the September 9, 2019, letter was unreliable. For example, Mother testified she requested a speech and language assessment in the September 9, 2019, letter, but the April 9, 2018, letter, described above, was the only documentary evidence that Mother ever requested a speech and language assessment. Madera Unified's prior written notice sent in response to the September 9, 2019, letter did not mention that the letter requested a speech and language assessment.

Under these circumstances, Student's contention that Madera Unified violated the IDEA by not granting a reassessment in response to the never-offered-into-evidence September 9, 2019, letter is unmeritorious. Student also contends, based on Mother's testimony, that Mother asked for assessments at every IEP team meeting. None of the IEPs at issue in this case show that Mother requested any assessments at any IEP team meeting, and there was no other documentary evidence that Mother made such requests. Except for Mother, no witness testified that Mother asked for assessments at any IEP team meeting. Mother's testimony on this point was unpersuasive in the absence of any supporting evidence. Therefore, Student did not demonstrate that Madera Unified violated the IDEA by not performing assessments requested by Mother.

The premise of Issue 2A is based on Mother's and Dr. Foster's perception and observations that Student performed at a far lower level than Madera Unified perceived, observed, and knew. At hearing, Mother explained that in the home environment, Student could not retain information, could not fill out school forms, and could not read or perform homework without help from Student's siblings and Mother. Mother described that Student stayed in his room and did not interact with family members, and he had no friends. Mother said he would not go outside, and he could not go away from home by himself because he could not remember his address or telephone number and could not find his way back home. She stated he did not take a shower unless she forced him, he needed help to wash his hair, and she had to help him find his clothes and brush his teeth. According to Mother, Student did not remember to, resisted, or could not perform household tasks. He went to school on the school bus with his sister. Mother did not let him go to school alone, because she worried about his safety. She was afraid he would be hit by a car.

Mother observed Student was unable to focus and was easily distracted. Mother described Student's frustration, stress, depression, and feelings of uselessness which she attributed to his inability to retain information and to perform his schoolwork independently at home. Mother stated that Student could not express himself well, explain why he wanted to go out, nor say what he wanted to eat. In her experience, she could not have a conversation with him, since sometimes he was nervous when she tried to converse with him, or he would not pay attention, or would be unable to formulate a response. In general, Mother did not relate her observations to any particular time period. As Mother continued to testify over the course of several hearing days, the worse her descriptions of Student's abilities became. Mother believed that Student had made no progress at school.

Dr. Foster was a child neurologist who first examined Student in 2018. He received his M.D. in July 1994 from the Universidad Michoacana de San Nicolas de Hidalgo, Mexico. He received his certification in June 2007 from the American Board of Psychiatry and Neurology in Neurology with special qualifications in Child Neurology. Since December 2016 he was an Assistant Clinical Professor, Department of Pediatrics, Division of Child Neurology, University of California, San Francisco.

At hearing, Dr. Foster testified as to his diagnosis of Student and his opinions of Student's disabilities and needs. Dr. Foster examined Student approximately four times between 2018 and the time of the hearing, but there was little evidence of the specific dates of most of his examinations, and few of his records were offered into evidence. Dr. Foster performed his last examination of Student prior to hearing on March 2, 2021. Much of Dr. Foster's testimony, such as when he developed certain opinions or obtained certain information, was not related to a specific time frame.

Upon first meeting Student, Dr. Foster was struck by how developmentally delayed Student was. Like Mother, Dr. Foster considered Student to be performing at a low level and to have few skills. Dr. Foster believed Student's delays worsened because Madera Unified did not address Student's learning disability.

Dr. Foster was unable to connect with Student at that first meeting, so he conversed with Mother. He also stated that he diagnosed Student at his latest visit of March 2, 2021, with moderate intellectual disability and some features of the autism spectrum. Dr. Foster did not diagnose Student with depression. He believed that Student was dysthymic, but did not believe Student had a personality disorder. Dr. Foster considered Student's moderate intellectual disability would have a significant impact on Student's ability to function in the classroom and learn information. Dr. Foster described Student as seeming "almost like a person with a brain injury." Dr. Foster confirmed that he ruled out that Student was a child with autism, but rather his autistic like behaviors were due to other factors, such as his auditory processing deficiencies. Dr. Foster posited that when Student did not understand communications, he would turn away and withdraw. Dr. Foster noted that Madera Unified's spring 2018 triennial assessment was sufficient for educational purposes, and remarked that the assessment disclosed Student's auditory processing deficiencies.

Dr. Foster recommended that Student be assessed for speech and language, because he believed Student's communication skills were very impaired. Dr. Foster did not state when he arrived at this opinion. He believed a speech and language assessment would more closely examine Student's auditory processing disorder and his difficulties with expressive and pragmatic speech. Dr. Foster noted that Student "doesn't seem to get" that the purpose of language was to have a relationship and communicate.

Dr. Foster did not think that Student's issues with focus were his main difficulties, rather, they were issues by "default," and secondary to his other deficits. Dr. Foster recommended an occupational therapy assessment because Student's writing was illegible, and Dr. Foster also believed Student had sensory difficulties. Dr. Foster explained that Student's sensory difficulties were reflected in the fact that he was easily overloaded, and that accounted for his withdrawal. Again, Dr. Foster did not state when he arrived at these opinions.

Dr. Foster also recommended a transition assessment for a realistic assessment of Student's skills to help determine whether Student was employable. Dr. Foster believed that Student's desire to be a policeman was unrealistic due to his low level of cognitive functioning, but that he was teachable and needed interventions to acquire skills so that he could learn a trade. Dr. Foster considered Student to be visual learner, and believed that Student could work in the construction field.

Dr. Foster never spoke to any of Student's teachers, nor observed Student in class or on campus. He never attended any of Student's IEP team meetings, although he would have been willing to attend them and to speak to Student's teachers. There was no evidence that Mother invited him to any IEP team meeting, although she had the right to do so. (34 C.F.R. § 300.321(a)(6).) Dr. Foster performed medical testing on Student, including DNA testing, but did not administer any standardized, norm-referenced tests. Dr. Foster prescribed medication to speed up Student's ability to process information, but the medication was unsuccessful.



Prior to 2021, the evidence showed that the only written information transmitted to Madera Unified concerning Dr. Foster's opinions and recommendations was the September 9, 2019, letter from Dr. Foster and Mother requesting a special education evaluation and a recommendation of special education services.

Madera Unified had assessed Student as part of its triennial psychoeducational assessment in March 2018 in the areas of autism, attention and focus, executive functioning skills adaptive skills, and social, emotional, and behavioral functioning. There was no evidence that Student's status in any of these areas had changed such that Student required any further assessment in any of these areas during the period from September 14, 2019, until his spring 2021 triennial assessment. Mother did not request any additional assessments in these areas during this period. Moreover, there was no evidence that Madera Unified was aware that Dr. Foster or any other health professional diagnosed Student with any disabilities during this period of time. Student did not meet his burden of proving that Madera Unified should have assessed him in these areas prior to the 2021 spring triennial assessment.

Dr. Foster testified that Student needed an occupational evaluation because of illegible writing, and possible sensory issues. However, on cross-examination he conceded that several handwritten samples of Student's schoolwork were legible. There was no evidence that Student had any occupational therapy issues, including sensory issues, at school between September 14, 2019, and the 2021 triennial assessment. None of Student's teachers who taught him prior to the 2021 triennial assessment testified that his writing was illegible or that he exhibited any sensory issues at school. The autism portions of the 2018 triennial assessment included sensory issue testing, and found no deficits in that area. As is further described with respect to Issues 3(B) and (4),

below, Student's IEPs between September 14, 2019, and the 2021 triennial assessment all stated that his gross and fine motor skills were age appropriate, and his handwriting was legible. Mother did not request an occupational therapy assessment during this time period. Consequently, Madera Unified did not deprive Student of a FAPE by failing to perform an occupational therapy assessment during this time period.

Student's contention that he required a mental health assessment during the period from September 14, 2019 to spring 2021 is also unmeritorious. Madera Unified referred Student for an educationally related mental health assessment. It completed such an assessment in fall 2019, and as a result the October 30, 2019 IEP amendment offered mental health services to Student. Student offered no evidence that Madera Unified had, or should have had, reason to suspect that Student had different or increasing mental health issues during this period such that he required another mental health assessment. Madera Unified did not deprive Student of a FAPE on this ground.

With respect to transition, Madera Unified had conducted a transition assessment of Student during the 2018-2019 school year, in conjunction with his March 15, 2019 IEP team meeting. To the extent Student challenges the appropriateness of that assessment, such a claim is barred by the statute of limitations, as discussed above. The IDEA did not require Madera Unified to develop a transition plan for Student until the March 12, 2020 annual IEP, as that was the IEP that would be in effect in September 2020, when Student reached the age of 16. That IEP, which is discussed in more detail with respect to Issue 4, below, included a transition plan. The transition plan in the March 12, 2020 IEP was based upon a Career Exploration Inventory that Madera Unified administered to Student in September 2019, as well as on an interview with Student.

Student contends that Madera Unified's transition assessment performed in anticipation of the March 12, 2020 IEP was inappropriate as Madera Unified failed to conduct a transition planning assessment related to training, education, employment, independent living skills, and vocational needs. As was described above, a transition assessment addresses essentially three areas: education and training, employment and vocational needs, and independent living skills. The first two are mandatory, the third, independent living skills, is only required if appropriate.

Student did not meet his burden of demonstrating that Student's transition assessment failed to address his education and training, and employment and vocational needs. In addition to the Student interview and the career inventory, Student was enrolled in the criminal justice career pathway, also referred to as the public safety career pathway, at Madera Unified, from ninth grade through the time of hearing. This pathway consisted of a series of elective classes focused on a post-secondary career in law enforcement, the military, and other front-line public service careers. Student had expressed his desire to become a police officer from the time he was approximately eight years old, and this career aspiration was known to Student's teachers at Madera South. The courses in this career pathway were designed to explore Student's interests and aptitude for law enforcement, security, and other public safety types of careers, including their physical fitness requirements, the types of careers one could pursue in this category, and their requirements. Based on these classes, Madera Unified had information about Student's career goals and aptitude. Bearing in mind the law, as stated above, that transition assessments do not have to be formal assessments, Student's contention that the employment and education portions of his transition assessment were lacking is not meritorious.

Madera Unified did not examine Student's adaptive behavior or adaptive living skills as part of the transition assessment. All of Student's IEPs at the time stated he could function at school, and, at hearing, Henderson testified that Student was functional at school. However, Madera Unified had reason to suspect that Student had deficiencies in adaptive living skills in the community. The 2018 triennial assessment included an interview with Mother, during which she reported that Student needed reminders to take care of his personal needs, and to perform other daily tasks such as chores safely and efficiently. Mother had to select his clothes for him to get dressed appropriately, otherwise he would not get dressed or would wear whatever he found in his room. He stayed in his room all the time, and refused to interact with others. He did not eat during the day unless directed to do so by Parent, and Parent had to serve his food. Student would sneak into the kitchen to eat at night. He was reluctant to go outside, and when Father took Student to work with him, Student stayed in the car and was unwilling to come out. Parents had to force Student to go to the gym, and when there, Parent had to stand next to him so that Student would use the exercise equipment. However, Student did not use the equipment, he simply stood by or on the equipment and stared at people.

On the adaptive scale on the Behavior Assessment Scales, which was administered as part of the 2018 triennial assessment, the assessor concluded that Mother's ratings were to be interpreted with caution, as she had an overly negative perception of Student's behavior. However, the assessor determined that both Parents' and teacher's ratings on the Behavior Assessment Scales reflected concerns with adaptive skills. The educationally related mental health assessment report dated September 9, 2019, noted that Student had no friends, preferred to be alone, and did not ask for help when needed.

Some of this information may reflect typical adolescent behavior. However, all of this information was sufficient for Madera Unified to suspect that Student had deficiencies in adaptive living skills in the community. There was no evidence that Student could not function reasonably well at school, but Student required adaptive skills to function in the community so as to be able to pursue postsecondary education and a career, and Madera Unified should have examined whether Student actually had needs in this area. In view of its knowledge of Student's deficiencies in adaptive behavior as reported by Mother and as demonstrated by assessment, Madera Unified should have observed and evaluated Student's adaptive capabilities outside of school and in the community, and, if warranted after assessment, offered goals and services to address Student's inability to care for himself independently at home and in the community. The failure of Student's transition assessment, as performed in preparation for the March 12, 2020 IEP team meeting, to include an evaluation of Student's adaptive capability in the community, rendered the transition assessment inappropriate and was a procedural violation of the IDEA. (*Park v. Anaheim Union High School Dist.* (9th Cir. 2006) 464 F.3d 1025,1031.) (*Park*.)

Procedural violations are only actionable if they impeded the child's right to a FAPE, significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of a FAPE to the child; or caused a deprivation of educational benefits. The failure of Madera Unified to include an evaluation of Student's adaptive living skills in the community as part of its transition assessment deprived Student of an educational benefit, because unless Student could care for himself and function with some degree of independence in the community, he could not attend college or hold a job. This failure also substantially impeded Parents' opportunity to participate in the decisionmaking process with respect to the provision

of a FAPE, because Parents were not able to be fully advised as to Student's deficits and how he could accomplish his educational and career goals. As a result of the inappropriate transition assessment, Madera Unified deprived Student of a FAPE.

Madera Unified also deprived Student of a FAPE by failing to perform a speech and language assessment between September 14, 2019, and the triennial assessment. Speech and language deficits in themselves can constitute a separate, defined eligibility category under Education Code section 56333, but they also often appear in conjunction with other eligibility categories. Either way, the IDEA imposes a continuing duty upon Madera Unified to evaluate all areas of suspected disability. Here, at all relevant times during the period between September 14, 2019 and the spring 2021 triennial assessment, Madera Unified had reason to suspect that Student had a disability in speech and language. First, his eligibility category of emotional disturbance was based on his inability to maintain peer relationships, a sign of poor social communication. Second, the 2018 triennial assessment supported that Student had communication difficulties. Student did not talk with his family, and he had no friends. Mother reported that Student had difficulty expressing his ideas, as he took a long time, and stuttered. Teacher's ratings on the Behavior Assessment placed Student in the at-risk range in the area of functional communication. Student's scores on the Test of Auditory Processing Skills, 3d Edition, placed him in the below average range. His scores on the Woodcock Johnson Test of Oral Language, 4th Edition, fell in the very low range in the area of oral expression. Third, Students' educationally related mental health assessment report, dated September 2019 highlighted Student's communication difficulties, and the Treatment Plan focused on Student's communication skills.

As stated above, a failure to assess constitutes a procedural violation of the IDEA. (Park, *supra*, 464 F.3d at 1031.) The procedural violation of failing to assess Student in the area of speech and language skills significantly impeded Parents' opportunity to participate in the decisionmaking process regarding the provision of a FAPE to Student. Regardless of the outcome of the assessment, without this assessment, Parents could not be fully informed as to Student's deficits, resulting in a denial of a FAPE.

## ISSUE 2B: FAILURE TO OFFER SUFFICIENT LEVELS OF SPECIALIZED ACADEMIC INSTRUCTION AND EXTENDED SCHOOL YEAR SERVICES FROM SEPTEMBER 14, 2019, TO MARCH 2020

Student contends that without proper and complete assessments, Madera Unified did not have material information to identify Student's unique needs, and could not have offered a program tailored to those needs from September 14, 2019, through the annual IEP in March 2020.

District contends that Student's high school transcript demonstrated Student's academic achievements in the classroom, the evidence showed that Student's academic achievements justified his earning a high school diploma at the end of the 2021-2022 school year, and Student offered no proof to the contrary.

An IEP is evaluated in light of information available to the IEP team at the time it was developed; it is not judged in hindsight. (*Adams v. State of Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149) (*Adams*.) "An IEP is a snapshot, not a retrospective." (*Id.* at p. 1149, citing *Fuhrmann v. East Hanover Bd. of Ed.* (3d Cir. 1993) 993 F.2d 1031, 1041.) (*Fuhrmann*.) The IEP must be evaluated in terms of what was objectively reasonable

when the IEP was developed. (*Ibid.*) Additionally, to determine whether a school district offered a student a FAPE, the focus must be on the adequacy of the district's proposed program. (*Gregory K. v. Longview Sch. Dist.*, *supra*, 811 F.2d 1307, 1314.) If the school district's program was designed to address the student's unique educational needs, was reasonably calculated to provide the student with some educational benefit, and comported with the student's IEP, then the school district provided a FAPE, even if the student's parents preferred another program and even if the parents' preferred program would have resulted in greater educational benefit. (*Ibid.*)

The IEP must include an assortment of information, including a statement of the child's present levels of academic achievement and functional performance. The IEP shall also include a statement of measurable annual goals designed to meet the child's needs that result from his disability to enable the child to be involved, and make progress, in the general education curriculum based upon the child's present levels of academic achievement and functional performance; a description of how the child's progress toward meeting the annual goals will be measured; and when periodic reports of the child's progress will be issued to the parent. (20 USC § 1414(d)(1)(A)(i); 34 C.F.R. § 300.320.) In the recent case of *Capistrano Unified Sch. Dist. v. S.W., et al.* (9th Cir. 2021) 21 F.4th 1125 (*Capistrano*), the court stated that the IDEA required IEP goals to target a student's needs, but the IDEA did not require an IEP to contain every goal from which a student might benefit. (*Id.* at pp. 1133-34.) Citing Education Code section 56345, subdivision (i), the *Capistrano* court also noted that California "does not require ... additional information, beyond that explicitly required by" the IDEA. (*Id.*) The *Capistrano* court also addressed goal baselines, stating that the IDEA did not require that the IEP team rely on specific kinds of quantitative data. (*Id.*)



The educational benefit provided to a child requiring special education is not limited to addressing the child's academic needs, but also social and emotional needs that affect academic progress, school behavior, and socialization. (*County of San Diego v. California Special Educ. Hearing Office* (9th Cir. 1996) 93 F.3d 1458, 1467.)

## SPECIALIZED ACADEMIC INSTRUCTION

The only IEPs that were effective between September 14, 2019, and the Student's annual IEP of March 12, 2020 were the annual IEP of March 15, 2019, which is not at issue in this case, the IEP amendment of May 1, 2019, which is also not at issue in this case, and the IEP amendment dated October 30, 2019.

Student's annual IEP of March 15, 2019, which was developed when Student was 14 years old and in ninth grade, was consented to in writing by Mother. It offered Student placement in general education inclusion classes. The IEP services page offered Student specialized academic instruction at a rate of 3 times 55 minutes, for a total of 165 minutes per day, to support Student for the remainder of the 2018-2019 school year in his three general education inclusion classes of English language arts, algebra, and living Earth. The IEP services page also changed the frequency and amount of specialized academic instruction to a rate of 4 times 55 minutes, for a total of 220 minutes per day for the fall of 2019 to support Student in his four general education inclusion classes during the 2019-2020 school year of English language arts, geometry, chemistry, and world history. The IEP did not offer extended school year services.

The March 15, 2019 IEP was amended on May 1, 2019, to change Student's primary disability to emotional disturbance and his secondary disability to other health impairment, but the amendment did not change Student's placement or the levels of Student's specialized academic instruction.

## THE OCTOBER 30, 2019 IEP

Madera Unified convened an amendment IEP team meeting on October 30, 2019, to address concerns raised by Mother about Student's academic progress, and to add educationally related mental health services to Student's IEP. The IEP team included Mother, an interpreter, Student, mental health counselor Kathi Henderson, a special education teacher, a school counselor, school psychologist Ambers, a Madera Unified program specialist, and a Madera Unified vice-principal. Mother consented, in writing, to excuse the general education teacher from the meeting, as is further discussed below with respect to Issue 3B.

The Parent's Rights document was presented and explained to Mother in Spanish.

Parent expressed concern about Student's grades and his placement. She expressed concerns about his academic progress. The team discussed Student's present levels and teachers' input on his progress. Based on classwork and assessments, Student was making progress on all of his academic goals in reading comprehension, algebra, and written expression. Student said he did not remember what he learned in math when he arrived home. The team agreed Student would have an academic assessment in spring 2020 and the team would meet by March 2020 to discuss results and Student's progress.

The IEP document included a transcript of Student's classes from seventh grade through the present, including a summary of the credits he had obtained and the credits he would need to graduate. Student was on track to graduate with a high school diploma. The transcript included Student's grades from seventh grade through ninth

grade, and a separate document included in the IEP set forth Student's grades in his 10th grade classes as of the time of the IEP team meeting. Student's grades were

- A+ in English, in which he was missing no assignments;
- F in math, in which he was missing 14 assignments;
- F in chemistry, in which he was missing 17 assignments;
- C in world history, in which he was missing two assignments;
- A in physical education;
- and C- in English language development, in which he was missing five assignments.

The IEP reported Student's scores on the state Smarter Balanced Assessment achievement tests. On English language arts overall, Student had scored a standard nearly met. He received a near standard score in reading, and below standard scores in writing, speaking, and listening, and research/inquiry. His overall math score was standard not met. The IEP also reported Student's scores on the English Language Development test for English language learners, which he had taken in March 2019. His scores showed that he was at a moderate level in listening and writing, at a well-developed level in speaking, and at a beginning level in reading.

Student had an A+ in English, with zero missing assignments. The case manager stated Student turned in work and half the time it met standards and other times it did not. He also noted that when Student tried, he completed his work.

Henderson, the mental health counselor, presented her educationally related mental health assessment report.

No changes were made to Student's placement or the academic services or levels of services included in the March 15, 2019 IEP. The IEP did not offer extended school year services.

The team agreed that Student's teachers would develop an action plan for Student to make up his missing assignments. Parent verbally agreed with the IEP team discussion, but did not sign consent then as she wanted to discuss the IEP with Student's father first.

The March 15, 2019 IEP, and the May 1, 2019 amended IEP were developed beyond the two year period of the statute of limitations in this case. Student is barred from challenging the appropriateness of those IEPs as written, even though their provisions were in effect within the period of the statute of limitations. (*K.P., etc. v. Salinas Union High Sch. Dist.* (N.D. Cal. April 8, 2016, Case No. 5:08-cv-03076-HRL) 2016 WL 1394377.) Student may, however, challenge the manner in which Madera Unified responded to any lack of progress during the period from September 14, 2019 to March 2020, such that Madera Unified knew, or should have known, the special education or related services offered in these IEPs no longer met Student needs such that the IEP was not providing Student a FAPE. (34 C.F.R. §300.324(b)(1)(ii)(A).)

Student failed to demonstrate that he made insufficient progress during the period from September 14, 2019 to March 2020, such that Madera Unified should have convened an IEP team meeting to offer Student additional specialized academic instruction. Throughout the relevant period, Student attended inclusive collaborative general education academic classes, co-taught by a general education teacher and a special education teacher. As such, he was consistently accessing hours of special education instruction in his academic classes throughout every school day, whenever

needed. A major contributing factor to Student's low grades in chemistry and math during the fall of 2019 was Student's failure to turn in assignments, and the IEP team committed to working with Student and Parent to develop a plan to make up those assignments. Student was making progress on all of his academic goals. As is further discussed below with respect to Issue 4, by the time of Student's March 12, 2020 IEP, Student met his reading comprehension and math goals. His grades improved from the fall semester of 2019-2020, when he received

- a B+ in English language arts;
- a C+ in English language development;
- a C in world history;
- a C- in math;
- a C- in chemistry; and
- an A in physical education;

to spring semester of the 2019-2020 school year, when he received

- an A- in English language arts;
- a B+ in English language development;
- an A in world history;
- a C- in math; and
- a C- in chemistry.

There was no evidence that Student was not making progress such that Student needed additional specialized academic instruction from September 14, 2019 to March 2020.

At hearing, Mother contended that, at all relevant times, Student did not earn his grades, as his siblings assisted him with his homework. Mother testified that she repeatedly advised Madera Unified of this at IEP team meetings. There was no

documentary evidence presented at hearing that Mother notified Madera Unified that Student's homework was not his own work, whether at an IEP team meeting or at any other time. In any event, there was also no evidence that Student's grades were based solely on his homework. Furthermore, there was no evidence that Student's siblings assisted Student with assignments and assessments that Student completed in class. To the contrary, Student's teachers persuasively testified that Student demonstrated knowledge of, and competency with, grade level material.

Finally, Student's contention that Madera Unified did not offer Student a sufficient level of specialized academic instruction is based on Student's theory in Issue 2A that Madera Unified did not assess Student between September 14, 2019 to March 2020 in all of the areas that Student claims it should have. However, with respect to Issue 2A, this Decision finds that Madera Unified appropriately assessed Student in all academic areas. Madera Unified failed to assess Student in the area of speech and language to address social communication difficulties, but the results of that assessment would not affect the amount of specialized academic instruction Student would receive.

Student did not meet his burden of demonstrating that Madera Unified deprived him of a FAPE by not providing a sufficient level of specialized academic instruction from September 14, 2019 to March 2020.

## EXTENDED SCHOOL YEAR

The October 2019 IEP did not offer Student extended school year instruction, but Student failed to prove that an extended school year was necessary to provide Student with additional specialized academic instruction.

A local educational agency must provide extended school year services when a child's IEP team determines that the services are necessary for the provision of a FAPE to the child. (34 C.F.R. § 300.106(a)(2).) Extended school year services are special education and related services that are provided to a child with a disability beyond the normal school year of the public agency, in accordance with the child's IEP, at no cost to the parent of the child, and that meet the standards of the state educational agency. (34 C.F.R. § 300.106(b).)

The California Code of Regulations states that extended school year services shall be provided, in accordance with 34 Code of Federal Regulations part 300.106, for each individual with exceptional needs who has disabilities which are likely to continue indefinitely or for a prolonged period, and interruption of the child's educational programming may cause regression, when coupled with limited recoupment capacity, rendering it impossible or unlikely that the child will attain the level of self-sufficiency and independence that would otherwise be expected in view of his or her disabling condition. (Cal. Code Regs, tit. 5, § 3043.)

None of the IEPs or amendment IEPs which are the subject of this Issue 2 offered extended school year services. As was discussed with respect to Issue 1 and with respect to the amount of specialized instruction in these IEPs and amended IEPs, Student is barred by the two year statute of limitations from challenging the development of the March 15, 2019 IEP and the May 1, 2019 amendment IEP. Student is limited to contending that, during the period from September 14, 2019 to March 2020, Madera Unified knew, or should have known, that circumstances had arisen such that Student required extended school year services, and therefore these IEPs should have been amended to include an offer of such services. Student did not provide any such evidence.

Extended school year services are only required when a student regresses over school breaks and has limited capacity to recoup what he learned prior to the school break. Mother contended that Student had a poor memory, and Student mentioned during the October 30, 2019 IEP that he did not remember what he learned in math class by the time he came home. However, Student presented no evidence that Student had any specific difficulty with regression over school breaks or in recouping what he learned upon returning to school after the break. Several of Student's teachers testified at hearing, and not one of them stated that Student had any difficulty with regression or recoupment over school breaks, such that he required extended school year services. Student did not meet his burden of demonstrating any need for extended school year services between September 14, 2019, to March, 2020.

Further, as set forth above, Student's contention that the IEP team could make no appropriate decision regarding extended school year services without the assessments Student asserted were necessary does not apply here. The only assessments this Decision found Student needed during the subject time period were an assessment of Student's living skills in the community as part of a transition assessment, and a speech and language assessment. The determination as to whether Student required extended school year services does not depend upon the results of such assessments; they depend upon the extent Student regressed over school breaks and the extent to which he could recoup what he learned prior to the break. IEP teams commonly decide whether extended school year services are required when assessments have not been done or are pending.

Madera Unified offered Student a sufficient level of specialized academic instruction, including extended school year services, from September 14, 2019, to March 2020.



### ISSUE 3A: COUNSELING SERVICES BASED ON A MENTAL HEALTH SERVICES ASSESSMENT

Student withdrew this issue in his Reply to District's Closing Brief, filed on February 1, 2022. Therefore, it will not be discussed in this Decision.

### ISSUE 3B: FAILING TO FOLLOW PROPER PROCEDURES TO EXCUSE THE GENERAL EDUCATION TEACHER FROM THE OCTOBER 30, 2019 IEP TEAM MEETING

Student contends that Madera Unified did not obtain Mother's informed consent to excuse the general education teacher from the IEP team meeting. The form Mother signed to excuse the general education teacher was not in her native language, and Mother did not receive written input from the general education teachers so as to make an informed decision as to whether to excuse their participation in the meeting.

Madera Unified contends that Student failed to prove that Madera Unified failed to comply with the required procedures, and that the information regarding Student's present levels was provided to the IEP team by Student's general education teachers.

The IDEA and the Education Code specify the required members of the IEP team. These include the parents, at least one general education teacher of the child if the child is, or may be participating in the general education setting, at least one special education teacher of the child or, where appropriate, not less than one special education provider, a knowledgeable district representative, an individual who can interpret the instructional implications of assessment results, and, when appropriate, the child with the disability. (34 C.F.R. § 300.321(a); Ed. Code, § 56341, subd. (b).) If the student is

suspected of having a specific learning disability, at least one member of the IEP team must be qualified to conduct individual diagnostic examinations of children. (34 C.F.R. §§ 300.308, Ed Code, § 56341, subd. (c).) At the discretion of the parent or the district, other individuals who have knowledge or special expertise regarding the pupil, including related services personnel, may be part of the IEP team, as appropriate. (34 C.F.R. § 321(a)(6).)

A single person may play more than one role on the IEP team. For example, a general education teacher may also be someone who can interpret the instructional implications of assessment results. (34 C.F.R. § 300.321(a)(5).)

The parent and the district may agree in writing to excuse the presence of a district team member if the team does not intend to modify or discuss that individual's services or area of curriculum. (34 C.F.R. § 300.321(e).) A mandatory IEP team member may be excused if the IEP team member's area of the curriculum or related services is being modified or discussed if the parent and the district consent to the excusal in writing. Additionally, the team member must submit in writing to the parent and the IEP team input into the development of the IEP prior to the meeting. (34 C.F.R. § 300.321(e)(2); Ed. Code, § 56341, subd. (g).) The need for a parent to consent to the excusal is in addition to the parent and the district simply agreeing to excuse the IEP team member. Title 34 Code of Federal Regulations part 300.9 defines consent to require the district to fully inform the parent of all information relevant to the team member's excusal, in the parent's native language or other mode of communication, and to ensure the parent understands that the granting of consent to the team member's absence is voluntary and can be revoked at any time. (71 Fed. Reg. 46,674 (August 14, 2006).)

In this case, Madera Unified convened the October 30, 2019 IEP team meeting, at least in part, to discuss any additional concerns Mother had, based on Mother's and Dr. Foster's September 2019 letter to Madera Unified. As Student received his specialized academic instruction in general education inclusion classes, a general education teacher was required to be present at the meeting or properly excused. The IEP includes Mother's written agreement and consent, dated October 30, 2019, that the general education teacher could be excused from being present and participating at the IEP team meeting. The agreement attached to the IEP was not in Spanish, but an interpreter was present at the IEP team meeting to translate written information, and there was no evidence that the document was not translated into Spanish for Mother. Mother admitted she signed the document, and knew she was excusing a teacher. Mother recalled that she was told that the meeting could not go forward on that day if she did not excuse the teacher. Mother did not recall whether she received written input from the teacher, but knew that the only ones who spoke were the people at the meeting. Mother asserted that if she had received written input she would have remembered it. Mother also asserted that she did not know the teacher excused was the general education teacher, but the excusal form referred to the "G.E." teacher.

Evidence at hearing revealed that, typically, prior to the IEP team meeting, general education teachers gave written progress reports to the case manager, who then distributed the reports to the IEP team. Prior to the meeting, such reports were not given to non-English speaking parents in their native language, but they were interpreted at the IEP team meeting. The content of the statements in the present levels of performance, and the progress reports on Student's goals, reflected the general education teachers' input on Student's progress prior to the October 30 2019 IEP team meeting. This information was discussed by the IEP team and interpreted for Mother.

Additionally, the excusal form Mother signed stated that the general education teacher submitted, in writing to the parent and the IEP team, input into the development of the IEP prior to the meeting.

The failure to provide written input to Parent in Spanish prior to the IEP team meeting is a procedural violation of the IDEA. However, Student did not prove that the failure of Madera Unified to provide written input from a general education teacher in Spanish in advance of the meeting denied Student a FAPE. First, the general education teachers' written input was translated for Mother at the IEP team meeting. Second, the IEP included, and the IEP team reviewed and discussed, this information regarding Student's progress. The general education teachers reported on Student's goals, his current grades, his progress in class, and his behavior on campus. Mother participated in the meeting, and agreed with the outcome of the meeting. She expressed her concerns at the meeting, and there was no evidence that Mother's questions at the meeting were not answered.

Student relies on the case of *S.H. v. Mount Diablo Unified Sch. Dist.* (N.D. Cal. 2017, 263 F.Supp. 3d 746 (*Mount Diablo*)) to support the proposition that the failure to include a general education teacher at the IEP team meeting is, by itself, a denial of FAPE, and not subject to a harmless error analysis. In that case, the court found that not only had the general education teacher not appeared at the meeting, but the general education teacher had also not provided written input. Moreover, the written form parent signed excusing the general education teacher misrepresented the law regarding the grounds upon which a general education teacher was not required at an IEP team meeting. Under those circumstances, the court considered the failure to have a general education teacher present at the meeting a structural error, and that a harmless error analysis was

not applicable, citing the case of *M.L. v. Federal Way Sch. Dist.* (9th Cir. 2005) 394 F.3d 634, 645. However, the Ninth Circuit has not adopted the standard that a procedural error in the composition of an IEP team forecloses a harmless error analysis. (*R.B. v. Napa Valley Unified Sch. Dist.* (9th Cir. 2007) 496 F.3d 932, 938, fn. 4.)

The facts of this case are distinguishable from those in *Mount Diablo, supra*, in that Madera Unified did not misrepresent to Mother the process for excusing a general education teacher. Applying a harmless error analysis, Student did not demonstrate that Mother's ability to participate in the October 30, 2019 IEP team meeting was substantially impaired by the failure to have written input from general education teachers provided to her in Spanish prior to the IEP team meeting. Nor did Student demonstrate that the failure to have such written input impeded Student's right to a FAPE or caused a deprivation of educational benefits. Madera Unified's failure to provide Mother with written input from general education teachers in Spanish prior to the meeting did not deprive Student of a FAPE.

#### ISSUE 4A: FAILING TO FOLLOW REQUIRED PROCEDURES TO EXCUSE GENERAL EDUCATION TEACHER FROM MARCH 12, 2020 IEP TEAM MEETING

Student contends Madera Unified failed to secure Mother's informed consent to excuse the general education teacher from the March 12, 2020 IEP team meeting. Madera Unified contends that Student failed to prove that Madera Unified did not comply with the procedures to excuse the general education teacher from the IEP team meeting.

On March 12, 2020, when Student was 15 years old and in 10th grade, Madera Unified convened Student's annual IEP. The IEP team included a special education teacher, a school administrator, Henderson, Student, Mother, and a counselor. An interpreter was also present to interpret and translate for Mother.

Mother signed the consent form to excuse an IEP team member, but none of the blanks in the body of the form were filled in. The form, which was in English, did not state the name, position, or role of the IEP team member Mother was excusing. The form did not state the date of the meeting, and the form had an incorrect date for the IEP typed in at the top. There was no evidence that a general education teacher was present at the IEP team meeting.

As was stated above in the discussion of Issue 3B, at least one general education teacher of the child is a mandatory member of the IEP team, if the child is, or may be participating in the general education setting, as Student was. General education teachers from Student's inclusion classes could have been excused if Student's participation in education inclusion classes was being modified or discussed at the IEP team meeting, if Parent and Madera Unified consented to the excusal in writing, and the general education teachers who were excused submitted written input to Parent and the IEP team prior to the meeting. (34 C.F.R. 300.321(e)(2); Ed. Code, § 56341, subd. (g).)

Since the March 12, 2020 IEP team meeting was an annual review meeting, and Student was placed in general education inclusion classes, one of his general education teachers was required to be present. Alternatively, Mother had to agree and consent to excuse that teacher in writing. The form that purported to document Mother's agreement and consent, while signed by Mother, was largely blank, contained no information as to what Mother was specifically agreeing and consenting, and, moreover,

bore an incorrect IEP meeting date. The IDEA requires that consent be informed, and, to that end, any consent writing must describe the activity to which Parent has consented. (34 C.F.R. § 300.9 (b).) Here, the signed form did not identify the date of the relevant IEP team meeting, and did not identify any teacher whom Mother was excusing by either name or status. The incomplete excusal form was not sufficient to constitute Mother's written consent to anything, must less serve as consent to excuse any of Student's general education teachers from the meeting.

Madera Unified's failure to obtain Mother's informed consent to the excusal of the general education teacher from the March 12, 2020 IEP meeting was a procedural violation of the IDEA. Therefore, it is only a denial of a FAPE if it impeded the Student's right to a FAPE, if it significantly impeded Parent's opportunity to participate in the decisionmaking process, or if it caused Student to be deprived of educational benefit.

As described below at Issue 4B-4F, Student's general education teachers provided written input to the IEP team members for consideration, even though they were not present at the meeting. Therefore, the failure to have a general education teacher present at the meeting in itself did not necessarily impede Student's right to a FAPE or deprive him of any educational benefit. However, the failure of Madera Unified to either have a general education teacher present to address Mother's concerns about Student's academic progress in the general education inclusion classes, or to obtain Mother's informed consent to the excusal of such a mandatory IEP team member, significantly impeded her opportunity to participate in the decisionmaking process regarding the provision of a FAPE. As a result of these failures, there was nobody present at the IEP team meeting to address Mother's concerns about Student's academic progress in his general education inclusion classes, and Mother was not even fully informed as to who was included on Student's IEP team at this meeting and who was missing the meeting.

Madera Unified's failure to either include a general education teacher at the March 12, 2020 IEP team meeting or to obtain Mother's informed consent to excuse the presence of a general education teacher at the meeting constituted a deprivation of a FAPE.

Several of the remaining issues Student alleged regarding the March 12, 2020 IEP involve substantive violations of the IDEA, as Student contends they pertain to a direct denial of services necessary for Student's education, or involve other procedural violations of the IDEA. A court need not reach the question of substantive compliance if the court finds procedural inadequacies that seriously infringe the parents' opportunity to participate in the IEP formulation process. (*N.B. v. Hellgate Elementary Sch. Dist.* (9th Cir. 2008) 541 F.3d 1202, 1207; see also *M.M. v. Lafayette Sch. Dist.* (9th Cir. 2014) 767 F.3d 842, 856, as amended Oct. 1, 2014 (declining to reach the issue of substantive compliance or whether the district otherwise procedurally violated the IDEA, after finding a procedural violation that denied a FAPE); *Amanda J. v. Clark Cty. Sch. Dist.* (9th CIR. 2001) 267 F.3d 877, 895 (declining to reach the issue of substantive compliance after finding that the district denied a FAPE by failing to provide a specific offer of placement).) However, in an abundance of caution and in recognition of the interests of the parties in resolving these claims, this Decision will rule on those issues.

ISSUE 4B-4F: FAILURE OF MARCH 12, 2020 IEP TO INCLUDE ACCURATE PRESENT LEVELS OF PERFORMANCE IN THE AREA OF ACADEMICS, A CLEAR OFFER OF A FAPE, MEASURABLE AND APPROPRIATE GOALS, LACK OF GOALS, AND APPROPRIATE LEVELS AND TYPES OF SERVICES



## CONTENT AND SUFFICIENCY OF IEPs AND TRANSITION PLANS

The law regarding the content and sufficiency of IEPs was discussed with respect to Issue 2B, above. The law regarding the content and sufficiency of transition plans was discussed with respect to Issue 2A, above. Student alleges procedural and substantive errors resulting from the March 12, 2020 IEP team meeting. Procedurally, Student alleges that the IEP did not contain accurate present levels of performance for the IEP team's review, that goals were not developed in all of Student's areas of need and those that were developed were not measurable or appropriate, and that the start date of services offered was unclear. Substantively, Student contends that he was not offered appropriate services, including transition services and an extended school year. In his closing brief, Student also contended that Student's present levels in various non-academic levels were also inaccurate.

These claims as to non-academic present levels were not placed in issue by Student's complaint, or discussed as issues at the prehearing conference and at hearing, and, as was stated above, their inclusion in Student's brief was contrary to the ALJ's instructions given throughout the hearing. Therefore, these particular contentions will not be addressed or resolved in this Decision. (Ed. Code, § 56502, subd. (i).)

Madera Unified contends that the IEP was accurate and complete, and that the services offered were reasonably calculated to allow Student to make progress appropriate to his circumstances.

### MARCH 12, 2020 ANNUAL IEP

At Student's March 12, 2020 annual IEP team meeting, the team determined Student's primary eligibility was emotional disturbance, and his secondary eligibility was

other health impairment due to his attention deficit. The team noted that these disabilities impaired Student's abilities in written expression and reading, and his difficulty maintaining focus impacted his involvement and progress in the general education curriculum.

The team reviewed Student's transition plan. Student participated in formulating it, as he was present at the IEP team meeting, was interviewed prior to the meeting, and had filled out a Career Exploration Inventory in September 2019. He scored highest in the career cluster of service-oriented professions, which showed he might have a higher interest in counseling and advocating.

The plan included as a postsecondary educational goal that Student would continue his education and/or training, possibly in the law enforcement area. It provided activities to support the goal, in that Student would meet with his counselor/case carrier to discuss postsecondary education options. Student would also be encouraged to visit the community and report back to his case carrier to decide upon two possible postsecondary education options. The postsecondary employment goal provided that upon completion of school, Student would pursue a career in a desired field, possibly law enforcement. The team identified activities to support the postsecondary goal, including encouragement to visit Madera South's Career Center to explore postsecondary employment options, and visiting the Madera County library to learn what services were available and obtain a library card.

The IEP included a summary of Student's coursework and anticipated coursework through the 2021-2022 school year to earn a diploma and graduate by June 30, 2022. When he earned the diploma, the IEP noted Student would cease to receive services

from Madera Unified. The IEP included an Age of Majority Letter in English, signed by Student, and one in Spanish, signed by Mother, explaining the transfer of educational rights when Student reached age 18.

The IEP documented Student's expressed desire to graduate from high school with a diploma. Parent was concerned with Student's academic progress.

The IEP again documented Student's scores on the state Smarter Balanced Assessments and the English Language Development tests, which were unchanged from the October 30, 2019 amendment IEP, as those tests were not due to be re-administered by the time of this IEP.

The team discussed Student's present levels. In English, Student could use context clues and support to determine the meaning of words and phrases in the text, including figurative and connotative meanings, with 80 percent accuracy in three out of four trials. However, he needed to improve his reading comprehension of grade-level literary texts.

In math, Student could solve problems involving rational numbers, fractions, positive and negative integers, and decimals, using addition, subtraction, multiplication, and division. He needed to improve in solving word problems requiring adding and subtracting rational numbers.

In the area of communication, Student was able to communicate his wants, needs, and ideas to peers and teachers. The team noted he received all of his academic instruction in English and could express himself in English.

Student had age-appropriate gross and motor skills, and participated in general education physical education where he earned grades of A. Student had age appropriate fine motor skills and legible handwriting.

In the social emotional/behavioral area, Student interacted more with adults than peers, but his teachers also reported that he worked in group settings and contributed to conversations in the classroom. In the vocational area, Student was polite and always greeted and said good-bye to his teachers. In the adaptive/daily living skills area, Student exhibited some difficulty interacting with peers, but communicated well with adults. He was able to take care of his own needs and could navigate through the school environment. The team did not find any concerns about Student's health. The team decided Student needed goals in writing, transition, and math. The team did not include reading comprehension on this list, but it was included as an area of need in the discussion of the present levels, and the team developed a reading comprehension goal.

The IEP team discussed assistive technology and decided Student did not require it. The team decided Student's English language development services would be provided to Student in general education, and specially designed academic instruction in English strategies and Madera Unified English language learner strategies would be used in the classroom for instruction. In accordance with teacher input that Student participated in class, was polite and exhibited no disruptive behaviors, the team determined that Student's behavior did not impede his learning or that of others.

The team reviewed Student's progress on his goals, and documented that he met three of his six previous annual goals, and he made progress on another goal. He met a college and career-readiness goal that required him to maintain an organized binder. He met a math goal to solve linear equations. He met a reading comprehension goal to

paraphrase ideas and construct a visual model to compare them to other sources and related topics. He met an objective on a written language goal that required him to brainstorm topics for expository writing samples and chart or visually organize supporting evidence, but there was no documentation on the IEP as to whether he met the annual goal. He did not meet a college/career readiness goal to identify two possible personal career paths. The IEP did not document whether he met a social emotional goal to use appropriate communication skills to ask for assistance, a goal that was only added in October 2019, as part of Student's educationally related mental health services. The goal stated it was to be accomplished by March 15, 2020, but, as an annual goal, it was technically not actually due to be accomplished until October 2020.

The team developed three new annual goals for Student. Goal 1 was a career goal requiring Student to demonstrate knowledge of job qualification, job requirements, educational background, training, and degree for various jobs of interest by identifying five requirements for each job with 80 percent accuracy in two out of three trials. The baseline for the goal was Student's ability to perform the task with 40 percent accuracy in two out of three trials. Goal 2 was a reading comprehension goal which required Student to analyze interactions between characters in grade-level literary text and explain how they affected the plot by verbally summarizing each character's motivation, relationships, influences, and conflicts with 85 percent accuracy in three out of four trials. The baseline for the goal was Student's ability to perform this task with 45 percent accuracy. Goal 3 was a math goal that required Student to solve five word problems involving adding and subtracting rational numbers. Student would correctly find the sum of opposites, use a number line, and subtract using the additive inverse, for four out of the five problems with 80 percent accuracy. Inexplicably, the goal contained a typographical error as it did not name Student but named someone else. The goal

objectives also named this other person. The baseline for the goal, however, named Student and stated he was able to perform the goal tasks with 40 percent accuracy. The IEP team did not include a writing goal, even though the team listed writing as an area of need.

The team discussed a general education placement, or general education inclusion classes with support. The team agreed that general education inclusion classes with support allowed Student to access core curriculum with support, and offered Student a FAPE in the least restrictive environment, with no potential harmful effect to Student. Student was to spend 100 percent of his time in the regular class and extracurricular and non-academic activities.

The team agreed on accommodations, many of which related to Student's issues with attention, focus, and attention deficit hyperactivity disorder, such as

- preferred seating,
- reduce distractions,
- use visual cues,
- give extra time for written assignments,
- Student to take tests in quiet area,
- give access to math chart,
- check multiple ways for understanding,
- give concise step-by-step directives,
- repeat and clarify instruction or concepts,
- review previously learned materials, and
- give time-and-a-half for turning in assignments.

To support Student's progress on goals, the IEP offered 220 minutes per day of specialized academic instruction starting on March 12, 2020, and ending on June 30, 2020, to be used in conjunction with Student's general education inclusion classes of English language arts, geometry, chemistry, and world history. The IEP offered 30 minutes per year of career awareness services, starting on March 16, 2020, and ending on March 16, 2021. The team also offered 30 minutes per year of college awareness services, and 30 minutes per year of vocational assessment, counseling, guidance, and career assessment services. These services were to start on March 12, 2020, and end on March 12, 2021. The team also offered 60 minutes per month of individual counseling to start on July 1, 2020, and end on March 13, 2021, and 165 minutes per day of specialized academic instruction to start on July 1, 2020, and end on March 13, 2021. The specialized academic instruction was to be used in conjunction with Student's general education inclusion classes of English language arts, math, and world history.

The team determined that Student was not exhibiting a regression of skills during breaks, and therefore decided he was not eligible for extended school year services.

The March 12, 2020 IEP documents submitted into evidence by each party included Notes pages with the same contents as the Notes pages included in the October 30, 2019 IEP, with only the date of March 12, 2020 added. The contents of the Notes pages refer only to events that occurred during the October 30, 2019 IEP team meeting, such as the presentation of the educationally related mental health services assessment report.

Mother signed consent to the IEP, and also signed that she received a copy of the procedural safeguards.

Christine Harmon, Student's special education teacher in his civics/economics general education inclusion class at the time of the hearing, testified at hearing regarding this IEP. Harmon was not present at this IEP, but she was Student's case carrier during the 2018-2019 school year, when he was in ninth grade. A case carrier, or case manager, for a special education student is a special education teacher who is assigned as the central person at school to manage Student's special education program. Their duties include helping the IEP team prepare for IEP team meetings, assisting parents at IEP team meetings, and preparing draft goals. Harmon commented that based on her knowledge of Student, the IEP gave Student the opportunity to receive a good education. She noted the present levels appeared to be accurate at that time, and felt that the goals were sufficient for annual goals. She believed the proposed services were sufficient to support Student's needs as described in the IEP. The transition plan appeared to reflect Student's postsecondary interests. In general, she believed that this IEP offered Student a FAPE.

#### ISSUE 4B: ACCURATE PRESENT LEVELS OF PERFORMANCE IN ACADEMICS IN THE MARCH 12, 2020 IEP

Student contends that the academic present levels of performance were inaccurate for several reasons. Student contends that the present levels did not include the 2018 Woodcock achievement test scores in math, reading, and writing, and that it was "impossible" for Student to perform the academic tasks described in the present levels in view of his low achievement scores on the Woodcock, as well as his beginning reading level on the English Language Proficiency test. In his closing brief, Student also contended that Student's present levels in various non-academic levels were also inaccurate. These claims as to non-academic present levels were not placed in issue by



Student's complaint, or discussed as issues at the prehearing conference and at hearing, and, as was stated above, their inclusion in Student's brief was contrary to the ALJ's instructions given throughout the hearing. Therefore, these particular contentions will not be addressed or resolved in this Decision. (Ed. Code, § 56502, subd. (i).)

Madera Unified contends that the testimony of Student's teachers at hearing demonstrated that all of Student's IEPs contained accurate present levels of performance, and Student provided no evidence to the contrary.

As described above, Mother testified, without usually providing any specific dates, times, or specifics, that Student's homework was done to varying degrees by his siblings. Mother testified that Student could not actually perform the tasks that Student's teachers said that he could at the IEP team meetings, even though his teachers reported he met the goals. Mother, who attended all of Student's IEP team meetings, also testified that she imparted this information at Student's IEP team meetings.

Harmon's testimony that the IEP contained accurate present levels of performance was not contradicted, except by Mother's testimony. Student presented no persuasive evidence that it was "impossible" for Student to perform the academic tasks described in the present levels of performance based on his low scores on his achievement tests. Nor did Student present any authority that his present levels in March 2020 should be defined by Student's performance on an academic achievement test administered two years earlier. In contrast, at hearing, Mitchell Roberts, Student's special education teacher during the 2020-2021 school year, testified that special education students such as Student often did not perform well on standardized tests. Roberts received his bachelor's degree from the University of California at Berkeley, his

English teaching credential from Fresno State in 2014, and his special education credential from National University in 2016. He was employed as a special education teacher in Madera Unified since 2014. In Roberts's opinion, special education students performed better in class than on standardized tests, because they had more opportunities and means to demonstrate their abilities in the classroom. Roberts's testimony and opinions on these matters were uncontradicted.

Mother's varying testimony that Student's siblings did some, most, or all of his homework, was the only evidence that Student's present levels were not accurate. There was no documentary evidence, however, that Mother ever advised Madera Unified or the IEP team that Student's siblings, and not Student, were doing his homework. Neither the March 12, 2020 IEP, nor any IEP at issue in this case, documents that Mother imparted any such information, or that Madera Unified had any knowledge that Student's work was not his own, or that Madera Unified suspected that the siblings did Student's work. Under the "snapshot rule," the IEP team is only held accountable for matters that they knew or should have known. The evidence did not demonstrate that Madera Unified was aware, or should have been aware, that Student's siblings were actually doing at least some portion of Student's homework, and that the schoolwork he represented was his own was not his own.

Moreover, the IEP showed that the present levels of academic performance in the IEP, and Student's progress on his goals, were based not only on homework, but also on teachers' observations in class, as well as formal and informal assessments. There was no evidence that Student received assistance from his siblings or from anybody else on the assessments and schoolwork that he performed in class, or during any time he was observed by his teachers during the 2019-2020 school year. As was discussed above

with respect to Issue 2B, Student's grades during the 2019-2020 school year improved during the school year, from mostly Cs to mostly As and Bs, and this IEP showed that Student made progress on his goals.

Student is correct that the IEP did not contain any present levels of performance regarding written expression, and that it should have contained present levels in that area because the IEP described it as an area of need. Therefore, to that extent only, Madera Unified deprived Student of a FAPE with respect to the academic present levels of performance. As to the accuracy of the present levels of performance in other academic areas, the IEP team did not have reason to believe they were not accurate. Therefore, under the snapshot rule, Madera Unified did not deprive Student of a FAPE with respect to the present levels of performance in the areas of math and reading.

Student also claims that Madera Unified did not conduct the academic assessment by March 2020, as it agreed to at the October 30, 2019 IEP team meeting, and this failure contributed to the March 12, 2020 IEP not including accurate present levels of performance. Student did not raise this issue as a separate issue for hearing, and did not even mention it in his complaint. There was no evidence presented at hearing as to why the October 30, 2019 IEP team agreed to perform the assessment, and no specific evidence as to why it was not performed. Therefore, it will not be considered as a separate issue and separate ground for a denial of a FAPE claim. (Ed. Code, § 56502, subd. (i).) Considering it merely as a relevant argument as to why the academic present levels of performance were inaccurate, the argument is not meritorious. As described above, the IEP team had a plethora of information regarding Student's levels of performance on standardized tests. Historically, Student's performance on those tests was poor. Student offered no reason or evidence to believe

that Student's performance on another set of standardized tests would provide any different or better information than the information that the IEP team already had.

Student further contends that various of the goals that the IEP team determined were met were not met, and, in some instances, they were not measurable. As these goals were included in the March 2019 IEP, Student's objections to their form are barred by the two-year statute of limitations.

With respect to academic goals, Student contends that the team incorrectly found that Student met Goal 3, an algebra goal, because the goal required 80 percent accuracy and the IEP stated Student had achieved 75 percent accuracy. The progress report on the goal stated the goal was met at 75 percent accuracy as of March 12, 2020, but a previous progress report on the goal, dated June 3, 2019, stated that the objective, which had the same task as the goal, was met at at least an 80 percent accuracy rate. Under these circumstances, the IEP team appropriately determined that the goal was met.

Student also contends that the team incorrectly found that Student met Goal 4, a reading comprehension goal, because the comment on the goal progress bore no relation to the goal. The comment indeed relates to the goal, as it referred to Student's ability to use context clues to understand new words or phrases so as to correctly respond to questions, and the goal focused on Student's ability to paraphrase ideas, which necessarily required Student to use context clues to be able to paraphrase unfamiliar words or phrases. The comment itself did not state precisely how the goal was met, but there was no need that it do so; it was just a comment on one of Student's skills that he used in performing the goal. Student did not meet his burden of proving that the goal was not met.

Finally, Mother testified that she did not understand the goals or baselines of various of the goals developed based upon the present levels of performance, and they were not explained to her. In view of the finding that the failure of Mother to give informed consent to excuse the general education teacher from this IEP prevented Mother from participating in the decisionmaking process regarding this IEP and deprived Student of a FAPE, there is no need to further discuss Mother's contentions regarding her ability to participate in the IEP meeting.

#### ISSUE 4C: FAILING TO INCLUDE A CLEAR OFFER OF A FAPE

Student contends that the IEP offer of services was not clear because the IEP did not provide for extended school year services, yet the IEP services page stated that Student's services would begin on July 1, 2020. Madera Unified contends that all of Student's IEPs included specific information as to when the offered services would begin and end.

In *Union v. Smith* (9th Cir. 1994) 15 F.3d 1519, the court explained the requirement that an IEP include a clear placement offer, stating,

this formal requirement has an important purpose that is not merely technical, and we therefore believe it should be enforced rigorously. The requirement of a formal, written offer creates a clear record that will do much to eliminate troublesome factual disputes many years later about when placements were offered, what placements were offered, and what additional educational assistance was offered to supplement a placement, if any. (*Union, supra*, 15 F.3d 1519, 1526.)

*Union* involved a placement, but its principle that an IEP must contain a clear offer also applies to services and other parts of the IEP. (71 Fed. Reg. 46,667 (August 14, 2006).)

Student's contention that the March 2020 IEP did not include a clear offer of a FAPE because the services were listed as starting on July 2021 is unmeritorious. First, the IEP clearly stated that the IEP team was not offering extended school year services because Student was not exhibiting a regression of skills during breaks. Second, the IEP specified that Student was placed in general education inclusion classes, and 100 percent of his day was to be spent in the general education environment. This meant that his specialized academic instruction would occur entirely when those inclusion classes were in session. Third, the services page specified that the quantity of services was based on the daily minutes of the general inclusion classes through March 13, 2021. Thus, a fair reading of the entire IEP, including the services page, reflects that the specialized academic instruction was to be delivered during the regular school year, in Student's general education inclusion classrooms.

At hearing, the evidence was undisputed that the IEP stated the services were to start on July 1, 2020, because that was the first day of Madera Unified's fiscal year. The IDEA only requires that an IEP contain the projected date that services would begin, not the exact date services would begin. (34 C.F.R. § 300.320(a)(7).) Madera Unified tied the projected date of the start of the services to the start date of its fiscal year. In short, Madera Unified dated these services according to its fiscal responsibility to budget for them. The IEP as a whole demonstrated that the July 1 date was an indicator that the services would be available at the beginning of the 2020-2021 school year.

Under the circumstances of this case, the IEP was not unclear as to the date the services began, and that the IEP did not offer extended school year services, so as to

deprive Student of a FAPE. If the IEP lacked sufficient clarity as to the start date, as claimed by Student, such a procedural violation did not deprive Student of an educational benefit or impede his right to a FAPE. Nor did it significantly impede Mother's ability to participate in the decisionmaking process with respect to the development of a FAPE offer. There was no evidence that Mother was at all confused by these matters, or ever asked any questions about them. Student did not contend that the IEP was not implemented and that he did not receive all of the instruction and services to which he was entitled. Madera Unified did not deprive Student of a FAPE on this ground.

#### ISSUE 4D: FAILING TO INCLUDE MEASURABLE AND APPROPRIATE GOALS

Student contends that several of the goals in the March 12, 2020 IEP were not objectively measurable or were inappropriate because they were unrealistic. Student also contends that the post-secondary transition goals were vague and unmeasurable.

Madera Unified contends that the goals were objectively measurable and appropriate. Madera Unified also contends that Student failed to provide evidence that the goals were incapable of being measured and reported upon objectively. Finally, Madera Unified contends that goals need not include quantifiable data to be objectively measurable.

The March 12, 2020 IEP contained three new annual goals. Student contends that Goal 1, a career goal, was not objectively measurable as it did not specify the number of jobs of interest. The career goal required Student to find information about jobs of interest to him, and identify five requirements for each job with 80 percent accuracy. According to the baseline, Student could already accomplish the goal with

40 percent accuracy, so the goal just built on that skill. Contrary to Student's contention, the point of the goal was not the number of jobs in which Student was interested, but to research the requirements for the job and be able to name five requirements for the job. The goal was appropriate and objectively measurable.

Student contends that Goal 2, a reading comprehension goal, was unrealistic in that it required Student to read and analyze a grade-level literary text when Student's reading scores showed a beginning level on the English Language Proficiency test. The reading comprehension goal required Student to read a grade-level literary text. At the time of this IEP, Student was in 10th grade general education inclusion class. His reading comprehension level was at the fourth grade level at the time of this IEP, according to the Reading Inventory Test, and he was at the beginning level on the English Language Proficiency tests. However, a student's reading level on standardized tests does not necessarily govern a student's reading goals. The IDEA requires goals to enable the student to be involved, and make progress, in the general educational curriculum. Furthermore, according to *Endrew F., supra*, goals are required to be ambitious. Additionally, Harmon stated, without contradiction, that reading levels on standardized tests do not mean that students could only successfully read at the level at which they tested. For example, a student could read texts at grade level if they read slower. Furthermore, she testified that a student's abilities were not evaluated only by standardized test scores. Harmon's testimony on this issue was supported by the uncontradicted testimony of Roberts that students with disabilities tended to perform better in class than their standardized test scores, because they often had difficulty with standardized tests, and in class they could show their knowledge and skills in different ways. Roberts's opinion on this point was uncontradicted.



The baseline for the goal itself showed that Student could perform the tasks of the goal by reading grade level texts with 45 percent accuracy. The goal built on that success by requiring Student perform the goal tasks with 85 percent accuracy. The goal was appropriate and measurable.

Student contends that Goal 5, a written language goal, was not objectively measurable in that it did not correlate to quantifiable baseline data. The evidence suggests that Goal 5 was a writing goal that was not developed by the March 12, 2020 IEP team, but rather was developed for the IEP of March 15, 2019. As such, objections to the goal itself are barred by the two-year statute of limitations.

That Goal 5 was not a goal developed by the March 12, 2020 IEP team, but by the March 15, 2019 IEP team is supported by the facts that the goal states it was to be performed by March 15, 2020, and the baselines for the goal are the same in the March 15, 2019 IEP and the March 12, 2020 IEP. Further, progress on the goal was reported as of June 3, 2019. Additionally, the next annual IEP of April 15, 2021 did not include this goal or contain any information about it. In other words, Goal 5 was a former goal, on which progress was to have been reported at the March 12, 2020 IEP but was not, and that failure was likely related to the failure of the IEP to include any present level of performance in the area of written language. As already stated above with respect to Issue 4B, the failure to include such a present level of performance was a denial of a FAPE. Therefore Goal 5 merits no further discussion here.

Student also contends the social emotional, mental health goal was not objectively measurable in that the baseline information did not specify what coping skills Student was using at the time, and the goal stated it was achievable with only 10 percent compliance, which the goal said was the baseline. Student criticized the goal

because it did not state the coping skills in the baseline. Student's criticism is unmeritorious. The goal could have been written better, but a fair reading of the baseline and the goal is that Student was only using appropriate skills, such as communication skills, 10 percent of the time as a means of coping with confusion and frustration in class. The targeted skills were included in the goal. The point of the goal was to encourage Student's use of his communication skills, as described in the goal, as a coping mechanism more than 10 percent of the time, and, ideally, 50 percent of the time. Contrary to Student's contention, other coping skills Student might have used were not relevant to the goal. The goal was measurable and appropriate.

Additionally, it does not matter that the goal itself mentioned the baseline skills and the baseline percentage. As long as the IEP contains the necessary content somewhere in the IEP, it does not matter where the content is. (34 C.F.R. § 300.320(d)(2).) Furthermore, this goal was introduced at the October 30, 2019 IEP team meeting, at which time the team discussed the purpose and reasoning behind this goal. Henderson, who drafted the goal, and Mother, were both at both the October 30, 2019 IEP team meeting and the March 12, 2020 IEP team meeting. If Mother had any questions about the goal at either of these IEP team meetings, she was free to ask.

Student contends that the goals in the transition plan were vague and unmeasurable. This contention is unmeritorious. The transition plan sets forth Student's goals for postsecondary education and training. The goals are simple, that Student will continue his education or training, possibly in law enforcement, and that Student will pursue a career in a desired field, possibly law enforcement. Student's contention that these goals do not reflect his desire to be a police officer is disingenuous. Moreover, both of these goals tie into Student's career goal in the IEP to demonstrate knowledge of job qualifications and requirements, and educational background, training, and

degrees for jobs of interest to him. As discussed above, this goal is objective and measurable. Further, any defects in the design of the transition plan would be a procedural violation that would not deny a FAPE unless they impeded Student's right to a FAPE, significantly impeded the parents' opportunity to participate in the decision making process, or caused a deprivation of educational benefits. Student has not demonstrated that any of these factors exist here. Student's transition goals express his desire to pursue postsecondary training and education regarding law enforcement, and a post-secondary career in law enforcement. The transition plan contains activities in the community related to those goals, and the IEP contains a specific career/college goal, and services to support this goal and the goals in the transition plan. As discussed above with respect to Issue 2A, Student is entitled to an assessment of his independent living skills as they relate to transition. The results of that assessment may impact Student's transition goals and activities in the community related to those goals. However, the goals themselves in the subject transition plan, as written, were not vague and unmeasurable so as to deprive Student of a FAPE.

Student did not demonstrate that that there were any defects in the goals or baselines regarding the new reading and career goals in the IEP, or the social emotional mental health goal, so as to constitute a procedural violation of the IDEA.

#### ISSUE 4E: FAILING TO INCLUDE GOALS IN THE AREAS OF MENTAL HEALTH, ATTENTION AND FOCUS, SOCIAL, EMOTIONAL, AND BEHAVIORAL FUNCTIONING, SPEECH AND LANGUAGE, ADAPTIVE DAILY LIVING, VISUAL MOTOR INTEGRATION, EXECUTIVE FUNCTIONING, AND OCCUPATIONAL SKILLS

Student contends that the March 12, 2020 IEP failed to include goals to address Student's difficulties with attention and focus, social isolation and withdrawal, sensory behaviors, speech and language, adaptive living skills, and failed to include a needed mental health positive social skills goal. Student's hearing issues included the failure to have goals in the areas of visual-motor integration and occupational therapy skills, but those goals were not mentioned in Student's closing brief or his reply brief. As Student did not specifically withdraw or dismiss those issues, this Decision will discuss them briefly.

Madera Unified contends the IEP contained goals in all areas of need, and Student failed to provide any evidence that Student exhibited areas of need other than those addressed in the IEP. Madera Unified contends that Student's impending graduation from Madera South is evidence that all of his needs were met.

As was stated previously, an IEP need not include every goal from which a student might benefit. The goals in the March 12, 2020 IEP included goals to cover Student's areas of need in math and reading comprehension. Additionally, as was discussed above regarding the contents of the March 12, 2020 IEP, the IEP did not

include any present level of performance in writing, or a current writing goal, although writing was listed as an area of need. The failure to include a current writing goal in the March 12, 2020 IEP, was likely a cascade effect from the failure to include a present level of performance as to writing, and may also be a result of the failure of any general education teacher to be present at the IEP. The failure of the IEP to include a writing goal was not raised as a separate issue at hearing. However, it is a deprivation of a FAPE, and it is, in essence, part and parcel of the deprivation of a FAPE that this Decision found with respect to the failure of the IEP to contain a present level of performance in writing, which the IEP specified as an area of need, and which was part and parcel of Student's Issue 4B pertaining to the adequacy of present levels of performance in the area of academics.

Student is incorrect that the March 20, 2020 IEP did not include a mental health goal. The March 12, 2020 IEP goals included a goal to address mental health and social emotional and behavior issues, as it included the educationally related mental health annual goal regarding coping skills. Student contends that another mental health goal should have been included, a "positive social skills" goal. This goal was included in Student's mental health treatment plan of September 2019 as a goal for Student, but Henderson did not designate it at that time as an IEP goal. Henderson commented at hearing that she developed that goal because she was beginning to be acquainted with Student and was unsure as to whether he was uncomfortable interacting with others because he needed to be taught to interact with others, or whether he would be fine not interacting with others. However, the law does not require inclusion of every goal

that may be beneficial to Student, rather, the law requires that there be at least one goal in each area of need. Student's mental health goal in this IEP requiring him to communicate with peers and teachers when feeling frustrated or when he did not understand something, by its terms, addressed Student's social, emotional, and behavior functioning needs by requiring him to relate to peers and teachers, and regulate his emotions and behaviors, by using coping skills. Henderson considered this goal to be especially important, and could help Student be more assertive and feel better about himself. Madera Unified did not deprive Student of a FAPE by not including another mental health goal in this IEP.

The IEP did not specifically include goals in attention, focus, and executive functioning, but numerous of Student's accommodations were directed at these matters, such as preferred seating, reducing distractions, extra time for written assessment and assignments, taking tests in a quiet area, checking multiple ways for understanding, giving concise set-by-step directives, repeating and clarifying information and concepts, and reviewing previously learned materials. Furthermore, Student's goals in the IEP each required him to exercise skills in focusing, attention, and executive functioning. His career goal required him to identify jobs of interest and learn five requirements for each job. His reading comprehension goal required him to locate and focus on character interactions and motivations. His math goal required him to solve word problems using specified methods. These goals, by their terms, necessarily required Student to organize his materials and his thoughts and focus on locating the

information required. As the court in *K.M. v. Tehachapi Unified Sch. Dist.* (E.D. Cal. April 5, 2017, No. 1:15-cv-001835 LJO JLT) 2017 WL 1348807, at p. \*17 (*K.M.*) noted,

The IEP annual goals must meet a student's needs, but the IDEA does not require that they have a one-to-one correspondence with specific needs. So long as the goals, as a whole, address the student's needs and enable progress appropriate in light of the student's circumstances, the IEP is appropriate.

These goals, combined with the accommodations, addressed Student's needs in the areas of attention, focus, and executive functioning.

As was discussed with respect to Issue 2A, Student did not meet his burden of demonstrating that he had any educational needs in the area of occupational therapy skills. He did not meet his burden of demonstrating that he had any sensory deficits or deficits in fine motor or gross motor skills that prevented him from accessing the curriculum. Additionally, Student presented no evidence, or even argument, that he had any educational needs in the area of visual motor integration.

The March 2020 IEP did not include a speech and language goal. As was described at Issue 2A, Madera Unified should have assessed Student in speech and language, and its failure to do so deprived Student of a FAPE. However, Student only demonstrated that he was entitled to a speech and language assessment. He offered no specific evidence that he actually had a need for, and qualified for, speech and language services, such that he required speech and language goals. (See *J.R. v. Oxnard Sch. Dist.* (C.D. Cal., Feb. 15, 2019, No. LA CV17-04304 JAK (FFMx)) 2019 WL 13031921, \*2-\*4.) (*J.R.*) Madera Unified did not deprive Student of a FAPE on this ground.

Similarly, as was concluded with respect to Issue 2A, Madera Unified should have assessed Student's adaptive living skills in the community as part of its transition assessment, and its failure to do so deprived Student of a FAPE. However, Student only demonstrated that he was entitled to an assessment of his adaptive living skills in the community for transition purposes. He offered no specific evidence as to what goals and services he required in a transition plan to address any needs he might have to develop independent living skills. (*J.R., supra*, 2019 WL 13031921, \*2-\*4.) As was also discussed at Issue 2A, Student did not demonstrate that he needed goals for adaptive skills in the IEP beyond what would be included in the transition plan. The evidence demonstrated that Student functioned well at school, in his classes, and in interactions with adults at school.

In his closing brief, Student contends that the March 12, 2020 IEP did not include a variety of additional goals that were not specified in this Issue 4E. This Decision will not address these goals, as they were not specified in any of the issues for hearing set forth at the beginning of this Decision. (Ed. Code. § 56502 subd. (i).)

#### ISSUE 4F: FAILING TO INCLUDE APPROPRIATE LEVELS AND TYPES OF SERVICES, INCLUDING TRANSITION AND EXTENDED SCHOOL YEAR SERVICES

Student contends that the March 12, 2020 IEP failed to include appropriate levels of services, but instead diminished Student's specialized academic instruction and failed to offer extended school year services despite Student's lack of progress. Madera Unified contends Student's March 12, 2020 IEP included appropriate services to meet Student's needs and that Student failed to provide any evidence that Student exhibited



a need for additional services. Mother testified as to her experiences with Student in the home setting, but none of Student's teachers expressed the same concerns regarding Student at school.

Student's contention that the IEP team deprived Student of a FAPE by diminishing his specialized academic instruction instead of increasing it is unmeritorious. The IEP team placed Student in general education inclusion classes with support, which was the placement he was in at all relevant times. The IEP specifically stated that Student was to spend 100 percent of his time in the regular class, and in extracurricular and non-academic activities. Student's academic classes were general inclusion classes, co-taught by a general education and special education teacher, and specialized academic instruction was available to Student throughout his entire time in his inclusion classes, whenever he needed it. The minutes of special education instruction he received were calibrated to the number of his general education inclusion classes, and to the number of minutes he was in each such class. Thus, the services page of the March 12, 2020 IEP offered 55 minutes of specialized academic instruction for each of four periods daily through the end of the 2019-2020 school year, because he was taking four general education inclusion classes: English language arts, geometry, chemistry, and world history. The IEP offered Student 55 minutes of specialized academic instruction for each of three periods daily for the 2020-2021 school year, because Student would only be taking three general education classes during the 2020-2021 school year: English language arts, math, and world history.

As was described above with respect to Issue 4B, Mother testified at hearing that Student's homework was done to an undefined extent by his siblings. There was no documentary evidence at any IEP meeting at issue that Mother advised anyone at

Madera Unified that the work Student presented to his teachers as his own was not his own. Rather, the IEP team knew, based largely on Student's academic present levels of performance, that Student had met three of his six previous annual goals, and made progress on another goal. Student contends that he did not actually meet Goal 2, a college/career ready goal that he keep an organized binder, as Mother testified that his binder was messy. Mother's testimony on this point was not persuasive. Mother offered no evidence that the messy binder to which she referred was the binder that was described in the goal, and Mother offered no evidence as to when or over what period of time the binder was messy such that Student did not meet the goal as of the time of this IEP. Further, there was no evidence that Mother advised the IEP team or anyone at Madera Unified, during the IEP team meeting, or at any other time, that the binder of which she had knowledge was actually messy, or questioned the IEP team's conclusion that Student had met the goal. The determination of the IEP team at the March 12, 2020 IEP team meeting that Student met this goal outweighs Mother's after-the-fact testimony.

The IEP team had further evidence of Student's progress with specialized academic support during inclusion classes. His Reading Inventory Test scores had increased significantly from the third grade level the prior year to the fourth grade level in December 2019. He raised his grades to mostly B or higher by the end of the spring semester. Student's March 12, 2020 IEP was defective for other reasons stated herein. However, Student did not demonstrate that, based on the information the IEP team had at the time of the meeting, the amount of specialized academic instruction offered in the IEP was not reasonably calculated to enable Student to make appropriate progress in light of his circumstances. The IEP did not deprive Student of a FAPE on this ground.

As to transition services, the March 12, 2020 IEP included 30 minutes per year of career awareness in both an individual and group setting, and 30 minutes per year of college awareness in both an individual and group setting. These services were sufficient for the transition plan as written, at the time of the March 12, 2020 IEP. As found at Issue 2A, Student needed an assessment regarding adaptive living skills in the community to determine whether Student required goals and services in the transition plan to address those skills, but Student did not demonstrate that Student had a need for such goals and services, as opposed to a need for assessment. Therefore, the transition plan, as written, did not deprive Student of a FAPE.

As discussed at Issue 2B, extended school year services would only have been required if Student significantly regressed over school breaks and had limited recoupment capacity that required excessive time for him to relearn skills previously acquired. (Cal. Code Regs, tit. 5, § 3043.) Student presented no evidence that, as of the time of the March 12, 2020 IEP, Student had significant regression over school breaks and limited recoupment capacity.

Student argues that the opinions Harmon, Roberts, and Ambers expressed at hearing as to when extended school year services were appropriate signified some type of predetermination on this issue. However, none of those individuals was a member of the March 12, 2020 IEP team, and therefore their opinions do not constitute proof of any type of predetermination by the team. Indeed, as the definition of predetermination set forth below demonstrates, even the expression of an IEP team member's opinion, without more, does not constitute predetermination. IEP team members are entitled to hold and express opinions. Student did not meet his burden to demonstrate that he required extended school year services in the March 12, 2020 IEP to receive a FAPE.

## ISSUE 5: UNILATERALLY REDUCING STUDENT'S LEVEL OF SPECIALIZED ACADEMIC INSTRUCTION IN THE DEVELOPMENT OF THE APRIL 2020 AMENDMENT IEP

Student alleged this issue in her complaint and agreed at the prehearing conference and the hearing that this was an issue, but Student's closing brief did not mention this issue. Student mentioned it, only briefly, in his reply brief. Madera Unified contends that it did not reduce Student's level of specialized academic instruction in the April 2020 amendment IEP. Rather, specialized academic instruction was provided to Student during his instructional periods just as before the COVID pandemic began, but in a virtual classroom setting.

Predetermination of a student's placement is a procedural violation that deprives a student of a FAPE in those instances in which placement is determined without parental involvement in developing the IEP. (*Deal v. Hamilton County Bd. of Ed.* (6th Cir. 2004) 392 F. 2d 840, 857-859.) (*Deal*). To fulfill the goal of parental participation in the IEP process, the school district is required to conduct a meaningful IEP meeting. (*Target Range, supra*, 960 F.2d at p. 1485.) A parent has meaningfully participated in the development of an IEP when the parent is informed of the child's problems, attends the IEP meeting, expresses their 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, supra* (3rd Cir. 1993) 993 F.2d 1031, 1036 [parent who had an opportunity to discuss a proposed IEP and whose concerns were considered by the IEP team has participated in the IEP process in a meaningful way].) A school district violates

IDEA procedures if it independently develops an IEP without meaningful parental participation, and then simply presents the IEP to the parent for ratification. (*Ms. S. ex rel. G. v. Vashon Island Sch. Dist.* (9th Cir. 2003) 337 F.3d 1115, 1131).)

A parent may agree to amend an IEP without an IEP team meeting. Title 34 Code of Federal Regulations part 300.324(a)(4) provides an IEP may be modified without a meeting, but only when the parent and the public agency agree as to the modification; agree not to convene an IEP team meeting; and develop a written document to amend or modify the IEP. Unless the IEP is modified by agreement in accordance with paragraph (a)(4), it may be modified only by the entire IEP team at an IEP team meeting. (*Id.* § 300.324(a)(6).)

## COVID-19 SCHOOL CLOSURES AND THE IDEA

The process for amending IEPs was modified somewhat as a result of school closures during the COVID-19 pandemic. The United States Department of Education, referred to as the US DOE, which is the agency responsible for developing regulations for and enforcement of the IDEA, outlined the states' responsibility under the IDEA to children with disabilities during the COVID-19 outbreak. (*Questions and Answers on Providing Services to Children with Disabilities During the Coronavirus Disease 2019 Outbreak* (U.S. Dept.. of Education, March 2020).) Subsequently, on March 19, 2020, Governor Newsom mandated that all individuals living in California stay home except as needed to maintain continuity of operation of federal critical infrastructure sectors.

On March 21, 2020, the US DOE issued supplemental guidance. (*Supplemental Fact Sheet Addressing the Risk of COVID-19 in Preschool, Elementary and Secondary Schools While Servicing Children with Disabilities.* (March 21, 2020, Office of Civil Rights

and Office of Special Education Programs.) On March 30, 2020, the California Department of Education, called the CDE, issued guidance encouraging school districts to use distance technology to meet its obligations under the IDEA. (*CDE Guidance 3/30/20* (March 30, 2020).)

On April 9, 2020, CDE issued further guidance. Citing to the US DOE's March 21, 2020 guidance, it stated that under the unique circumstances of the COVID-19 pandemic, it was not necessary for a school district to convene an IEP team meeting, or propose an IEP amendment without a team meeting, for the purpose of discussing the need to provide services away from school, because that change must necessarily occur. The IEP that was in effect at the time of physical school closure remained in effect for students, and the CDE directed school districts, to the greatest extent possible, to continue to provide the services called for in the IEPs in alternative ways. (*CDE Guidance*, April 9, 2020.) Although an IEP amendment was not necessary for every child with an IEP, the CDE noted that there might be instances when amending an IEP to reflect the change to distance learning might be necessary, and urged school districts to communicate and collaborate with parents to transition students to distance learning. (*Ibid.*)

This issue arises out of a proposed IEP amendment dated April 20, 2020, attempting to amend the March 12, 2020 IEP. Shortly after the March 12, 2020 IEP, Madera Unified, along with other California schools, closed pursuant to due to governmental emergency orders related to the COVID-19 pandemic. Madera Unified then began to provide all instruction in a virtual classroom setting, using the Zoom platform. Madera Unified sent the proposed amendment to Parents for signature, accompanied by a prior written notice, written in Spanish. The stated purpose of the proposed amendment was to update the frequency and delivery model of specialized

academic instruction during school closure. The proposed amendment stated that during the school closure period, specialized academic instruction would change to 30 minutes, one time per week. The original IEP would be reinstated when school re-opened for in-person learning.

The Spanish-language prior written notice that accompanied the amendment explained that Madera Unified schools were closed due to the COVID-19 pandemic, and explained that computer-based, smartphone, and other technological methods would be used to deliver instruction and services during distance learning during the school closure period. The notice also explained that after the schools reopened, the services and other content of the Student's IEP that were effective at the time of school closure would be reinstated. The prior written notice invited Parents to let Madera Unified know if they wished to convene an IEP team meeting "to discuss a child's educational needs and expectations regarding distance learning."

At hearing, Rebecca McHaney, Madera Unified's Director of Special Services, credibly explained that the amount of specialized academic instruction was not decreased by virtue of this proposed amendment, rather, it was intended to increase the amount of specialized academic instruction for special education students during remote learning. The 30 minutes represented additional specialized academic instruction to be used for case management, checking in to see how students were doing, and similar matters. McHaney also credibly testified that Madera Unified offered all of Student's general education inclusion classes throughout the school closure period, and Student received all of the specialized academic instruction provided in his IEP throughout that period. McHaney's testimony was supported by the testimony of Roberts that he taught Student in his general education inclusion English class remotely during the 2020-2021 school year, and checked in with him regularly via chat.

The proposed amendment and the prior written notice were submitted in conformity with the guidance issued by US DOE and the CDE. Madera Unified did not engage in improper predetermination, and did not unilaterally reduce Student's specialized academic instruction or other services. Rather, Student continued to attend online classes, earn passing grades, and acquire credits toward graduation. The proposed amendment was not written as clearly as it could have been, but it did not impede Student's right to a FAPE or cause a deprivation of educational benefits, or significantly impeded Parents' participation in the decisionmaking process regarding the provision of a FAPE.

Madera Unified did not deprive Student of a FAPE by reason of the proposed IEP amendment of April 2020.

## STUDENT'S PROGRESS FOLLOWING THE MARCH 12, 2020 IEP TEAM MEETING

Shortly after the March 12, 2020 IEP team meeting, Madera Unified closed its schools and provided distance learning to Student and its other students, as a result of the COVID-19 pandemic. Student was in distance learning from approximately mid-March to the end of the 2019-2020 school year, and then during the entire, or nearly entire, 2020-2021 school year, when Student was in 11th grade. Student's performance in some areas did not show progress during remote learning, and indeed, remote learning was difficult for many students. Student's Reading Inventory Test scores deteriorated from 808, the fourth-grade level, on December 12, 2019, to 752, a lower fourth-grade level, in fall 2020. They rebounded to 766 on January 22, 2021, which was still at the fourth-grade level.



Some of Student's grades during the fall semester of the 2020-2021 school year were also low. He received an F in the one class that was part of the public safety career pathway, and a D+ in the Protective Services Academy class, which was also part of the public safety career pathway. However, his other grades in the fall semester 2020-2021 were satisfactory. Student earned Bs in English language arts and English language development, a B- in US History, and a C- in Math. Student's grades were even better during the spring semester of 2021. He earned

- an A in English language arts;
- an A- in English language development;
- an A+ in U.S. History;
- a C in Math;
- a B- in a criminal justice class that was part of the public safety career pathway; and
- an A in protective services academy, another class that was part of the public safety career pathway.

## ISSUES 6A AND 6B: SPRING 2021 TRIENNIAL ASSESSMENT INAPPROPRIATE

In Issues 6A and 6B, Student contends that the spring 2021 triennial assessment was inappropriate because it was not administered bilingually, and it did not assess Student in all areas of suspected disability. Madera Unified contends that the assessment was appropriate. Madera Unified further contends Student did not prove that he required a bilingual assessment or that the assessment was inappropriate.

As was stated above with respect to Issue 2A, special education law distinguishes between an initial assessment of a child, which occurs to determine, in part, whether a child is eligible for special education and related services, and a reassessment of a child. However, there are common standards and principles which govern both types of assessments. (Ed. Code, § 56381, subd. (a)(1).) A child must be assessed in all areas related to their suspected disability, and no single procedure may be used as the sole criterion for determining whether the child has a disability or whether the child's educational program is appropriate. (20 U.S.C. § 1414 (a)(2), (3); Ed. Code, § 56320, subds. (e) & (f).) The assessment must be sufficiently comprehensive to identify all of the child's special education and related service needs, regardless of whether they are commonly linked to the child's disability category. (34 C.F.R. § 300.306.)

Tests and assessment materials must be administered by trained personnel in conformity with the instructions provided by the producer of such tests. (20 U.S.C. § 1414(a)(2), (3); Ed. Code, § 56320, subds. (a), (b).) Assessments must be conducted by individuals who are both "knowledgeable of the student's disability" and "competent to perform the assessment, as determined by the school district, county office, or special education local plan area." (Ed. Code, §§ 56320, subd. (g), and 56322; see 20 U.S.C. § 1414(b)(3)(B)(ii).) A psychological assessment must be performed by a credentialed school psychologist. (Ed. Code, § 56324.) Tests and assessment materials must be validated for the specific purpose for which they are used; must be selected and administered so as not to be racially, culturally, or sexually discriminatory; and must be provided and administered in the student's primary language or other mode of communication unless this is clearly not feasible. (20 U.S.C. § 1414(a)(2), (3); Ed. Code, § 56320, subds. (a), (b).) The primary or native language for a child who is limited

English proficient is the language which is normally used by the child's parents, except when, in all direct contact with the child, including evaluation, another language is normally used by the child in the home or in the learning environment. (34 C.F.R. § 300.329 (a)(1), (2).) A child such as Student, who is "limited English proficient" for purposes of the IDEA is the same as an "English learner" in the Elementary and Secondary Education Act of 1965. (34 C.F.R. § 300.27). Tests and assessment materials must be provided and administered in the language and form most likely to yield accurate information on what the pupil knows and can do academically, developmentally, and functionally, unless not feasible to so provide or administer. (Ed. Code, § 56320, subd. (b)(1).)

In conducting the assessment, the school district must use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the student. This includes any information provided by the parent which may assist in determining whether the student is a child with a disability and the content of the IEP. (20 U.S.C. § 1414(b)(2)(A)(i).) The school district must use technically sound instruments to assess the relative contribution of cognitive and behavioral factors, as well as physical or developmental factors. (20 U.S.C. § 1414(b)(2)(C).)

Assessments must be selected and administered to best ensure that the test results accurately reflect the pupil's aptitude, achievement level, or any other factors the test purports to measure and not the pupil's impaired sensory, manual, or speaking skills unless those skills are the factors the test purports to measure. (Ed. Code, § 56320, subd. (d); 34 C.F.R. § 300.304(c)(3).)

## SPRING 2021 TRIENNIAL ASSESSMENT

Madera Unified performed a triennial assessment of Student in March 2021, when Student was 16 years old and in 11th grade. On February 24, 2021, Mother signed an assessment plan, written in Spanish, which provided that Madera Unified would assess Student in the areas of academics, cognitive functioning, social emotional and behavioral, and transition.

Jordan Ambers, a Madera Unified school psychologist, and Mitchell Roberts, one of Student's special education teachers, were part of the triennial assessment team, along with the school nurse. Ambers wrote a report of the assessment. Ambers was employed by Madera Unified as a school psychologist from 2016 through the time of the hearing. He earned his master's degree in school psychology and his pupil personnel services credential in school psychology from Fresno Pacific University in 2016.

The introductory and identification information at the beginning of the assessment report, which gave Student's name, age, date of birth, and other similar information, stated that Student's primary language was Spanish. Student's most recent state English Language Proficiency test score was Level 1, beginning stage. Ambers and Roberts conducted the entire assessment in English, which was the academic language in which Madera Unified instructed Student throughout his high school career, with the exception of his foreign language Spanish class. Ambers considered Student to be competent in English, and that English was Student's dominant language.

Ambers reviewed Student's background information, including his developmental history, medical history, family history, educational history, review of previous assessments, and review of attendance. Ambers briefly summarized Student's previous triennial assessment of March 20, 2018. Ambers's report listed all of Student's grades and classes during the previous semester and his current grades. Ambers interviewed Student, Parent, and teachers. He observed Student in class, remotely, as Madera South was then offering only distance learning due to the COVID-19 pandemic. Ambers listed Student's services as set forth in Student's then-current IEP. Ambers reviewed Student's previous scores on standardized state and Madera Unified testing, and provided a summary of Student's scores from his previous triennial assessment in 2018.

During his interview, Student was able to tell his age, but not his birth year. Student mentioned that he tried his best to turn in his work, even though sometimes he did not understand or forgot. Spanish was the primary language spoken in the home. Student shared he had no problems with classmates, but also commented that he had no friends, and he was not sure he wanted friends because he felt calm when he was alone. Student said he played video games on his phone, enjoyed watching mystery and horror shows on Netflix, and enjoyed anime. He liked listening to music, and he wanted to be a police officer. He did not know how many brothers and sisters he had, but he was able to name five siblings. He reported that he heard voices that no one else heard, and the voices said his name. He also shared that sometimes he saw things that were not there and that others did not see.

Ambers interviewed Mother on the telephone, with an interpreter on the line. Mother said Student showed similar behaviors as those he demonstrated at his last triennial assessment. She stated Student did not leave his bedroom or interact with

family members. He would not shower unless she forced him to do so. She stated all he did was draw and that he had no friends. Student had not been meeting with his mental health counselor. Evidence at hearing reflected that the mental health counselor had several discussions with Student's Mother about her services, and Mother agreed to forward Student the computer links the counselor sent her so Student could access the services remotely, but there was no evidence that Mother forwarded the links.

Ambers received reports from six of Student's teachers. Student's teachers all stated that the was generally doing well in their virtual classes and was well-behaved. Student was engaged and participated in some of his classes, and had good attendance. He completed all or nearly all of his work, except in math. His math teacher reported Student turned in some assignments, but not all. Several teachers reported Student self-advocated by asking for help or asking clarifying questions.

Ambers observed Student online in one of his public safety career pathway classes. Student logged in on time, and his camera was on, but he was in a dark room and had his hood on. Student appeared to be watching the video the teacher was showing, at least initially, but then his camera moved to a view of the ceiling.

Ambers assessed Student in-person at the school site for two to three hours, over two sessions, using COVID-19 precautions that he listed in his report. Roberts did academic testing at the school site, and the school nurse provided input.

Student was quiet, soft-spoken, and compliant during testing. He kept his hood on at all times, which Ambers considered to demonstrate limited alertness, sluggishness, and shyness. He did not respond fully to Ambers's conversation at first, but slowly they established rapport. Student began to make eye contact when speaking, and asked Ambers questions. He was attentive and attempted to persevere through the test tasks.

Ambers considered the findings of his assessment to be a valid representation of Student's current functioning. He did not believe that the use of personal protective equipment impacted Student's performance. The tests were selected and administered so as not to be racially, culturally, or sexually discriminatory, and they were administered in accordance with the instructions provided by the test producers. They were administered in English because Ambers and Roberts determined English was the mode of communication most likely to yield accurate information. Ambers and Roberts selected their assessment tools to produce results that accurately reflected Student's aptitude and achievement level, and not the pupil's impaired sensory, manual, or speaking skills, unless those skills were the factors the test purported to measure.

Ambers assessed Student's cognitive abilities by administering the Kaufman Assessment Battery for Children, Second Edition, Normative Update, a nonverbal test. Student received a standard score of 80 on the nonverbal index, which placed him in the below average range. Ambers also administered the Woodcock-Johnson Test of Oral Language-Fourth Edition. This test measured various aspects of oral language, such as

- listening comprehension,
- oral expression,
- vocabulary,
- phonological processing,
- speed of vocabulary retrieval, and
- cognitive academic proficiency.

Student scored in the low average to very low range on all of the subtests.

Ambers assessed Student's behavior and emotional status by administering the Behavior Assessment System for Children, Third Edition rating scales to Mother, one of Student's general education teachers, and Student. The responses to the scales enabled

Ambers to evaluate Student's behavior and self-perception, and to identify, evaluate, and monitor any behavioral and emotional problems Student had. Mother's responses were to be interpreted with caution, according to the testing manual, as she possibly rated Student in an inordinately negative fashion. Both Mother's and teacher's ratings demonstrated no concerns in the areas of externalizing problems or internalizing problems, and the teacher's ratings reflected no concerns in school problems, behavioral symptoms, and adaptive skills. In short, teacher did not have any concerns about student's social-emotional functioning. Mother had some concerns regarding behavior and adaptive skills. She rated Student either in the clinically significant or at-risk ranges on adaptive skills.

Ambers interpreted Student's self-report on the clinical skills portion of the Behavior Assessment with caution because Student's responses suggested the possibility that he was attempting to present himself in an overly positive light. Student rated himself very low on the school problems, and in the average range on internalizing problems, inattention/hyperactivity, emotional symptoms, and personal adjustment.

Ambers concluded that Student had an inability to build or maintain satisfactory interpersonal relationships with peers and teachers consistent with Student's emotional disturbance eligibility. Ambers noted that Mother and Student did not identify friends of Student either currently or in the past, and the Behavior Assessment ratings highlighted continued concerns with social skills, withdrawal, sense of inadequacy, and interpersonal relations. Ambers also concluded Student met eligibility for emotional disturbance under the criteria of inappropriate types of behavior or feelings under



normal circumstances. Ambers's report cited Student's comments that he heard and saw things that were not there, and Mother's comments that Student preferred to be alone in his room and did not interact with family members.

Roberts, Student's special education teacher in his English language arts inclusion class, during the 2020-2021 school year, as well as his case carrier, administered the Woodcock Johnson Test of Achievement-Fourth Edition. It measured four curricular areas: (1) reading, (2) mathematics, (3) written language, and (4) academic knowledge, including

- basic reading skills,
- reading comprehension,
- reading fluency,
- math calculation skills,
- math problem solving, and
- written expression.

Student scored in the very low range in all areas.

Roberts discussed his academic testing of Student for the triennial assessment. Roberts administered the test on campus, using precautions due to COVID. The testing sessions were approximately one and one-half hour each, over the course of at least two days. During remote learning, Roberts and Student had normal interactions with each other, and each day would converse or use the chat to communicate one-on-one on Zoom. However, during the academic testing, Student seemed uncomfortable and in a poor emotional state. Student was not in a mood to respond to Roberts's attempts at conversation, to make eye contact, or to make any personal connection. Student kept his responses to Roberts short, and his head down. He answered "not sure" to simple

questions about his siblings, and he could not seem to express himself. He seemed “frozen,” and to be very reserved. Roberts was surprised because this was not how Student acted on Zoom during distance learning. Student’s responses on Zoom might be delayed, but he was responsive. Roberts thought Student made his best efforts during the testing, given his poor affect. Student attempted each answer and thought about the answers. Roberts noted part of the assessment required Student to read aloud, and did not recall Student struggling with words.

Roberts did not think Student was able to perform as well as he could have if Student were more comfortable. Roberts considered that Student’s discomfort was a reaction to being back on campus after such a long time participating in distance learning. He termed the test results “anomalous” as they did not align with Student’s achievement levels at that time, or Roberts’s observations of Student’s class participation online. Based on previous test scores, and progress reports he received from teachers as Student’s case carrier, Roberts believed Student could have performed better.

Ambers summarized Student’s test results towards the end of his report. He noted that Student’s achievement scores were drastically different from Student’s previous initial and triennial achievement test results. Therefore, he wrote that the academic scores should be interpreted with caution. He wrote that they were not consistent with past evaluations and may not be a true indicator of Student’s current academic performance. Ambers and Roberts conferred regarding Student’s performance on the academic achievement tests, and Ambers considered Student’s low achievement scores as possibly related to his emotional disturbance, based on his discomfort with being on campus and his lack of rapport with Roberts.

Ambers also concluded that Student met criteria for eligibility under other health impairment, based on Student's previous diagnosis of attention deficit hyperactivity disorder, and Student's and Mother's ratings of Student as at risk of attention problems on the Behavior Assessment. During in-person assessments, Ambers considered that Student demonstrated limited alertness or energy, but appropriately noted that a more typical observation of attention behaviors in class was limited due to distance learning.

Ambers found that Student did not meet the criteria for specific learning disability. He found a severe discrepancy between intellectual ability and achievement in the academic areas of

- oral expression,
- written expression,
- basic reading skills,
- reading comprehension,
- mathematics calculation, and
- mathematics problems solving,

but did not find the discrepancy to be directly related to a processing disorder. Rather, he cautioned the validity of whether student demonstrated his true ability, in that his achievement scores were significantly lower than, and not consistent with, past evaluations. He concluded that Student's educational needs would be better addressed under the emotional disturbance eligibility criteria.

The Ambers report recommended Student continue to receive special education services under the primary eligibility of emotional disturbance, and under the secondary eligibility of other health impairment. His report recommended a variety of methods to use at home and at school to enhance Student's academic functioning.

## ISSUE 6A: BILINGUAL ASSESSMENT

Student contends that the spring 2021 triennial assessment should have been administered in a bilingual format, as Student was an English language learner. Madera Unified contends Student failed to provide any evidence that Student required bilingual assessments. In fact, Madera Unified noted that Student's expert, Dr. Foster, testified that both Student's 2018 and spring 2021 triennial assessment were sufficient for educational purposes.

Student's contention that the triennial assessment should have been administered bilingually is unmeritorious. First, all of Student's academic instruction throughout high school was in English, except for his Spanish foreign language class. Each of his IEPs in evidence affirmed Student received all of his academic instruction in English and could express himself in English. The language normally used by Student in all direct contact in the learning environment was English, making it his native language for evaluation purposes. (See 34 C.F.R. § 300.29 (a)(1), (2).) Second, there was no evidence that Student's 2018 triennial assessment was administered bilingually, although the school psychologist who administered portions of the assessment spoke English and Spanish. Third, at hearing Student relied upon assessment results performed by Lindamood-Bell to support his contentions and the remedies he seeks in this case, and all of those assessments were performed in English.

Finally, several of Student's current and former teachers testified at hearing, and all of them, except for his Spanish teacher, testified that Student spoke and wrote English in their classes.

Student cited no relevant legal authority to support his position, and presented no witness who testified that Student required a bilingual multidisciplinary triennial psychoeducational evaluation to be validly assessed. Rather, Student relied only on speculation that Student's low scores on various of Student assessments or need to ask clarifying questions about the assessments could have been affected by his needs as an English language learner. The law and the evidence do not support Student's position.

Madera Unified did not deprive Student of a FAPE by reason of not administering a bilingual triennial assessment to Student in spring 2021.

#### ISSUE 6B: FAILURE TO ASSESS OR APPROPRIATELY ASSESS STUDENT IN THE AREAS OF ACADEMICS, AUTISM, ATTENTION AND FOCUS, MENTAL HEALTH, SPEECH AND LANGUAGE, OCCUPATIONAL THERAPY, BEHAVIOR AND EMOTIONAL FUNCTIONING, AND TRANSITION

Student contends that Madera Unified failed to assess Student in all areas of suspected disability, by failing to assess him in the areas of

- academics;
- speech and language, including auditory processing deficits;
- mental health; and
- transition needs;

and failed to appropriately assess him in the areas of emotional and behavioral functioning and attention and focus. Again, Student's impression of what this issue actually encompassed was fluid, as the original issue as set forth in the Issues for

hearing section of this Decision also referenced the areas of autism and occupational therapy. Student did not mention those topics in his discussion of this Issue 6B in his closing brief, yet he did not formally withdraw or dismiss them as issues.

Madera Unified contends Student did not produce any evidence that Madera Unified should have assessed Student in any area other than those in which Madera Unified assessed Student. Further, Madera Unified contends that Dr. Foster testified that Madera Unified's 2018 and 2021 triennial assessments were sufficient, and. Ambers affirmed that Student had been appropriately assessed in all areas of suspected disability.

The analysis of this issue is similar to the analysis set forth above in Issue 2A. As was discussed there, the evidence did not support that Student required any autism assessment, as there was no evidence to suspect that Student might be a student with autism. Student presented no evidence that autism was an area of suspected disability as of the spring 2021 triennial assessment.

Similarly, the evidence did not support that Student required an occupational therapy assessment, as there was no evidence that Student had any needs in occupational therapy as of the spring 2021 triennial assessment.

On the other hand, there was evidence that Student had difficulties with social communication, particularly in his isolation from peers. This Decision found at Issue 2A that Student required an assessment in speech and language between September 2019 and spring 2021. As such an assessment was not performed then, the assessment should have been part of Student's triennial assessment. This Decision also found that

Student's transition assessment in March 2020 should have included an evaluation of Student's adaptive living skills in the community. Such an assessment should also have been performed as part of the 2021 triennial assessment.

Student presented only one expert, Timothy Foster, M.D., to testify regarding the appropriateness of the spring 2021 triennial assessment. In Dr. Foster's opinion, the spring 2021 triennial assessment was sufficient for educational purposes and for obtaining services at school. In Dr. Foster's opinion, Student needed a neuropsychological assessment to understand Student's disability and inform appropriate classroom interventions. Dr. Foster believed that a neuropsychological assessment was necessary for a variety of reasons, including to double-check Madera Unified's finding that Student did not have a specific learning disability and to further evaluate Student's auditory processing disorder which was noted but not further evaluated in the spring 2021 triennial assessment. Further, a neuropsychological evaluation would delve more into Student's psychological problems and give a better picture of Student's abilities and functioning. Dr. Foster's testimony, however, was not persuasive that Student required a neuropsychological assessment to inform the IEP team regarding Student's educational needs. This is especially so in view of his opinion that the spring 2021 triennial assessment was sufficient for educational purposes, as well as his lack of familiarity with Student's classroom performance.

Dr. Foster only examined Student approximately four times over approximately three years. He performed medical testing on Student, but never administered any norm-referenced standardized tests. He never spoke to Student's teachers, or observed

Student in class or on campus. There was little evidence that Dr. Foster realized that Student functioned well at school, made progress, was applying to several colleges, and was on track to graduate.

Further, this Decision has found that Student should be assessed in several of the areas which Dr. Foster recommended, such as speech and language, to include an auditory processing component, adaptive living skills in the community, and, as set forth below, an academic assessment. The academic assessment and the auditory processing assessment, together, will provide additional information regarding whether Student meets the eligibility criteria for a specific learning disability. Under these circumstances, Student did not demonstrate that he required a neuropsychological assessment for educational purposes.

Mother testified that she provided Madera Unified Dr. Foster's examination notes dated March 2, 2021, on several occasions, including at the April 15, 2021 IEP. These examination notes contained Dr. Foster's recommendation that Student have a neuropsychological examination. There was no formal documentation, contemporaneous note, additional witness testimony, or other specific evidence to confirm Mother's testimony that she transmitted Dr. Foster's notes to Madera Unified. Parents' May 26, 2021 note to Madera Unified taking exception to portions of the April 15, 2021 IEP team meeting did not mention Dr. Foster's recommendation for a neuropsychological assessment. In light of the absence of corroborating evidence, Mother's testimony was not persuasive. Rather, the examination notes were considered as evidence to support Dr. Foster's opinions.

Student's contention that the spring 2021 triennial assessment did not assess or appropriately assess Student in the areas of attention and focus, and behavior and



emotional functioning is not meritorious. The spring 2021 triennial psychoeducational assessment assessed Student in these areas. Ambers interviewed Student and Mother. Both interviews provided information about Student's behaviors and emotional functioning, such as Mother's report of Student's isolation from his family. Student described his hobbies, his likes and dislikes, and his efforts at performing schoolwork. Ambers gathered information from several of Student's teachers, who reported on his classroom behavior, his attitude, his class performance, and his ability to complete his work. Ambers observed Student's behavior and attention over Zoom as well as during in-person testing. In addition to these less formal methods of assessing Student's behavior, emotional, attention, focus, and social functioning, Ambers also formally assessed Student's behavioral, emotional, attention, focus and social functioning in class and at home by administering the Behavior Assessment rating scales to Parent, a teacher, and Student.

In his closing brief, Student contended that observations over an online platform were unreliable, and misquoted Ambers to that effect, but Ambers did not comment that online observations were unreliable. Ambers only noted that observations performed online, such as the one he did, were more limited observations of behavior than they would have been had he done it in person, and that observing online made the observation more challenging. As Student, like his classmates, was engaged in remote learning at the time of the assessment, Ambers and Student's teacher who participated in the Behavior Assessment could only observe Student online. In addition, Student provided no evidence that the results of the behavior rating scales were unreliable due to Student's teacher's observations of Student online during distance

learning. Student provided no evidence that Madera Unified failed to appropriately assess Student in the areas of behavior, social and emotional functioning, attention, and focus.

Student was not assessed for mental health as part of the triennial psychoeducational evaluation. However, Henderson performed a mental health assessment of Student in spring and summer of 2019, less than two years prior to the triennial assessment, and the evidence showed Madera Unified offered Student mental health services from the time of the October 30, 2019 IEP up to the time of the spring 2021 triennial assessment. There was no evidence that Student required another mental health assessment only two years after Henderson's assessment. For example, there was no evidence that there was any substantial change in Student's mental health, or in his academic performance that could be attributed to his mental health, or any escalation in his behavior at school, as of the time of the spring 2021 triennial assessment. Student reported to Ambers during the spring 2021 assessment that he sometimes heard and saw things that nobody else heard or saw. Student's report of these visionary and auditory phenomena was not new; they were noted in Madera Unified's 2018 triennial assessment, and were part of the basis for Madera Unified's referral of Student for an educationally mental health assessment in 2019. The evidence showed that Student had not participated in his educationally-related mental health services during remote learning during 2020-2021, but there was no evidence that was due to any avoidance on Student's part so as to justify another mental health assessment. Additionally, Mother did not request another mental health assessment as part of the triennial, nor did any of Student's teachers. (See 34 C.F.R. § 300.303(a); (*M.S. v. Lake Elsinore Unified Sch. Dist.*, *supra*, 678 Fed.Appx. at p. 544 (mem.).) Under these circumstances, Student did not

establish a need for Madera Unified to conduct an additional assessment of Student's mental health in spring 2021. Indeed, at hearing, Henderson described Student's current mental health as stable, and predicted he would be able to function at school through the rest of his senior year.

With respect to Student's academic assessment, Ambers's report noted that Student's scores on the Woodcock achievement test should be interpreted with caution, as they were much lower than scores Student received in previous standardized testing. The fact that Student's academic scores were far lower than previously did not necessarily invalidate them or require that Student be re-tested. Yet, the circumstances of this case require that Student receive another academic assessment. Specifically, in his assessment report, Ambers determined that Student was not eligible as a student with a specific learning disability because, although Student's test scores showed a severe discrepancy between his cognitive ability and academic achievement, Ambers determined that the discrepancy was not directly related to a processing disorder, rather, the discrepancy was due to Student's very low scores on his academic achievement testing, and those scores were not consistent with his previous academic achievement test scores. As a result, Ambers considered Student's educational needs to be better addressed under the eligibility of emotional disturbance. Ambers's conclusion that the eligibility category of emotional disturbance better addressed Student's educational needs may well be correct. However, to conclude that Student did not meet criteria for a specific learning disability because Student's academic assessment scores were abnormally low violates the spirit, if not the letter, of the IDEA. Madera Unified must assess Student in all areas of suspected disability; it cannot exclude him from an

eligibility category because the results of one of the central assessment instruments that was used to determine eligibility were unreliable, or at least questionable. Therefore, Madera Unified should perform another academic assessment of Student.

As discussed above in Issue 2, Madera Unified failed to assess Student in the areas of speech and language, including auditory processing, but was required to do so by the time of the triennial assessment. Similarly, Madera Unified failed to fully assess Student's adaptive living skills in the community as part of the transition assessment, and should have done so. Indeed, Student's reported inability to tell Ambers his year of birth and how many siblings he had during the spring 2021 triennial assessment were additional evidence to support the need for an assessment of Student's adaptive living skills in the community as part of a transition assessment. Finally, Madera Unified should administer Student another academic assessment. By reason of Madera Unified's failure to assess or appropriately assess Student in several known areas of need, including speech and language, academics, and adaptive living skills in the community, Parents and the IEP team were deprived of crucial information to develop an educational program to meet Student's communication, transition, and academic needs, and Student was deprived of an educational benefit. Accordingly, these failures resulted in a denial of a FAPE to Student.

#### ISSUE 7: DID MADERA UNIFIED DEPRIVE STUDENT A FAPE BY REASON OF THE TRIENNIAL IEP OF APRIL 15, 2021?

The law pertinent to this issue was set forth in the discussion of Issues 4B through 4F, above.

## APRIL 15, 2021 ANNUAL AND TRIENNIAL IEP TEAM MEETING

Madera Unified convened Student's annual and triennial IEP team meeting by way of a teleconference on April 15, 2021. The team members include a Madera Unified administrator, two general education teachers, Ambers, the school nurse, Henderson, Roberts, the school counselor, Mother, and Student. A Spanish interpreter was present to interpret and translate for Mother.

The team reviewed Student's progress on his previous transition and academic goals. Student had not met his prior transition goal to research post-secondary environments and know their requirements. He met his reading comprehension goal, which required him to analyze and summarize aspects of a grade-level literary text. Student met his math goal of solving word problems involving addition and subtraction.

The team discussed Student's strengths. Student was dedicated, he asked questions for clarification, he turned in the majority of his assignments, and he had great attendance. He was friendly with peers and staff and enjoyed playing video games. He wanted to graduate from high school with a diploma, and possibly work in law enforcement.

Parent expressed concerns about Student's academic progress, behavior, and mental health. Student rarely left his bedroom or interacted with family members, and he had no friends. Parent was concerned about Student's ability to lead a normal life and take care of himself in adulthood, as well as his ability to remember and retain information.

The team reviewed Student's scores on the English Language Development test, which described Student's listening performance level as somewhat/moderately

developed, his speaking performance level well-developed, his reading performance level as beginning, and his writing performance level somewhat/moderately developed. The Northwest Evaluation Association Measures of Academic Progress assessment score from winter 2021 placed Student at the fourth-grade level in math. His reading score from winter 2020 also placed him at around the fourth-grade level. The IEP team noted Student's score on the Reading Inventory Test taken in January 2021 in Student's English language development class was 766, which was a 14-point increase since his last such test.

Ambers reported to the team on the spring 2021 triennial psychoeducational assessment. The IEP listed Student's scores on the Woodcock oral language tests and achievement tests. Ambers told the IEP team that Student's scores on the Woodcock achievement tests were lower than Student had scored on previous evaluations and may not be a true indicator of student's current academic performance but instead might be more indicative of Student's social emotional state when taking the assessments. Mother received a copy of the assessment report.

The two general education teachers and special education teacher Roberts reported Student's present levels of performance. In English language arts, Student was able to write a thesis statement and multi-paragraph essay, to use rhetorical devices in a slide show, and to use evidence in writing to support an answer. He needed to improve his reading comprehension because he continued to struggle to show understanding and analysis of grade-level texts.

Student used trigonometric definitions to write ratios of correct sides in a right triangle, and could identify points on the sine curve and relate them back to the unit

circle. The team found Student had no needs in the area of math at the time of this IEP. Student's math skills were sufficient to complete the math requirement to graduate with a diploma, and he would not be taking any further math classes.

In the area of communication, the team noted Student was able to communicate his wants, needs, and ideas to peers and teachers. He received all of his academic instruction in English and could express himself in English. He spoke Spanish with Parents at home, and was still an English language learner.

In the area of gross and fine motor development, Student had age-appropriate skills to participate in general education. His handwriting was legible.

In the social emotional/behavioral area, Student's interaction with his peers was still a challenge. Currently, he preferred and tended to interact more with adults. Student would interact in group settings and contribute to conversation in the classroom.

In the vocational area, Student was polite and had excellent manners. He greeted, said good-bye to, and exchanged pleasantries with his teachers each day.

In the area of adaptive/daily living skills, Student exhibited difficulty interacting with peers, but communicated quite well with adults. He was able to take care of his own needs and could navigate the school environment.

Mother advised the team that Student had been taking a prescription medication every morning for approximately three to four months. Student was doing well in school. Mother asked if the pills were making Student smarter, and Ambers responded that they were perhaps making him more alert and focused.

The team determined Student had needs in reading comprehension, transition, and peer interaction.

Henderson spoke about Student's therapist's attempts to provide Student with individual counseling. Student did not access the mental health counseling services at all during the 2020-2021 school year, and the team did not report on Student's progress on his mental health goal. Henderson reported that a social skills group would provide a great environment for Student to work on his social communication, if Student would attend it. There were no social skills groups on campus.

Student's public safety general education teacher, who was present at the meeting, reported Student was doing well, always engaged, and answered questions.

The general education teachers reviewed Student's class performance. They, along with other teachers through progress reports, commented on Student's good attendance, class participation, and that he asked clarifying questions. He completed most of his work. Some teachers had small concerns that some of Student's written answers were incomplete when Student was asked to explain "why," and Student sometimes struggled with writing but tried and would make corrections when asked. He did not read at grade level, which sometimes presented a challenge for Student to understand instructions. The team was aware that the teacher's reports and work samples were based on distance learning. Roberts, Student's English language arts special education teacher and case carrier, compiled the information for the IEP. He believed the present levels accurately described Student at the time.



The team reviewed the Age of Majority document with Parent, who had no questions. Roberts explained the special factors page, and Mother had no questions. Student was to take the Smarter Balance Assessments and the English Language Proficiency tests with accommodations in his IEP.

The team developed annual goals and related objectives. Goal 1 addressed reading comprehension. The baseline for the goal noted Student sometimes struggled to read and comprehend grade-level texts, which he did only at about 60 percent accuracy. The team noted Student working below grade level. The reading comprehension goal required Student to independently read 120 minutes per week from texts of his choosing that interested yet challenged him, to increase his comprehension and fluency. Growth in those areas would be measured by interview, assessments, and other measures of increased reading level.

The team developed Goal 2, a college and career readiness goal, by which Student would identify three post-secondary environments of interest and the educational background, training, and educational credentials necessary to enter those environments, with 90 percent accuracy. The baseline stated that during an interview prior to the IEP team meeting, Student did not know the steps he would need to take after high school to become a police officer, but noted Student was taking classes in the public safety career pathway.

Goal 3 addressed peer interactions, and was an educationally related mental health services goal. The baseline noted that Student had been learning remotely at home due to the COVID-19 pandemic, but based on previous reports, when Student attended school in person prior to the pandemic, he interacted primarily with teachers

throughout the day. During his triennial assessment, he exhibited significant social awkwardness with limited conversation and eye contact and gave short, two-word answers. The goal required Student to interact appropriately with his classmates to build peer relationships from 40 percent to 75 percent success.

Based on all of the information Roberts had at the time, he believed Student's area of need in April 2021 were reading comprehension, transition, and peer interactions. Roberts also noted that it was not appropriate to base Student's goals strictly on the results of standardized tests. Henderson proposed the goal regarding peer interactions, and proposed the level of mental health services.

The goals and objectives in this IEP were appropriate. They addressed Student's needs as identified by the IEP team, to enable him to make progress in the general education curriculum.

The team reviewed Student's accommodations. The accommodations included: monitoring/discussing what Student watched on television or phone, and conversing about how he interpreted the information, including discussing the difference between fiction and non-fiction; encouraging joining a club on campus and/or sports team to network with peers and find friends with common interests; pairing visual supports with auditory information; using tactile and/or kinesthetic learning modalities; allowing more time on class assignments and homework, and giving time-and-a-half for turning in assignments, but not to exceed final grading period; checking for understanding; allowing use of a calculator if needed; using repeat, repetition, and rephrasing strategies; giving preferred seating; reducing distractions; having Student take tests in a quiet area, if needed; giving access to math chart; checking multiple ways for

understanding; giving concise step-by-step directions; repeating and clarifying instruction or concepts when necessary; and reviewing previously learned materials.

The team discussed the possible placements of general education and general education inclusion classes with support. Based on Student's abilities, the team agreed that general education inclusion classes with support offered a FAPE in the least restrictive environment. Student could access core curriculum in the placement, and there were no potential harmful effects in the placement. The team explained the placement to Mother. Student was, and had been, in this placement, and was successful in it. Student would spend 100 percent of his time in the general education environment, and he would have access to special education services and personnel in the general education classroom.

As to services to support Student's goals in the recommended placement, the IEP team advised that due to the public emergency caused by the COVID-19 pandemic, Madera Unified would implement the contingency learning plan for Student. Once school resumed in-person learning, this plan would expire and the current programs and services outlined in the IEP would continue.

The team offered special education and services. Student was to receive specialized academic instruction for 165 minutes per day, to support Student in his three specified general education academic inclusion classes, starting immediately on April 15, 2021, and ending on June 30, 2021, at the end of the current school year. He was to receive specialized academic instruction for 110 minutes per day from July 1, 2021, through April 15, 2022, as Student had finished his math requirements to graduate and would be taking one less academic course in his general education inclusion program during the 2021-2022 school year. The services page specified the two general

education academic inclusion classes in which Student was to receive the specialized academic instruction support for each semester of the 2021-2022 school year. Further, Student was to receive career awareness services for 30 minutes yearly from April 15, 2021, through April 15, 2022, and college awareness services for 30 minutes yearly from April 15, 2021, through April 15, 2022. He would also receive vocational and career assessment, counseling, and guidance services for 30 minutes yearly from April 15, 2021, through April 15, 2022. He was to receive individual educationally related mental health counseling for 60 minutes monthly from May 1, 2021, through April 30, 2022, and from July 1, 2020 through April 30, 2021. The latter set of dates appeared to be a typographical error. The IEP team did not offer extended school year services, based on the rationale, as specified in the IEP, that Student was not exhibiting a regression of skills during breaks.

Roberts considered the services offered were sufficient to support Student. Mother orally agreed with and accepted the proposed placement and services for Student, and the case carrier scheduled an appointment with Mother to consent to and sign the IEP. Father signed consent to the IEP on May 28, 2021, with the exceptions in the note dated May 26, 2021, described in Issue 1, to which Father referred on the signature page of the IEP. Parents transmitted the note to Madera Unified along with the signed IEP.

Roberts described his customary process in preparing for an IEP team meeting. He requested and received progress reports from teachers, talked to the student, looked at work samples, and sometime talked to parents. He reviewed transcripts and assessments, including the transition assessment. He gathered this information to use when he considered the present levels of performance. He measured progress on goals.

He developed draft goals based on the present levels of performance and baselines, and considered Student's needs and where he could be or needed to be in a year.

During the IEP team meeting, it was Roberts's custom to communicate with parents about their rights and concerns. He customarily asked whether they had questions, confirmed whether a particular aspect of the IEP was all right with them, and shared views and ideas with them as the meeting proceeded.

#### ISSUE 7A: ACCURATE PRESENT LEVELS OF PERFORMANCE IN ACADEMICS

Student contends that the April 15, 2021 IEP did not contain accurate present levels of performance in academics, because it only documented the Woodcock academic achievement scores from the spring 2021 triennial assessment, and omitted more accurate Woodcock achievement scores from the 2018 triennial. Student also contends the IEP included Student's low math and Northwest assessment reading scores that were inconsistent with Student's abilities as set forth in the present levels of performance. Student contends that Madera Unified knew, or should have known, that Student's actual English and math abilities were not as described in the present levels of performance, because Mother had told the IEP team that all of Student's classwork during school closures was completed at home with assistance from his siblings.

Madera Unified contends that the present levels of performance were accurate, as testified to by Student's teachers.

The April 15, 2021 IEP presented accurate present levels of performance in academics. The IEP team considered general education teacher reports, progress on goals, Student's reading test scores, and Student's scores on the academic portion of the triennial psychoeducational assessment. Ambers specifically advised the team to

review the latter scores with caution, and copies of Ambers's complete assessment report, which included the 2018 scores, were available to the team. Mother received a copy of the assessment report. The team was also aware that the teachers' reports were based on remote learning.

Student's contention that his present levels as described by his teachers were not consistent with his standardized test scores does not constitute evidence that Student's present levels were overstated. As was discussed above with respect to Issue 4B, in Roberts's opinion, special education students often perform lower on standardized tests than they do in the classroom, as such students have multiple means of displaying their abilities in the classroom. It follows that they also have multiple opportunities to display their abilities in class, as opposed to the single-shot situation of a standardized test.

As was discussed above, Mother testified that some unspecified amount of Student's homework, or classwork during remote learning, was actually worked on or completed by his siblings. She also testified that she advised the IEP team of that, but there was no corroborating evidence that any member of the IEP team knew at any time that schoolwork that Student represented as his own was not his own.

Rather, three of Student's teachers at the time of this IEP team meeting, Roberts, Madrigal, and Hernandez, testified at hearing regarding Student's performance in their classes. Roberts, the special education teacher in Student's inclusion English language arts class during the 2020-2021 school year, felt Student was a good, hard-working, student. Roberts spoke with Student several times one-on-one during breakout sessions online, usually without a camera. Roberts described Student as not very conversational online, and a bit socially awkward. Sometimes he took a long time to respond, but so did some of Roberts's other students. Student was able to converse

and Roberts considered their chat interactions to be normal. Student turned in his work, and asked questions in the online chat, and his work met the standards for the class. Roberts did not notice any problems with Student's writing in the class.

At hearing, Mother contended that Student would sometimes become nervous during remote learning and briefly leave his room. At those times, Mother said Student's siblings would surreptitiously take his place and use his online chat feature to chat with Student's teachers, pretending to be Student. Mother also testified that Student's siblings would tell him what answers to give to his teachers online during remote learning. Mother's testimony contained no details as to when and how often these interventions by Student's siblings occurred, or in which classes. There was no documentation that Mother advised Roberts or any other staff at Madera Unified that Student was not necessarily the person with whom Roberts thought he was chatting online. There was no documentation that Mother advised Roberts or any other staff at Madera Unified that Student's siblings were feeding him answers that Student would then provide to his teachers online. As Mother was not present in the single room in which Student and his siblings attended their online classes, Mother's testimony was vague as to the degree of assistance Student's siblings provided.

Benjamin Madrigal was Student's English language development teacher during both the 2020-2021 and 2021-2022 school years. Madrigal was credentialed as a special education teacher and was certified to teach dual language Spanish/English classes. The class involved reading, writing, speaking, and listening in English. Student did well and improved his Reading Inventory Test scores from October 2020 onward. Student took

those tests in person, with no assistance from others. By the end of the 2021 school year, Student's Reading Inventory Test scores improved from 752 to 819, which the test report showed as a fourth grade level.

Rikki Hernandez was Student's teacher for the protective services academy class in the 2020-2021 school year. The class required the students to perform physical exercises, and Student participated with the camera on. Student's fall semester grade in the class was a D, which Hernandez could not explain except to posit that Student did not participate or failed to perform well on some tests. Student's final grade in the class was an A.

Student also contended that Student's ability to perform the tasks described in the present levels were not explained to Mother at the IEP team meeting because the team could not explain them. This was unsupported speculation by Mother. Mother's testimony at hearing was the only evidence that she did not receive an explanation of present levels at the IEP team meeting. Roberts testified to his practice of managing IEP meetings, which included checking in with parents throughout the meeting, asking whether they had questions, making sure they understood what was being said, and soliciting their views. The April 15, 2021 IEP supported Roberts's testimony and documented that the IEP items were explained to Mother as the meeting proceeded. There was no documentation at the IEP team meeting that Mother asked any questions or raised any concerns at the meeting regarding Student's ability to perform the tasks in the present levels, and no evidence that any such questions or concerns, if raised at the meeting, would not be addressed.

More than a month after the meeting, Parents wrote a note dated May 26, 2021, to Madera Unified objecting to the IEP team's perceptions about Student's present



levels of performance and asking for proof. However, there was no evidence that Mother did not have the opportunity to ask questions about those matters at the IEP team meeting. The note itself did not mention that Mother raised any objections or asked any questions about this topic at the IEP team meeting.

In its discussion of this issue, Student's closing brief raised an additional issue about the IEP team's reporting of Student's performance on non-academic goals. The issue for hearing only involved Student's academic present levels of performance. Consequently, Student's concerns about his present levels in other areas will not be addressed in this Decision. (Ed. Code, § 56502, subd. (i).)

Student did not demonstrate that Student's present levels of academic performance in this IEP were inaccurate. Madera Unified did not deprive Student of a FAPE on this ground.

## ISSUE 7B: FAILING TO INCLUDE OBJECTIVELY MEASURABLE AND APPROPRIATE GOALS

Student contends that none of the three goals in the April 15, 2021 IEP were measurable because none of them correlated to baseline data. Madera Unified contends that the IEP included objectively measurable and appropriate annual goals.

The April 15, 2021 IEP included three goals. Goal 1, the reading comprehension goal to read for two hours per week from a challenging text was measurable and appropriate. Roberts drafted the goal to encourage Student to read for pleasure because that very act could improve Student's reading fluency and comprehension. The baseline for the goal was detailed, described Student's struggle to read and comprehend grade-level texts, and stated that he could do so with about 60 percent

accuracy. The goal addressed Student's struggles with reading comprehension and fluency. It was measurable, as it required Student to independently read for a specific amount of time, and Student's progress on the goal, that is, his reading comprehension and fluency, would be measured by reading tests and assessments. Student criticized the goal because the baseline did not state how many hours Student was reading for pleasure currently, but that criticism is not meritorious, and misses the point of the goal. The point of the goal was not how many hours Student already read. The point of the goal was whether Student's comprehension and fluency improved if he independently read even one book that interested and challenged him for two hours per week. Those factors were measurable.

Goal 2, the college and career readiness goal to research a career of interest, was also appropriate and measurable. Roberts drafted this goal because, in interviewing Student for the transition plan, he discovered that Student did not know what steps he had to take to become a police officer. The goal had a detailed baseline, based on an interview with Student, and mentioned Student's public safety career pathway classes. The goal required Student to identify three post-secondary environments of interest, and research their requirements with 90 percent accuracy. Student contended that the baseline for the goal contained no information regarding the extent to which Student had identified post-secondary environments of interest. Again, Student has misconstrued the point of the goal. The goal was not directed at increasing the number of post-secondary environments of interest Student could identify. The goal was directed at developing Student's ability to research or investigate the training and educational requirements necessary for him to reach whatever post-secondary education or career he wished to pursue. Progress on the goal would be measured by

how accurately he was able to show what he learned about the training and educational requirements for the three post-secondary educational environments or careers he identified. The goal was appropriate and measurable.

Goal 3, the peer interactions goal was also measurable and appropriate. This mental health and transition goal, drafted by Student's mental health counselor Henderson, had a detailed baseline describing Student's difficulties with peer interactions, and the need to develop those to help facilitate his transition to a post-secondary environment. The goal itself required Student to appropriately interact with his classmates to build peer relationships in a variety of specified ways, "from 40% to 75%" success. Student contends that the baseline did not specify the amount of time Student was appropriately interacting with his classmates. Student is incorrect. The goal itself includes that information: Student was appropriately interacting with his classmates 40 percent of the time. Forty percent is the baseline, as is made clear by reviewing the short-term objectives of the goal. The first short-term objective refers to "from 40% to 50% success." The second short-term objective refers to from "50% to 60% success" and so on. The baseline for a goal does not have to appear in the baseline column; information required in an IEP can be included anywhere in the document. (*Capistrano, supra*, 2021 WL 6141122, at \*5.)

The goals included in this IEP were measurable and appropriate. Madera Unified did not deny Student a FAPE by including these goals in the April 15, 2021 IEP.

ISSUE 7C: FAILING TO INCLUDE GOALS IN THE AREAS OF READING SKILLS, READING FLUENCY, MATH, WRITTEN EXPRESSION, ADAPTIVE LIVING SKILLS, ATTENTION AND FOCUS, MENTAL HEALTH, TRANSITION, SOCIAL/EMOTIONAL/BEHAVIORAL FUNCTION, OCCUPATIONAL THERAPY, AND SPEECH AND LANGUAGE

Student contends that the three goals in Student's April 15, 2021 IEP failed to address Student's academic deficits in the areas of reading, writing, and math, or in his other areas of disability-related needs. Student also raises an additional issue regarding Madera Unified alleged failure to address Student's progress on previous non-academic goals. Notwithstanding that several of the goals to which Student refers were older goals, or goals upon which Madera Unified had reported progress, this issue was not included in Student's complaint, was not raised as an issue for hearing, and Madera Unified did not agree that it was to be added as an issue for hearing. It will not be further discussed in this Decision. (Ed. Code, § 56502, subd. (i).)

Madera Unified contends Student's IEP included annual goals in all areas of educational need, and Student failed to provide any evidence that Student exhibited areas of need other than those addressed in Student's IEP. That Madera Unified met Student's needs was demonstrated by his teachers' reports and observations, as well as the fact that Student will soon graduate from high school with a diploma.

The law does not require Student's IEPs to include every goal from which Student might benefit.

Many of Student's contentions regarding this issue are unmeritorious. As was discussed at Issue 4E, Student did not require an occupational therapy goal in March 2020, and there was no evidence that Student's fine motor needs had changed or increased by April 2021.

There was also no evidence that Student required a speech and language goal. A school district is required to assess for suspected needs, but must only write goals for actual educational needs. As was previously determined in this Decision, Madera Unified should have assessed Student in speech and language in light of his social communication difficulties. However, Student offered no evidence that he had speech and language deficits that qualified for speech and language services and accompanying goals.

The IEP's peer interaction goal addressed Student's mental health, and his social/emotional/behavioral functioning. Student's difficulty with peer interactions was a basis for his referral for, and receipt of, educationally related mental health services. The goal targeted Student's social behaviors and his emotional state by requiring him to act appropriately with peers. Moreover, the IEP listed accommodations that addressed Student's peer relationships, such as encouraging Student to join a club or seek to find friends with common interests. There was no evidence that Student required an additional goal in this area, and there was no legal requirement that the IEP include an additional goal in this area. An IEP must have a goal to address each area of need, but there is no limitation that one goal cannot address multiple areas of need.

Additionally, this IEP addressed Student's deficiencies in attention, focus, and executive functioning by way of the skills required by the goals themselves and the accommodations in the IEP. Goals need not have a one-to-one correspondence with

specific needs, so long as the goals, as a whole, address the student's needs and enable progress in light of Student's circumstances. (*K.M., supra*, 2017 WL 1348807, \*17.) For example, the reading comprehension goal required Student to attend and focus. IEP Goal 2, the college and career readiness transition goal, required Student to attend, focus, and use executive functioning skills such as organization and planning to research and assimilate information about post-secondary opportunities. Student's mental health peer interaction goal required Student to attend and focus during conversations with others so that he would respond appropriately. The accommodations addressed one or more of Student's attention, focus, and executive functioning deficits by

- pairing visual support with auditory information,
- allowing more time for class assignments and homework,
- checking for understanding,
- using repetition and rephrasing strategies,
- preferred seating,
- reducing distractions,
- testing in a quiet area,
- checking multiple ways of understanding giving concise step-by-step directions, and repeating and clarifying instruction and concepts when necessary, and
- reviewing previously learned materials.

Student's reading skills and fluency were addressed by Goal 1, the reading comprehension goal, which was directed at Student's reading skills and reading fluency. Additionally, Goal 2, the college and career readiness goal, also addressed Student's

reading skills and reading fluency, as Student would have to perform research to identify the education, training, and credentials necessary to pursue post-secondary environments of interest.

Madera Unified did not deprive Student of a FAPE by reason of the April 15, 2021 IEP by not having goals in the foregoing areas.

Student's contention that he required a math goal is not meritorious. Madera Unified contended that Student did not require a new math goal because he had completed his math requirement for graduation, had met his annual math goal from his previous IEP, and would not be taking math in the upcoming 2021-2022 school year. Roberts acknowledged that, were Student to take a math class during the 2021-2022 school year, he would probably have developed a math goal for Student. He did not do so because Student did not need a math goal in the 2020-2021 school year to receive a FAPE. Student offered no evidence to demonstrate that, at this point in his high school career, Student required a math goal to receive a FAPE. Given Student's good performance in his senior year classes, and the expectation of his teachers and the IEP team that Student would graduate with a diploma at the end of the 2020-2021 school year, Madera Unified did not deprive Student of a FAPE by not developing a math goal in the April 15, 2021 IEP.

Madera Unified did not deprive Student of a FAPE by not including a goal in written expression in the April 15, 2021 IEP. Student had not had a written expression goal in an IEP since the March 2019 IEP, and yet he still passed his classes with good grades. Several of his teachers testified as to written work that Student created in their classes, and none of them commented that Student's writing was an area of need such that Student required a goal. Roberts stated that when he collected progress reports

from Student's teachers, none of them expressed concerns about Student's writing. Roberts himself had not considered including a writing goal in this IEP, based on Student's performance in Roberts' English language arts general education inclusion class. On cross-examination he conceded that he "maybe" should have drafted such a proposed goal. However, he also acknowledged that he did not dictate the goals; the IEP team agreed on the goals. There was no evidence that any other member of the IEP team felt that Student had a need for a goal in written expression so as to receive a FAPE. Student did not meet his burden of demonstrating that Madera Unified deprived Student of a FAPE on this ground.

As was discussed with respect to Issues 2A and 4E, above, Student required a transition assessment to evaluate his adaptive living skills in the community. Student did not demonstrate that he required any goal in this area, just that he needed an assessment. Further, Student did not need additional goals in school-related adaptive skills in his IEP, as the weight of the evidence demonstrated that Student was functional in the school environment.

Student contends that there was no transition goal to address Student's skills relevant to his desire to become a police officer. The college and career readiness goal in the IEP was directly related to that desire, by requiring Student to research the requirements for areas of postsecondary interest, and the goal baseline refers specifically to Student's desire to become a police officer and his enrollment in courses in the public safety pathway. The goals in the transition plan also specify Student's desire for a career in law enforcement. Again, there need be no more than one goal in each area of need, and the IEP need not contain every goal from which a student might benefit.



## ISSUE 7D: FAILING TO INCLUDE A CLEAR OFFER AS TO WHEN SERVICES WOULD START

Student contends that the April 15, 2021 IEP repeated the failure of the March 12, 2020 IEP in failing to make a clear offer as to when services would start, in that it stated services would begin on July 1, 2021, yet the IEP team decided not to offer Student extended school year services. Madera Unified contends that all of the IEPs included specific information as to when the offered services would begin and end. Madera Unified further notes that Mother did not assert at the IEP team meeting that she was confused as to when services would start.

An IEP must contain a clear offer of a FAPE. (*Union, supra*, 15 F.3d 1519, 1526.) However, an IEP need not contain the precise date upon which services will begin, only a projected date on which services would begin. (34 C.F.R. § 300.320(a)(7).) The April 15, 2021 IEP stated that the start date for specialized academic instruction for Student's general education inclusion classes during the 2021-2022 school year was July 1, 2021. As was discussed with respect to Issue 4C, above, the start date of July 1, 2021, for specialized academic instruction was tied to Madera Unified's fiscal year, and did not, under the circumstances of this case, cause confusion regarding whether Student should be offered extended school year, or whether Student would receive services upon starting classes in August 2021 for the 2012-2022 school year. As the IEP specifically stated that Student would not receive extended school year services, the start date of the specialized academic instruction was not fatally unclear.

Had Mother had any questions about whether the July 1 start date meant that Student was to receive extended school year services, she was free to ask questions about it at the IEP team meeting or at any other relevant time. There was no evidence

that, at any relevant time through the time of filing the due process complaint, she asked any such questions, or that she was confused. Student in fact received his specialized academic instruction in all of his general education inclusion classes in the 2021-2022 school year. Accordingly, Student did not prove that, if the offer was unclear, it deprived him of educational benefit or interfered with Parents' participation in the IEP development process.

Madera Unified's offer of a FAPE was not unclear as to the start date for services so as to deprive Student of a FAPE.

#### ISSUE 7E: FAILING TO INCLUDE A CLEAR OFFER AS TO THE AMOUNT OF SPECIALIZED ACADEMIC INSTRUCTION THAT WOULD BE DELIVERED ON AN INDIVIDUAL BASIS AND HOW MUCH WOULD BE DELIVERED ON A GROUP BASIS

Student contends that Madera Unified offered both individual and group specialized academic instruction services of 165 minutes daily without specifying the number of minutes allocated to the group and individual settings. Therefore, Mother was unable to effectively monitor Student's progress or enforce his specialized academic instruction services. Madera Unified contends that the evidence at hearing demonstrated that how much specialized academic instruction would be provided on an individual basis or on a group basis was tailored to meet Student's needs in each of his general education inclusion classes on an ongoing basis. Student did not produce any evidence that Student was denied a FAPE by using this dynamic process to meet Student's unique educational needs. Further, Student did not provide any evidence that Madera Unified failed to implement his IEP.

The IEP services grid on the April 15, 2021 IEP describes specialized academic instruction in two parts. The first part offered Student his specialized academic instruction in inclusion classes in the amount of 165 minutes daily from the date of the IEP to the end of the Madera Unified District's fiscal year, and the IEP shows that both the individual and group boxes on the service grid were checked in that section of the grid. The second part offered Student his specialized academic instruction in general education inclusion classes in the amount of 110 minutes per day from the date that Madera Unified's fiscal year began, through the date of the next expected annual IEP team meeting. The IEP shows that only the group box was checked in that section of the grid. There was no evidence at hearing as to why there was a discrepancy between the way in which these boxes on the grid were marked, but the evidence showed that the type of specialized academic instruction Student was offered in this IEP would be delivered in the same manner during the entire school year.

Student's contention that the IEP was unclear as to whether Student's specialized academic instruction was offered in a group setting or an individual setting so as to deprive Student of a FAPE is incorrect. In the recent case of *Los Angeles Unified Sch. Dist. v. A.O.* (C.D. Cal., January 26, 2022, No. 2:21-cv-00757-ODW) 122 LRP 3903, the court cited 34 C.F.R. part 300.320, and ruled that the IDEA does not require that an IEP offer must specify whether the services will be provided in individual or group settings. Rather, such information falls under the specific methodology of delivering the services, which is left to the discretion of school districts. So it is here. The April 15, 2021 IEP provided, as did all of Student's previous relevant IEPs, that Student would be placed in specific general education inclusion classes. Student's placement in such classes was discussed with Mother at this and previous IEPs. The inclusion classes, sometimes referred to as co-lab classes, were jointly taught by a general education teacher and a

special education teacher. The number of minutes of specialized academic instruction Student received corresponded to the number and length of such classes, and all of Student's specialized academic instruction occurred in his general education inclusion classrooms. The evidence reflected that Student's receipt of such specialized academic instruction occurred organically, as a practical matter. Student sometimes received instructional assistance individually, sometimes as part of a small group, and sometimes as part of the entire class, depending on his needs with the particular grade level material at any particular time on a particular day in his inclusion classes. Specialized academic instructional support was available to Student throughout the class time, as needed.

There was no evidence that Mother did not understand Student's placement in inclusion classes, and how Student's instruction had been delivered, or was to be delivered in such classes, or that Mother was confused by the description of this in the IEP. Under these circumstances, the offer of specialized academic instruction was not unclear, and Madera Unified did not deprive Student of a FAPE on this ground.

## ISSUE 7F: PREDETERMINING THE DECISION NOT TO OFFER GROUP SOCIAL SERVICES

Student did not address this issue in his closing brief, or in his reply brief, except to say, in his reply brief, that Student needed group social skills services. District contended that the evidence at hearing did not demonstrate any predetermination regarding the decision not to offer Student group social skills services.

As was stated above in the discussion of Issue 5, predetermination of a student's placement is a procedural violation that deprives a student of a FAPE in those instances

in which placement or services are determined without parental involvement in developing the IEP. (*Deal, supra*, 392 F.2d 840, 857-859.) A parent has meaningfully participated in the development of an IEP when they attended the IEP team meeting, had the opportunity to discuss the proposed IEP, and their concerns were considered by the IEP team. (*Fuhrmann, supra*, 993 F.2.1031, 1036.)

There was no evidence that the IEP team predetermined that it would not offer group social skills services. Rather, no member of the IEP team, including Henderson, recommended it as necessary for Student to receive a FAPE. There was no evidence that Mother had any comments or concerns about this aspect of the IEP offer, or that she was unable to discuss with the team whether Student needed a social skills group. Student interprets the comment in the Notes pages of the IEP that there were no social skills groups on campus as evidence that the IEP team would only offer such services if they were on campus, but there was no evidence that was the case. There was no evidence that any decision made by the IEP team was based upon the availability of services on campus. Student did not meet his burden of demonstrating that there was any predetermination regarding social skills services so as to deprive him of a FAPE on this ground.

#### ISSUE 7G: FAILING TO OFFER AN APPROPRIATE LEVEL AND TYPE OF SERVICES, INCLUDING TRANSITION SERVICES

Student contends that the reduction in Student's specialized academic instruction from 165 minutes per day through June 2021, to 110 minutes per day from July 2021 forward, was not reasonably calculated to confer meaningful educational benefit. and that the transition plan in the IEP failed to provide services based on Student's individual needs, including his needs with respect to daily living skills. Madera Unified contends

the IEP included appropriate services to meet Student's educational needs so as to offer Student a FAPE, as evidenced by Student's impending graduation with a diploma, and the testimony of Student's teachers and service providers at hearing. Additionally, Student has applied to post-secondary colleges and universities statewide, which shows that Mother also perceived Student was prepared to achieve academically after high school.

The April 15, 2021 IEP offer reduced the number of minutes of Student's specialized academic instruction for the 2021-2022 school year because Student would be enrolled in only two general education inclusion classes of 55 minutes each instead of the three classes at 55 minutes each he was taking during the last semester of the 2020-2021 school year. The amount of time Student spent in general education inclusion classes determined the amount of specialized academic instruction he received. Student presented no evidence that this reduction in the amount of specialized academic instruction offered to Student, as a result of the corresponding reduction of the amount of time he would spend in general education inclusion classes, deprived Student of a FAPE.

As to transition services, the transition services offered by the April 15, 2021 IEP included 30 minutes per year of career awareness, 30 minutes per year of college awareness, and 30 minute per year of vocational assessment, counseling, guidance, and career assessment. There was no evidence that Student required additional transition services. As was discussed in Issue 2A, Madera Unified should have assessed Student in independent living skills in the community as part of Student's transition assessment, due to his deficits in that area. A school district is required to assess for suspected

needs, but must only write goals and offer services for actual needs. Student offered no evidence that he actually qualified for, and was thereby entitled to, transition services regarding independent living skills in the community.

As written, given Student's placement in general education inclusion classes, the amount of specialized academic instruction this IEP offered was reasonably calculated to enable Student to receive some educational benefit and to make appropriate progress in light of his circumstances. Student offered no evidence that the amount of transition services in his IEP was not reasonably calculated to enable him to receive some educational benefit and to make appropriate progress in light of his circumstances. Madera Unified did not deprive Student of a FAPE on these grounds.

## ISSUE 7H FAILING TO OFFER GROUP SOCIAL SKILLS SERVICES

Student's brief did not discuss this issue. In his reply brief, Student asserts that the combination of Henderson's comment at the IEP team meeting that social skills groups would be great, plus Mother's testimony that Student had no friends and isolated himself in his bedroom all day, and Student's emotional disturbance eligibility based on his inability to build or maintain satisfactory interpersonal relationships, strongly suggested the need for social skills development. Madera Unified contends that Student did not require social skills training in a group setting.

Madera Unified was obligated to offer Student a FAPE that encompassed not only the academic domain, but also the social domain. The April 15, 2021 IEP team was aware that Student had a need to improve his peer interactions, and drafted a mental health goal to support that need. Student's accommodations also provided that he be

encouraged to engage with peers. Student offered no evidence that he had a need for group social skills services as of the time April 21, 2021 IEP. Henderson testified that she was not recommending a formal social skills group for Student at that time.

Madera Unified did not deprive Student of a FAPE on this ground.

## ISSUE 7I: FAILING TO OFFER EXTENDED SCHOOL YEAR SERVICES

Student contends that Madera Unified should have assessed or examined whether Student required extended school year services, and failed to do so. Madera Unified contends that Student's academic achievements and progress demonstrated that Student did not require such services.

Extended school year services would only be required if Student significantly regressed over summer breaks and had limited recoupment capacity so that it would require excessive time for him to re-learn previously acquired skills. Thus, Madera was required to offer Student extended school year services if it was likely that Student would regress in his education over the 2021 summer break, or other school breaks, and be unable to recoup his educational loss in a reasonable amount of time. The IEP specified that the IEP team did not offer extended school year services because Student was not exhibiting a regression of skills during breaks. Student presented no evidence that he would significantly regress and be unable to recoup such educational losses at the same rate as his peers. Student did not meet his burden of demonstrating that he required extended school year services.



Accordingly, Madera Unified was not required to offer extended school year services, and Madera Unified did not deprive Student of a FAPE by failing to offer such services.

## STUDENT'S PROGRESS DURING THE 2021-2022 SCHOOL YEAR

Student made progress during the 2021-2022 school year. His latest score on the Reading Inventory Test, taken on October 5, 2021, placed him at 977, which was a seventh grade level, according to the test report. This was an increase from his previous score of 819, or fourth grade level, which he achieved when he was tested at the end of 10th grade, on June 6, 2021.

Several of Student's teachers during the 2021-2022 school year testified at hearing regarding his grades and performance in their classes.

Harman, Student's special education teacher in Student's general education inclusion civics class during the 2021-2022 school year, said Student was doing well, and was responsible and respectful. He had a solid B in Civics and was in the top 25% of the class. He kept up with the work, turned in the work on time, completed some portion of his work in class, and averaged a B on tests, which Harman referred to as "quite a feat." His grade was based 70% tests and quizzes and 30% on classwork or homework. If Student did not finish his work in class, it became homework. She described the class tests, which were taken online. They usually included approximately 25 multiple-choice questions which called for an understanding of the concepts taught. The teachers observed the test-taking on livestream or walked around the classroom during the tests.

Gerald Christiansen was Student's general education teacher who co-taught Student's Civics class with Harman during the 2021-2022 school year. He affirmed that Student's current grade was a B. He observed that Student functioned as an above-average student in the class. Student participated in class by asking and answering questions. He was well-behaved in class and worked well with peers. Christiansen confidently stated that based on his 20 years of teaching experience, Student will deserve and receive a diploma from Madera South. Both Christiansen and Harman described an in-class testing process that was not susceptible to a student having access to someone or something feeding them answers or allowing them to otherwise engage in cheating.

Kathleen Kennedy was student's general education teacher in the general education inclusion English language arts class during the 2021-2022 school year, which focused on expository reading and writing and speaking. She noted that 10 to 12 of the approximately 38 students in her inclusion class were special education students. Student had an 82% or 83% average in her class, which was above the class average. She had recently observed him working well with other students on a small-group project that involved written product and then developing and making a video. He knew the project's many schedules and deadlines. She checked his individual progress in class using a learning log. Every two weeks, students wrote in the learning log what they learned in class. The learning log was usually completed in class. She also reviewed work Student submitted to her that Student created in class. He behaved appropriately in class, and participated in class when he was with his group.

Various of Student's teacher testified similarly to these teachers. Student was well-behaved in class, performed his work, and was tested in class in ways that did not readily permit cheating. He earned good grades, and he participated in their classes. He had an A in Spanish, according to Aracely Gonzalez, Student's Spanish teacher during the 2021-2022 school year. Hernandez, Student's public safety career pathway class teacher during the 2021-2022 school year, described that Student had at least a C in the class, and that Student had recently developed a power point presentation about a research project he completed and presented the power point to the class. As part of the public safety career pathway, Student was scheduled to take a criminal justice course in the spring semester in conjunction with Madera Community College, for which he would receive college credit from Madera Community College. The teachers who testified at hearing confirmed that, when Student turned in work, he represented it as his own.

As of the time of hearing, Student was in the process of applying to several post-secondary institutions, including Madera Community College, and several California State University campuses located throughout California. His teacher or counselor assisted him with the Madera Community College application, as part of his transition services. Mother helped Student select the California State University campuses to which he applied, and his siblings assisted him with the applications.

## 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:

Madera Unified did not deprive Student of a FAPE by failing to provide Student with a statutorily required prior written notice in response to Parents' May 26, 2021 notice.

Madera Unified prevailed on Issue 1.

## ISSUE 2A:

Madera Unified denied Student a FAPE by failing to appropriately assess Student in all areas of suspected disability, specifically speech and language, and adaptive living skills in the community as part of the transition assessment, from September 14, 2019, until his 2021 triennial assessment. Madera Unified did not deny Student a FAPE by failing to appropriately assess Student in autism, occupational therapy, attention and focus, executive functioning skills, and mental health, from September 14, 2019 until his 2021 triennial assessment.

Student and Madera Unified each prevailed on a portion of Issue 2A.

## ISSUE 2B

Madera Unified did not deny Student a FAPE by failing to offer Student a sufficient level of specialized academic instruction, including extended school year services, from September 14, 2019, to March 2020.

Madera Unified prevailed on Issue 2B.

### ISSUE 3A:

Student withdrew this issue.

### ISSUE 3B:

The October 2019 amendment IEP did not deny Student a FAPE by Madera Unified failing to follow the required procedures to excuse the general education teacher's attendance at the IEP team meeting.

Madera Unified prevailed on Issue 3B.

### ISSUE 4A:

Madera Unified denied Student a FAPE in developing the March 12, 2020 IEP by failing to follow the required procedures to excuse the general education teacher from attending the IEP team meeting.

Student prevailed on Issue 4A.

### ISSUE 4B:

Madera Unified deprived Student of a FAPE in developing the March 12, 2020 IEP by failing to include any present level of performance in the area of written expression. Madera Unified did not deprive Student of a FAPE in developing the March 12, 2020 IEP by failing to include accurate present levels of performance in other academic areas.

Student and Madera Unified each prevailed on a portion of Issue 4B.

#### ISSUE 4C:

Madera Unified did not deny Student a FAPE in developing the March 12, 2020 IEP by failing to include a clear offer of a FAPE regarding when the offered services would begin.

Madera Unified prevailed on Issue 4C.

#### ISSUE 4D:

Madera Unified did not deny Student a FAPE in developing the March 12, 2020 IEP by failing to include objectively measurable and appropriate goals.

Madera Unified prevailed on Issue 4D.

#### ISSUE 4E:

Madera Unified denied Student a FAPE in developing the March 12, 2020 IEP by failing to include a goal in written expression. Madera Unified did not deny Student a FAPE in developing the March 12, 2020 IEP by failing to include goals in the areas of mental health; attention and focus; social, emotional, and behavioral functioning; speech and language; adaptive daily living, visual motor integration; executive functioning, and occupational therapy skills.

Student and Madera Unified each prevailed on a portion of Issue 4E.

#### ISSUE 4F:

Madera Unified did not deprive Student of a FAPE in developing the March 12, 2020 IEP by failing to include appropriate levels and types of services, including transition and extended school year services.

Madera Unified prevailed on Issue 4F.

#### ISSUE 5:

Madera Unified did not deprive Student of a FAPE in the development of the April 2020 amendment IEP by unilaterally reducing Student's level of specialized academic instruction.

Madera Unified prevailed on Issue 5.

#### ISSUE 6A:

Madera Unified's 2021 triennial assessment was not inappropriate by reason of being administered only in English.

Madera Unified prevailed on Issue 6A.

#### ISSUE 6B:

Madera Unified's 2021 triennial assessment was inappropriate because it failed to appropriately assess Student in the areas of academics, speech and language, and adaptive daily living skills in the community for the transition plan. Madera Unified's 2021 triennial assessment was not inappropriate to the extent it failed to assess or appropriately assess Student, or both, in the areas of autism, attention

and focus, mental health, adaptive daily living skills in the school environment, occupational therapy, and behavior and emotional functioning.

Student and Madera Unified each prevailed on portions of Issue 6B.

#### ISSUE 7A:

The April 15, 2021 triennial IEP did not deprive Student of a FAPE by failing to include accurate present levels of performance in academics.

Madera Unified prevailed on Issue 7A.

#### ISSUE 7B:

The April 15, 2021 triennial IEP did not deprive Student of a FAPE by failing to include objectively measurable and appropriate goals.

Madera Unified prevailed on Issue 7B.

#### ISSUE 7C:

The April 15, 2021 triennial IEP did not deprive Student of a FAPE by failing to include goals in the areas of reading skills, reading fluency, math, adaptive living skills, attention and focus, mental health, transition, social, emotional, and behavioral functioning, occupational therapy, and speech and language.

Madera Unified prevailed on Issue 7C.



#### ISSUE 7D:

The April 15, 2021 triennial IEP did not deprive Student of a FAPE by failing to include a clear offer as to when services would start.

Madera Unified prevailed on Issue 7D.

#### ISSUE 7E:

The April 15, 2021 triennial IEP did not deprive Student of a FAPE by failing to include a clear offer as to how much of Student's specialized academic instruction and services would be delivered on an individual basis and how much would be delivered on a group basis.

Madera Unified prevailed on Issue 7E.

#### ISSUE 7F:

The April 15, 2021 triennial IEP did not deprive Student of a FAPE by predetermining the decision not to offer Student group social skills services.

Madera Unified prevailed on Issue 7F.

#### ISSUE 7G:

The April 15, 2021 triennial IEP did not deprive Student of a FAPE by failing to offer an appropriate level and type of services, including transition services.

Madera Unified prevailed on Issue 7G.

## ISSUE 7H:

The April 15, 2021 triennial IEP did not deprive Student of a FAPE by failing to offer group social skills services.

Madera Unified prevailed on Issue 7H.

## ISSUE 7I:

The April 15, 2021 triennial IEP did not deprive Student of a FAPE by failing to offer extended school year services.

Madera Unified prevailed on Issue 7I.

## REMEDIES

Student proved by a preponderance of the evidence that he was deprived of a FAPE by reason of Madera Unified's failures to assess Student in speech and language and adaptive living skills in the community as part of the transition assessment as described in Issue 2A, failing to follow required procedures to excuse the general education teacher's attendance at the March 12, 2020 IEP team meeting, as described in Issue 4A, failing to include a present level of performance in written expression in the March 12, 2020 IEP, as described in Issue 4B, and, as a result, failing to develop a goal in written expression in the March 12, 2020 IEP, as described in Issue 4E, and failing to assess in the areas of adaptive daily living skills in the community, in speech and language, and in academics in spring 2021 as part of the triennial assessment, as described in Issue 6B. Student seeks remedies, to include an independent neuropsychological evaluation, an independent speech and language assessment, an

occupational therapy assessment, a transition assessment, and a functional behavior assessment by independent assessors, including bilingual assessors, of Parent's choice. Student also seeks an IEP team meeting to develop an IEP based upon these assessments within 10 business days from the date Madera Unified receives the independent assessment reports. For the reasons described in this Decision, Student did not demonstrate that he is entitled to many of these remedies. Additionally, Student seeks compensatory one-on-one specialized academic instruction of at least 600 hours by Lindamood-Bell or a nonpublic agency. Upon completion of the 600 hours, further hours would be determined as needed.

Courts have broad equitable powers to remedy the failure of a local educational agency to provide a FAPE to a child with a disability. (20 U.S.C. § 1415(if)(1)(C)(iii); Ed. Code, § 56505, subd. (g); see *School Committee of the Town of Burlington, Massachusetts v. Dept. of Education* (1985) 471 U.S. 359, 369 [105 S.Ct.1996] (*Burlington*); *Parents of Student W. v. Puyallup School Dist.*, No. 3 (9th Cir. 1994) 31 F.3d 1489, 1496.) The conduct of both parties must be reviewed and considered to determine whether equitable relief is appropriate. (*Id.* at p. 1496.) This broad equitable authority extends to an ALJ who hears and decides a special education administrative due process matter. (*Forest Grove School Dist., v. T.A.*, *supra*, 557 U.S. 230, 240 [129 S.Ct. 2484].)

An award to compensate for past violations must rely on an individualized analysis, just as an IEP focuses on the individual student's needs. (*Reid v. District of Columbia* (D.C. Cir. 2005) 401 F.3d 516, 524.) "[T]he inquiry 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." (*Ibid.*)

In an appropriate case an ALJ may grant relief that extends past graduation, age 22, or other loss of eligibility for special education and related services as long as the order remedies injuries the student suffered while he was eligible. (*Maine School Admin. Dist. No. 35 v. Mr. and Mrs. R.* (1st Cir. 2003) 321 F.3d 9, 17-18 [graduation]; *San Dieguito Union High School Dist. v. Guray-Jacobs* (S.D. Cal., Oct. 27, 2005, No. 04cv1330 DMS (POR)) 2005 WL 8173338 [same].)

## LINDAMOOD-BELL PROGRAM

To remedy the school district's failures to offer Student a FAPE, Student contends he is entitled to direct private tuition funding and transportation services to attend the Lindamood-Bell program or another similar nonpublic agency provider of specialized academic instruction of Parent's choice.

Lindamood-Bell Academy is an accredited private school, and its Learning Center a private agency, but they were not certified by the state of California as a nonpublic school or agency. Students enrolled there participate in Lindamood-Bell instruction and curriculum. The Lindamood-Bell program offered a specific instructional methodology, and, as far as Student was concerned, its primary emphasis would be improving his reading skills.

On September 15, 2021, when Student was 17 and in 12th grade, Lindamood-Bell Learning Center conducted a Learning Ability Evaluation of Student. The Learning Ability Evaluation Summary stated the goal of the evaluation was to determine Student's present levels of sensory cognitive processing and learning skills, and his potential for further development in these areas. A Lindamood-Bell employee identified only by her first name, who did not testify at hearing, administered a variety of tests to Student

remotely, over the course of two hours after his regular school day. Some of the testing instruments were informal, some were not standardized, and at least one test was not the current version of the test. There was no documentation that the assessor observed Student as he took the tests, no evidence as to the remote testing environment in which Student took the tests, no written description of the tests, and no direct evidence or documentation that the tests were administered or scored in accordance with their protocols. Student's scores on most of the testing instruments from which a score could be calculated ranged from a kindergarten to first grade equivalent. He obtained a score of less than a 2:6 age equivalent on the Peabody Picture Vocabulary Test-5, Form A, and a score of less than a 6.0 age equivalent on the Word Opposites subtest of the Detroit Tests of Learning Aptitude-5. No grade equivalent score was provided with respect to the Symbol Imagery Test, and no intelligible scores was provided with respect to the Informal Tests of Writing and Tests of Written Language-Form A. In many instances, only one or two subtests of a comprehensive assessment instrument was administered, with no documentation as to what the other subtests were and why they were not given.

Student offered evidence regarding Lindamood-Bell's testing and program both as proof that Student had made no progress in Madera Unified's special education program, and also as evidence of a remedy for Student's deprivation of a FAPE.

Lindamood-Bell's diagnostic testing may be reliable for Lindamood-Bell purposes, but there was no evidence that it was reliable as a measure of whether Student made progress at Madera South. Significantly, all of Student's very low scores on the Lindamood-Bell tests were lower than Student's most recent reading comprehension score of 977 on the Reading Inventory Test, which placed Student at the seventh grade reading level.

Ashley Radieve, the Executive Center Director of Lindamood-Bell Learning Processes, testified that Lindamood-Bell was not certain whether Student would indeed benefit from Lindamood-Bell's services, and therefore Lindamood-Bell recommended that Student start its program provisionally, with up to 80 hours of service. At some point while Student was receiving those 80 hours, Lindamood-Bell would determine whether Student would be able to benefit from its services. If Lindamood-Bell decided to accept Student into its program, then Student could require as much as 600 hours or more of Lindamood-Bell services. Lindamood-Bell charged \$146 per hour for one-to-one instruction, and when students required a large number of hours, Lindamood-Bell offered a 15 percent discount.

Since Student was not able to prove that he would benefit from Lindamood-Bell services, they cannot be ordered as compensatory education in this matter. Furthermore, although Radieve's speculation that Student could require as much as 600 hours of its services provides the basis for Student's request for 600 hours of relief in its closing brief, Student provided no evidence as to how that number of hours relates in any way to any deprivation of FAPE Student alleged.

## COMPENSATORY EDUCATION IN ACADEMICS

Student's IEP of March 12, 2020, deprived Student of a FAPE because of Madera Unified's failure to obtain Mother's informed consent to excuse the general education teacher, and failure to include a present level of performance in writing and a goal in written expression. These failures affected those portions of the IEP that concerned Student's participation and involvement in the general education environment over the entire regular school year period to which this IEP applied. Student was in general education inclusion classes throughout the entire period of this annual IEP, involving the

academic skills of reading, written expression, and math. Moreover, the evidence reflected that, for all of the period to which this IEP applied, from March 12, 2020 through April 15, 2021, Student was participating in distance learning. The evidence reflected that Student, like many students, was negatively impacted by distance learning during the 2020-2021 school year. For example, his Woodcock achievement test scores, obtained towards the end of distance learning, were far lower than his previous achievement scores. The evidence showed that Student's reading skills, in particular, declined.

At the same time, the evidence reflected that during the 2020-2021 school year, Student indeed received instruction in reading, math, and writing. Student's teachers testified he benefitted from that instruction. Indeed, Student so benefitted from that instruction that he passed all of the math classes required for his diploma and was also expected to have enough credits to graduate from high school at the end of the 2021-2022 regular school year with a diploma.

Weighing all of these factors, Student is entitled as compensatory education to a block of hours equivalent to one hour per week of one-to-one specialized academic instruction in each of the areas of reading and written expression, and a block of hours equivalent to one-half hour per week of one-to-one specialized academic instruction in math, from a nonpublic agency. Madera Unified had 191 school days during the 2020-2021 school year, which amounts to 38 weeks of instruction. Thus, Student shall receive a block of 38 hours of specialized academic instruction for reading, a block of 38 hours of specialized academic instruction for writing, and a block of 19 hours of specialized academic instruction for math, all to be provided by a nonpublic agency on a one-to-one basis, under the terms described in the Order below.

## ASSESSMENTS

As a compensatory remedy, an administrative law judge can order a school district to fund further assessments as compensatory remedies. (*Los Angeles Unified Sch. Dist. v. D.L.* (C.D. Cal. 2008) 548 F. Supp. 2d 815, 822-23 [ordering school district to fund student's independent educational evaluation as equitable remedy where student moved to new district and new district agreed to conduct assessment]; *J.R., supra*, 2019 WL 13031921, \*6 [ordering school district to fund independent educational evaluation as equitable remedy to determine whether cognitive behavior therapy was needed for student's anxiety when district had not previously assessed].)

As was discussed above, Student did not demonstrate that he required a neuropsychological assessment. However, as was also discussed above, Student is entitled to other assessments.

As compensation for the failure of Madera Unified to assess Student in speech and language since fall 2019, Student is entitled to an independent speech and language assessment. The speech and language assessment shall include an auditory processing assessment. Student's auditory processing deficiency was noted in Student's spring 2021 psychoeducational assessment, but Madera Unified did not investigate it further. Student's individual needs in speech and language must be explored, and a speech and language assessment that included an auditory processing assessment would assist in that endeavor. The assessor shall be selected by Parents at Madera Unified's expense, and the assessment shall be performed as soon as practicable, under the terms described in the Order below.



As compensation for the failure of Madera Unified to assess Student in adaptive living skills in the community as part of Student's transition assessment, Student is entitled to receive a compensatory independent assessment of his transition needs, including his needs regarding his adaptive living skills in the community. The transition assessment shall be performed as soon as practicable by an independent transition assessor selected by Parents at Madera Unified's expense, under the terms described in the Order below. The assessor shall have experience in developing transition plans for students with deficiencies in adaptive behavior and adaptive living skills, and the assessor shall also develop the transition plan following the assessment. Within 30 days after the transition assessment has been completed, and the transition plan prepared, Madera Unified shall convene an IEP team meeting to discuss the assessment and the transition plan.

As compensation for the failure of Madera Unified to conduct an appropriate triennial academic assessment of Student, Student is entitled to receive a compensatory academic assessment by an independent assessor. The assessor shall be selected by Parents at Madera Unified's expense, and the assessment shall be performed as soon as practicable, under the terms described in the Order below.

## STAFF TRAINING

Student did not request any relief in the form of training for Madera Unified's staff. However, the facts of this case reveal that Madera Unified did not consistently fully appreciate its obligations regarding the procedures surrounding the excusal of a mandatory IEP team member, such as a general education teacher, from an IEP team

meeting Staff training can be an appropriate compensatory remedy, and is appropriate in this case. (*Park v. Anaheim Union High School Dist.* (9th Cir. 2006) 464 F.3d 1025,1034 [student, who was denied a FAPE due to failure to properly implement his IEP, could most benefit by having his teacher appropriately trained to do so].) Accordingly, Madera Unified will be ordered to provide staff training on those procedures.

## ORDER

1. Within 45 days from the date of this Decision, Madera Unified shall contract with a California certified nonpublic agency selected by Parents, to provide a block of 38 hours of specialized academic instruction in reading, 38 hours of specialized academic instruction in written expression, and 19 hours of specialized academic instruction in math, all to be provided on a one-to-one basis, and all to be funded by Madera Unified. Madera Unified shall also, and additionally, fund the cost for any assessments, materials, or other fees associated with those services. The services shall occur at Student's residence or at another location to be agreed upon by Parents and the nonpublic agency. If the services are held at a location other than Student's residence, Madera Unified shall reimburse Parent for transportation for one round-trip for travel to the location for each session of service at that location, not to exceed 50 miles round-trip. The block of hours is to be used by no later than 18 months from the date Madera Unified contracts with the nonpublic agency selected by Parents for these services. Any hours not used by that date

shall be forfeited. Student's graduation from high school with a regular diploma shall not terminate this remedy. This remedy is compensatory only and does not constitute part of a stay put placement.

2. Student shall have a speech and language assessment by an independent assessor selected by Parents at Madera Unified's expense, as soon as practicable. The assessment shall include an assessment of Student's auditory processing. Madera Unified shall provide Parents, in writing, its criteria for assessors within 10 calendar days of the date of this Decision.
3. Within 30 days after the speech and language assessment has been completed, Madera Unified shall convene an IEP team meeting to discuss the assessment. Madera Unified shall pay for the time of the assessor who performed the assessment to prepare for and attend this IEP team meeting, including payment for the assessor's time and expenses to travel to and from the meeting, not to exceed three hours.
4. Student shall have a transition assessment of his current transition needs, including his needs in the area of adaptive living skills in the community, as well as a new transition plan based on the assessment, funded by Madera Unified. The assessment shall be performed as soon as practicable by an independent transition assessor who has experience in developing transition plans for students with deficiencies in adaptive behavior and adaptive living skills, and that assessor shall also develop the transition plan following the assessment. The assessor shall be selected by Parents. Madera Unified to provide Parents, in writing, its criteria for assessors within 10 calendar days of the date of this Decision.

5. Within 30 days after the transition assessment has been completed and the transition plan prepared, Madera Unified shall convene an IEP team meeting to discuss the assessment and the transition plan. Madera Unified shall pay for the time of the assessor who performed the assessment and prepared the transition plan to prepare for and attend this IEP team meeting, including payment for the assessor's time and expenses to travel to and from the meeting, not to exceed three hours.
6. Student shall have an academic assessment by an independent assessor selected by Parents at Madera Unified's expense, as soon as practicable. Madera Unified shall provide Parents, in writing, its criteria for assessors within 10 calendar days of the date of this Decision.
7. Within 30 days after the academic assessment has been completed, Madera Unified shall convene an IEP team meeting to discuss the assessment. Madera Unified shall pay for the time of the assessor who performed the assessment to prepare for and attend this IEP team meeting, including payment for the assessor's time and expenses to travel to and from the meeting, not to exceed three hours.
8. Within 45 calendar days of the date of this Decision, Madera Unified shall contract with a nonpublic agency or law firm, not involved in this matter, to provide 3 hours of training to Madera Unified administrators and special education staff concerning requirements and best practices for obtaining informed consent from Parents and for appropriately excusing mandatory meeting members from IEP team meetings. This training shall be completed by June 30, 2022.
9. All other relief sought by Student is 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/

Elsa Jones

Administrative Law Judge

Office of Administrative Hearings