

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

CASE NO. 2021100153
CASE NO. 2021090782

THE CONSOLIDATED MATTERS INVOLVING

PARENTS ON BEHALF OF STUDENT, AND

IRVINE UNIFIED SCHOOL DISTRICT.

DECISION

APRIL 29, 2022

On September 24, 2021, the Office of Administrative Hearings, called OAH, received a due process hearing request from Irvine Unified School District, naming the Parents of Student, OAH case number 2021090782, and referred to as Irvine's case.

On October 5, 2021, OAH received a due process hearing request from Parents on behalf of Student, naming Irvine, OAH case number 2021100153, and referred to as Student's case.

On November 17, 2021, OAH consolidated Student's case and Irvine's case at the parties' joint request, and Student's case was designated as primary. On January 21, 2022, OAH granted Student's request to file an amended due process hearing request.

Administrative Law Judge Alexa Hohensee heard this matter by videoconference on March 15, 16, 17, 22, 23 and 24, 2022.

Timothy Adams, attorney at law, represented Student. At least one Parent attended all hearing days on Student's behalf. Amy Rogers, attorney at law, represented Irvine. Jennifer O'Malley or another Irvine representative attended all hearing days on Irvine's behalf.

At the parties' request, the matter was continued to April 15, 2022, for written closing briefs. The record was closed, and the matter was submitted on April 15, 2022.

ISSUES

In this Decision, a free appropriate public education is called a FAPE and an individualized education program is called an IEP. On March 14, 2022, Student withdrew in writing Issues 2, 5, 7, 8, 9 and 14 as stated in the March 7, 2022 Order Following Prehearing Conference for Hearing by Videoconference. At that time, Student also withdrew the reference to goals and accommodations in Issues 11, 15, 16, 17, 19, and 21. Student's remaining issues for hearing were reviewed and confirmed on the first day of hearing, and have been reorganized and renumbered in this Decision to reflect these changes.

STUDENT'S ISSUES:

1. Did Irvine Unified School District deny Student a FAPE by failing to provide Parents with a prior written notice in response to their request from June 6, 2019 for clarity regarding the specialized academic instruction minutes offered in the May 23, 2019 IEP?
2. Did Irvine deny Student a FAPE by failing to send Parents a prior written notice in compliance with and addressing the specific requirements of 34 C.F.R. § 300.503 in response to the closures related to the COVID-19 pandemic?
3. Did Irvine deny Student a FAPE by failing to provide Student with her last agreed-upon and implemented IEP placement, services, and accommodations during the COVID-19 pandemic?
4. Did Irvine deny Student a FAPE by failing to have an IEP in place for her at the beginning of the 2020-2021 school year?
5. Did Irvine deny Student a FAPE by failing to hold an IEP team meeting in response to Student's increasing needs during the 2020-2021 school year?
6. Did Irvine deny Student a FAPE by failing to make an appropriate offer of placement and services in the IEP developed on March 22, 2021?
7. Did Irvine deny Student a FAPE by failing to fully implement the October 29, 2020 annual IEP?
8. Did Irvine deny Student a FAPE by failing to provide Parents with a prior written notice in response to Parents' request for a change in Student's placement, and the addition of additional support during the 2020-2021 school year?

9. Did Irvine deny Student a FAPE by failing to make an appropriate offer of placement and services in the IEP developed on April 27, 2021?
10. Did Irvine deny Student a FAPE by failing to make an appropriate offer of placement and services in the IEP developed on June 2, 2021?
11. Did Irvine deny Student a FAPE by failing to make an appropriate offer of placement and services in the IEP developed on August 24, 2021?
12. Did Irvine deny Student a FAPE by failing to fully implement the October 29, 2020 IEP as amended on April 27, 2021?
13. Did Irvine deny Student a FAPE by failing to make an appropriate offer of services in the IEP developed on November 23, 2021?
14. Did Irvine deny Student a FAPE by failing to fully implement the November 23, 2021 amendment IEP?
15. Did Irvine deny Student a FAPE by failing to make an appropriate offer of services in the IEP developed on January 11, 2022?

IRVINE'S ISSUE

16. Was Irvine's June 2, 2021 Multidisciplinary Assessment Report appropriate, such that Irvine is not required to fund independent educational evaluations, referred to as IEEs, of Student at public expense?

JURISDICTION

This hearing was held under the Individuals with Disabilities Education Act, its regulations, and California statutes and regulations. (20 U.S.C. § 1400 et. seq.; 34 C.F.R.

§ 300.1 (2006) et seq.; Ed. Code, § 56000 et seq.; Cal. Code Regs., tit. 5, § 3000 et seq.)

The main purposes of the Individuals with Disabilities Education Act, referred to as the IDEA, are to ensure:

- all children with disabilities have available to them a 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).) In these consolidated cases, Student had the burden of proof on Student's issues, and Irvine had the burden of proof on Irvine's issues. The factual statements in this Decision constitute the written findings of fact required by the IDEA and state law. (20 U.S.C. § 1415(h)(4); Ed. Code, § 56505, subd. (e)(5).)

Student was 10 years old and in fifth grade at the time of hearing. Student resided within Irvine's geographic boundaries at all relevant times. Student was eligible for special education under the categories of emotional disturbance and other health impairment, as well as speech language impairment.

ISSUE 1: DID IRVINE DENY STUDENT A FAPE BY FAILING TO PROVIDE PARENTS WITH A PRIOR WRITTEN NOTICE IN RESPONSE TO THEIR REQUEST FROM JUNE 6, 2019 FOR CLARITY REGARDING THE SPECIALIZED ACADEMIC INSTRUCTION MINUTES OFFERED IN THE MAY 23, 2019 IEP?

Student contends that Irvine was required to respond with a prior written notice when Parents asked by way of a handwritten note for correction of the specialized academic instruction minutes from 1,665 minutes to 1,755 minutes in their June 6, 2019 written consent to a May 28, 2019 amendment to the November 6, 2018 IEP. Student argues that because Irvine failed to provide prior written notice in response to this request, Parents were denied participation in the development of Student's educational program because the offer lacked clarity and Student was denied a FAPE. District contends that a prior written notice was not required because it was not proposing any change to Student's educational program. It argues that it appropriately responded to Parent's handwritten note on June 7, 2019.

A FAPE means special education and related services that are available to an eligible child that meets state educational standards at no charge to the parent or guardian. (20 U.S.C. § 1401(9); 34 C.F.R. § 300.17.) Parents and school personnel develop an individualized education program, referred to as an IEP, for an eligible

student based upon state law and the IDEA. (20 U.S.C. §§ 1401(14), 1414(d)(1); and see Ed. Code, §§ 56031, 56032, 56341, 56345, subd. (a) and 56363 subd. (a); 34 C.F.R. §§ 300.320, 300.321, and 300.501.)

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

The IDEA requires an IEP to include a statement of the special education and related services that will be provided to the student. (20 U.S.C. § 1414(d)(1)(A)(i)(IV); Ed. Code, § 56345(a)(4).) The IDEA also requires that the IEP set forth the anticipated frequency, location, and duration of those services. (20 U.S.C. § 1414(d)(1)(A)(VII); Ed. Code, § 56345(a)(7).)

A formal, specific offer from a school district

- (1) alerts the parents of the need to consider seriously whether the proposed placement is appropriate under the IDEA;
- (2) helps parents determine whether to reject or accept the placement with supplemental services; and
- (3) allows the district to be more prepared to introduce relevant evidence at hearing regarding the appropriateness of placement. (*Union School Dist. v. Smith* (9th Cir. 1994) 15 F.3d 1519, 1526 (*Union*)).

The requirement of a formal written offer creates a clear record that may eliminate troublesome factual disputes many years later about what was offered. (*Id.* at p. 1525.)

A school district is required to give the parents of a child with a disability written notice a reasonable time before it refuses to initiate or change the identification, evaluation, or educational placement of the child or the provision of FAPE to the child. (20 U.S.C. § 1415(b)(3)(b); 34 C.F.R. § 300.503(a)(2); Ed. Code, §56500.4, subd. (a).) A prior written notice must contain a description of the action proposed or refused by the agency, an explanation for the action, and a description of the assessment procedure or report which is the basis of the action. (Ed. Code, § 56500.4, subd. (b).) An IEP document can serve as prior written notice as long as the IEP contains the required content of appropriate notice. (*Assistance to States for the Education of Children with Disabilities and Preschool Grants for Children with Disabilities*, 71 Fed. Reg. 46540, 46691 (Aug. 14, 2006)(Comments to 2006 Regulations).)

The procedures relating to prior written notice are designed to ensure that the parents of a child with a disability are both notified of decisions affecting their child and given an opportunity to object to these decisions. (*C.H. v. Cape Henlopen School Dist.* (3rd Cir. 2010) 606 F.3d 59, 70 (*Cape Henlopen*).) When a failure to give proper prior written notice does not actually impair parental knowledge or participation in educational decisions, the violation is not a substantive harm under the IDEA. (*Ibid*; *Murphy v. Glendale Unified School Dist.* (C.D. Cal. June 14, 2017, Case No. 2:16-cv-04742-SVW-AS) 2017 WL 11632966, **13-14 (*Murphy*).)

Student failed to meet her burden of proof on Issue 1, as Irvine was not proposing a change in Student's educational program, and Irvine responded timely and appropriately to Parents' inquiry. In addition, this claim was barred by the statute of limitations.

In May 2019, Student was in second grade in Irvine's Behavior, Social Learning, and Communication program, called BSLC. Student's medical providers had previously diagnosed Student with autism, attention deficit hyperactivity disorder, called ADHD, anxiety, and mood disorder. Student's autism made it difficult for her to interpret social cues and understand the perspective of others, and her ADHD made it difficult for her to initiate and maintain attention to tasks. Student was qualified for special education under the primary category of emotional disturbance because her anxiety and mood disorder resulted in outbursts and noncompliance. The BSLC classrooms had a low student-to-teacher ratio, a highly structured schedule, and a behavioral system that used rewards and levels to motivate good behavior. The levels were gold for participating, doing work, following instructions, and acting appropriately independently; silver for needing some direction; and bronze for needing extensive prompting.

The May 23, 2019 IEP amended Student's annual IEP dated April 19, 2019, although it incorrectly states it is an amendment to the November 6, 2018 IEP which was not in evidence. The May 23, 2019 IEP, as relevant to this issue, amended the specialized academic instructions to specify the mainstreaming minutes by subject. Mainstreaming is a term used to describe opportunities for disabled students to engage in activities with nondisabled students (*M.L. v. Federal Way School Dist.* (9th Cir. 2005) 394 F.3d 634, 640, fn. 7). The May 2019 IEP amendment recorded the mainstreaming

minutes as specialized academic instruction because Student would be accompanied by BSLC support staff in general education classes, and at lunch and recess with general education students.

The May 2019 IEP amendment clearly stated that 935 minutes per week of specialized academic instruction would be provided in the BSLC classroom, and a total of 730 minutes would be provided by BSLC support during mainstreaming into Physical Education for 100 minutes per week, Music for 20 minutes per week, English language arts for 300 minutes per week, and lunch and recess for 310 minutes per week. It summarized of the 1,755 minutes in a school week, Student would be in specialized academic instruction, which included mainstreaming with BSLC support as itemized, for a total of 1,665 minutes. The IEP also offered Student 30 minutes per week of group speech services, 30 minutes per week of individual counseling services, and 30 minutes per week of group counseling services, which accounted for the remaining 90 minutes of Student's school week.

Parents consented to the May 23, 2019 IEP on June 6, 2019, and included a note on the signature page handwritten by Student's lay advocate, which read:

The total minutes for specialized academic instruction and mainstreaming should be 1,755 minutes per week (please correct). However, the total number of minutes only total 1,665 minutes per week. Please account for the 90 minutes per week discrepancy.

Parents incorrectly read the May 23, 2019 IEP amendment. They calculated that the specialized academic instruction in the BSLC classroom and mainstreaming minutes should have added up to the total minutes in a school week, but failed to account for the 90 minutes per week of related services. Their misreading did not render the IEP

unclear as to the number of specialized academic instruction minutes offered. The IEP amendment expressly offered 1,665 minutes of specialized academic instruction and 90 minutes of speech services and counseling, totaling a 1,775-minute school week. The May 23, 2019 IEP offer was clear in accordance with *Union*, and Parents were merely confused by their lay advocate's erroneous calculation. Parents were not deprived of an opportunity to participate in the development of Student's IEP as to the number of specialized academic minutes because of their lay advocate's calculation error.

Student also failed to identify a proposed change that triggered an obligation by Irvine to give prior written notice. The lay advocate's request for clarification did not establish that Irvine refused to initiate or change the identification, evaluation, or educational placement of the child or the provision of FAPE to Student. Moreover, upon receipt of the handwritten comment seeking clarification, Irvine responded to Parents immediately on June 7, 2019 with an email explaining the interpretation error, which substantially complied with any alleged obligation to provide prior written notice.

Even assuming for the sake of argument a change in specialized academic instruction minutes was proposed by the May 23, 2019 IEP amendment, the IEP itself would have substantially complied with any prior written notice requirement. It contained a description of the proposed instructional minutes, explained the offer at the FAPE services page, and gave Student's improved behavior in the classroom and on the playground along with progress on prior goals as the basis of the offer.

Finally, even assuming Irvine failed to give the required prior written notice in response to the lay advocate's June 6, 2019 handwritten note, Student's issue is barred by the two-year statute of limitations. The statute of limitations in California on special education claims is two years, consistent with federal law. (Ed. Code, § 56505, subd. (l);

see also 20 U.S.C. § 1415(f)(3)(C).) An individualized education program for a disabled child is measured at the time that it was created. (*Adams v. State of Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149 (*Adams*).)

A parent may not bring a due process claim challenging the appropriateness of an IEP that was created outside the statute of limitations in the absence of an implementation issue, although the IEP document is in effect within the statute of limitations, as special education law does not recognize the doctrine of continuing violations as an exception to the two-year statute of limitations as the operative date is the date the IEP was developed. (*K.P. v. Salinas Union High Sch. Dist.* (N.D. Cal., April 8, 2016, No. 5:08-CV-03076-HRL) 2016 WL 1394377 [nonpub. opn.], pp. 10-11; See also *J.L. v. Ambridge Area School Dist.* (W.D.Pa. 2008) 622 F.Supp.2d 257, 268-269; *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).) Student filed her request for a due process hearing on October 5, 2021. Her challenge to the May 23, 2019 IEP amendment to the April 19, 2019 IEP, and to Irvine's June 7, 2019 response to the handwritten note included with Parents' consent to that amendment, are barred by the two-year statute of limitations.

Student did not meet her burden proving by a preponderance of the evidence that Irvine denied Student a FAPE by failing to provide Parents with a prior written notice in response to their June 6, 2019 for clarity regarding the specialized academic instruction minutes offered in the May 23, 2019 IEP.

ISSUE 2: DID IRVINE DENY STUDENT A FAPE BY FAILING TO SEND PARENTS A PRIOR WRITTEN NOTICE IN COMPLIANCE WITH AND ADDRESSING THE SPECIFIC REQUIREMENTS OF 34 C.F.R. § 300.503 IN RESPONSE TO THE CLOSURES RELATED TO THE COVID-19 PANDEMIC?

Student contends that Irvine's school closures and distance learning beginning March 13, 2020 in response to the COVID-19 pandemic constituted a change in the provision of FAPE to Student that required prior written notice. Student argues that Irvine's March 25, 2020 prior written notice to all special education parents was not specific to Student, and so did not comply with the requirements for such notice. Irvine contends that the mandated school closures did not require parental consent, and that Irvine's had no obligation to give prior written notice for district-wide changes to that applied to all students.

If the parent of a child consents in writing to special education and related services for the child, the components of the program to which the parent has consented must be implemented. (Ed. Code, § 56346, subd. (e).) A child's parents must receive written notice of any proposed changes to the IEP. (20 U.S.C. § 1415(b)(3).)

As long as a school district provides an appropriate education, methodology is left up to the district's discretion. (*Rowley, supra*, 458 U.S. at p. 208.) Courts are ill-equipped to second-guess reasonable choices that school districts make among appropriate instructional methods. (*T. B. v. Warwick School Commission* (1st Cir. 2004) 361 F.3d 80, 84; *J.L. v. Mercer Island School Dist.* (9th Cir. 2010) 592 F.3d 938, 950 (*Mercer Island*)). The IDEA does not require a school district to provide the educational methodology preferred by parents to address a student's educational needs. (*Croft v.*

Issaquah School Dist. No. 411 (9th Cir. 2022) 22 F.4th 1048, 1056–57.) A district is simply required to provide an appropriate methodology. It is not required to provide the best methodology. (*M.M. v. School Board of Miami-Dade County, Fla.* (11th Cir. 2006) 437 F.3d 1085; *Gregory K. v. Longview School Dist.* (9th Cir. 1987) 811 F.2d 1307, 1314 [an appropriate education does not mean absolutely the best or potential-maximizing education for the individual child] (*Gregory K.*).

School districts are not required to include specific teaching methodologies in the IEP. (34 C.F.R. § 300.320(d)(1); 71 Fed. Reg. 46,665 (2006).) A parent’s disagreement with a school district’s educational methodology is insufficient to establish an IDEA violation. (*Carlson v. San Diego Unified School Dist.* (9th Cir. 2010, unpublished) 380 F. App’x 595, 597; see also, *Lachman v. Illinois State Board of Education* (7th Cir. 1988) 852 F.2d 290, 297, cert. denied at 488 U.S. 925 [holding that parents do not have a right to compel a school district to provide a specific program or employ a specific methodology in providing for the education of a student with a disability].)

Irvine’s actions in closing schools and switching to distance learning must be viewed in the context of the mandates of national and local authorities at the time. On March 4, 2020, Governor Gavin Newsom declared a state of emergency in the State of California due to the rapid spread of a highly contagious airborne coronavirus that caused respiratory distress and could lead to death, designated COVID-19.

On March 12, 2020, the U.S. Department of Education, called 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* (US DOE, March 2020).)

When an agency interprets its own regulations, a very deferential standard applies, and such an interpretation is controlling unless plainly erroneous or inconsistent with the regulation. (*Federal Express Corp. v. Holowecki* (2008) 552 U.S. 389, 397.)

The US DOE advised that if a school district closed its schools to slow or stop the spread of COVID-19 and did not provide educational services to the general student population, it was not required to provide services to students with disabilities during that same period of time. (*Questions and Answers on Providing Services to Children with Disabilities During the Coronavirus Disease 2019 Outbreak, supra*, at p. 2, *Answer A-1*; see also, *N.D. v. Hawaii Dept. of Education* (9th Cir. 2010) 600 F.3d 1104, 1116-1117.) If educational opportunities were provided to the general population during a school closure, then the school district would need to ensure that students with disabilities received a FAPE at that time. (*Ibid.*) The US DOE instructed school districts to determine if each child with a disability could benefit from online or virtual instruction, instructional telephone calls, and other curriculum-based instructional activities. However, it cautioned that in doing so, school personnel should follow appropriate health guidelines to assess and address the risk of COVID-19 transmission in the provision of services. (*Id.*, at pp. 3-4, *Answer A-3*.)

On March 13, 2020, the Governor issued Executive Order N-26-20, which was specifically directed to California schools. It stated that if a local educational agency closed its schools to address COVID-19, the local educational agency was not prohibited from offering distance learning or independent study to impacted students, and that the local educational agency would continue to receive state funding to continue delivering high-quality educational opportunities to students to the extent feasible through, among other options, distance learning and/or independent study.

Irvine closed its schools on March 16, 2020. On March 19, 2020, Irvine notified all parents that pending a return date for in-person learning at school sites, students would be issued Chromebooks so that emergency distance learning could be implemented. All notices to parents of Irvine students were sent to the parents' email addresses of record and posted on the school district's website. Parents were in regular communication with school district personnel and administrators and Student did not establish that these notices were not received by Parents or were inaccessible to them. Parents were, or reasonably should have been, aware of the updates issued by Irvine on distance learning.

On March 19, 2020, due to the rapid spread of COVID-19 throughout the State of California, Governor Newsom mandated that all individuals living in California stay in their home except as needed to maintain continuity of operations of federal critical infrastructure sectors. (*Governor's Exec. Order No. N-33-20* (March 19, 2020).)

On March 20, 2020, the California Department of Education, called the CDE, issued a notice reminding educational agencies that they were still required to adhere to IDEA requirements, but encouraged agencies to consider ways to use distance technology to meet those obligations, such as distance learning and independent study. The CDE committed to a reasonable approach in monitoring compliance that accounted for the exceptional circumstances facing the State. Educational agencies were instructed that if they could provide special education and related services through a distance learning model, they should do so. To ensure continuity of services, educational agencies were encouraged to move to virtual platforms for service delivery to the extent feasible and appropriate. Alternative delivery options were to comply with federal, state and local health official's guidance related to social distancing, with the goal of keeping students, teachers, and service providers safe and healthy. The CDE acknowledged that

given the unprecedented situation caused by the threat of COVID-19, exceptional circumstances would affect how a particular service was provided under a student's IEP, and compensatory services might be required when the regular provision of services resumed. (CDE Guidance (March 20, 2020) *No. 1. If an LEA offers distance learning for instructional delivery in lieu of regular classroom instruction during a school site closure for students, what is the obligation to implement the IEP for students with disabilities?*)

The CDE advised that educational agencies were required to create access for instruction for students with disabilities, including accommodations and modifications based on the individual needs of each student and the differences created by the change in modality, for example, virtual instead of classroom based. (CDE Guidance, *supra*, at *Question No. 2. What is considered equal access for students with disabilities?*) Educational agencies were instructed to plan to make individualized determinations regarding the need for compensatory education in collaboration with the IEP team once regular school sessions resumed. (*Id.*, at *Question No. 3. If distance learning is provided in some capacity but does not mirror the offer of FAPE in the IEP, will compensatory services be required once an LEA resumes the regular school session?*)

On March 21, 2020, the US DOE Office of Special Education and Rehabilitative Services, called OSERS, issued supplemental guidance, stating school districts must provide a FAPE to students with disabilities during the COVID-19 pandemic, but expressly recognized that education and related services and supports might need to be different in a time of unprecedented national emergency. (OSERS, *Supplemental Fact Sheet Addressing the Risk of COVID-19 in Preschool, Elementary and Secondary Schools While Serving Children with Disabilities* (March 21, 2020) p. 2.) It stated that FAPE might include, as appropriate, services provided through distance instruction provided virtually, online or telephonically. (*Id.*, at pp. 1-2.) The US DOE emphasized that the

IDEA allowed for flexibility in determining how to meet the individual needs of students with disabilities. (*Id.*, at p. 2.) If there were inevitable delays in providing services, the US DOE directed IEP teams to make individualized determinations of whether and to what extent compensatory services were due when schools resumed normal operation. (*Ibid.*)

On March 24, 2020, in response to the Orange County Health Care Agency tightening restrictions on public and private gatherings, Irvine extended school closures through May 1, 2020.

On March 25, 2020, Irvine emailed a prior written notice to all parents of special education students, including Parents, information on its Emergency Distance Learning plans and how they affected students with IEPs. It informed parents that students would continue to receive instruction with planned activities both virtually and through paper packets. As Irvine's Spring Break was from March 30 through April 3, 2020, parents were informed that their child's related service providers would reach out to them on return from the break on how to support their individual child with distance learning, including options such as consultation with parents and staff, direct interaction with the child by virtual platform or telephone, and provided activities to be completed between sessions. Irvine also offered parents whose child was due to have an annual IEP during distance learning to elect to hold the IEP virtually or postpone it to within 30 days of students' return to campus. It also informed parents who they should contact for any problems related to technology, curriculum or instruction, unique personal circumstances, or if their child was struggling.

On March 30, 2020, 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 additional guidance that not all IEPs needed to be amended to change to distance learning. Citing 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 CDE stated that it was not necessary for a school district to obtain the parents' written consent to provide previously agreed-upon services away from school. 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 4/9/20* (April 9, 2020).) Although an IEP amendment was not necessary for every child with an IEP, the CDE noted that there might be instances where 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*.)

Here, Student did not prove Irvine failed to comply with prior written notice obligations in response to COVID-19 closures. Irvine's actions in closing schools and switching to distance learning complied with the mandates of national and local authorities at the time. As applied to the Student in this case, CDE's April 9, 2020 guidance clarified that the change from in-person instruction and services to distance learning was not one that required parental consent. Indeed, the purpose of prior written notice is to notify parents of decisions affecting their child and give them an

opportunity to object. (*Cape Henlopen*, 606 F.3d at p. 70.) However, Parents could not object to the switch to distance learning, as Irvine was required by law to provide instruction in the form of virtual interactions, online resources and pencil and paper tasks during the pandemic.

As the Ninth Circuit recently noted, in March 2020, the California State Public Health Officer issued a list of designated essential workers who were allowed to leave their homes to support specified critical infrastructure sectors. That list expressly included workers teaching at public and private K-12 schools, but only for distance learning. Although many schools had already independently decided to close, the effect of these orders was to impose a new State mandate that schools remain limited to distance learning. (*Brach v. Newsom* (9th Cir. 2021) 6 F.4th 904, 911 (*Brach*).)

When Irvine closed its schools, it did not change Student's placement or services, but instead provided instruction and related services through a virtual delivery model. Student remained in the BSLC classroom with the same peers and the same adults, and with instruction provided online and through online activities and paper activity packets. The April 19, 2019 IEP in effect at the time of school closures expressly referenced special education and mainstreaming in units of minutes per week, and related services in minutes per year. There was no credible evidence that Irvine failed to offer special education instruction as soon as general education instruction was available, or that Student was offered any less than the minutes required by her IEP.

Irvine's special education director and Student's speech provider and school-based therapist testified convincingly that Student was offered all minutes required by Student's IEP. Although Mother testified that Student often did not attend online classes or do classwork because Student was so upset, that did not establish that all

instruction and services called for by Student's IEP were not offered and available. Mother's testimony was not as persuasive as the school district witnesses regarding Student's access to online education. For example, an email exchange between Mother and Student's BSLC teacher Humphrey over April 9 and 10, 2020, demonstrated that despite the problems at home, on at least one occasion, Student locked herself in the bathroom to attend a classroom session. Also unknown to Mother, Student had watched an assigned video and correctly answered a question about it online. Mother testified that Student could independently access the classroom by laptop and keyboard, and wore headphones while online, so Mother could not know the full extent of Student's participation in class activities and assignments. Mother would not have been able to overhear, or have access to, classroom participation through the typed chat feature in the online platform. In another email exchange from April 17 to April 20, 2020, Mother expressed surprise that despite upset in the home, Student was always happy to be online for her classes. In that exchange, Student's school counselor, Beth Haile, reported that Student wanted to retain her schedule of daily classes and related services. Irvine made the special education and related services in Student's IEP available to her online, and Student accessed and enjoyed them.

The IDEA allows flexibility in providing FAPE to a child with disabilities, and per *Rowley* and *Mercer Island*, Irvine had discretion to choose the methodology for delivering services. The CDE's April 9, 2020 guidance expressly stated that under the unique circumstances of the COVID-19 pandemic, school districts such as Irvine did not need to convene an IEP team meeting or obtain the parent's written consent to provide previously agreed-upon services away from school. The CDE directed school districts to the greatest extent possible to continue to provide the services called for in the IEPs through distance learning. Accordingly, Irvine's change in delivery method of services

called for in Student's IEP as a result of the COVID-19 school closures did not require a prior written notice individually developed specifically for Student. Irvine made no other change to Student's IEP.

Even were a prior written notice required, Irvine's March 25, 2020 notice substantially complied with IDEA and California requirements. It contained a description of the action proposed by Irvine, an explanation for the action, and a description of the basis of the action. The notice also advised Parents that they were protected by procedural safeguards and how to obtain a copy of the procedural safeguards, as well as sources for Parents to contact for assistance in understanding the notice. (34 C.F.R. § 300.503; Ed. Code, § 56500.4, subd. (b).) Irvine included a list of the agency recommendations it had also considered from the United States Center for Disease Control, the CDE, the US DOE Office of Special Education Programs and Office of Civil Rights, state and local government officials, and the California Department of Public Health. Lastly, it encouraged Parents to contact Student's program specialist with any questions or concerns.

Student unpersuasively argues that the notice was not sufficiently personalized, and so did not provide Parents with sufficient information to effectively participate in the decision to transition to distance learning. Again, Parents' participation in the change to distance learning was not required under these circumstances. Californians were ordered to shelter at home, including teachers and students, and distance learning was recommended by federal and State agencies to comply with public health requirements. Irvine applied this change to all students equally, general education and special education students alike, and Parents' participation in the decision to transition to delivery of instruction and related services through online platforms was not required.

In addition, Irvine's March 25, 2020 notice gave parents whose child had an annual IEP review due during distance learning the opportunity to do a virtual IEP team meeting or postpone it until schools reopened. Mother informed Irvine that Parents did not want a virtual IEP in April 2020, and requested a postponement until schools reopened. As such, Parents had an opportunity to attend a prompt IEP team meeting to discuss personalizing Student's distance learning program to the extent feasible but elected not to do so. Any failure to give proper prior written notice did not impair Parents' knowledge or participation in educational decisions, and, in accordance with *Murphy*, would not have resulted in a substantive harm under the IDEA.

Student did not meet her burden of proving by a preponderance of the evidence that Irvine denied Student a FAPE by failing to send Parents a prior written notice in compliance with and addressing the specific requirements of 34 C.F.R. § 300.503 in response to the closures related to the COVID-19 pandemic.

ISSUE 3: DID IRVINE DENY STUDENT A FAPE BY FAILING TO PROVIDE STUDENT WITH HER LAST AGREED-UPON AND IMPLEMENTED IEP PLACEMENT, SERVICES, AND ACCOMMODATIONS DURING THE COVID-19 PANDEMIC?

Student contends that the distance learning program implemented by Irvine during the pandemic was not in compliance with Student's April 19, 2019 IEP, as amended by the May 23, 2019 amendment. Irvine contends Student failed to meet her burden of proof in establishing that her IEP was not implemented, and that it provided Student with all required specialized academic instruction and related services with fidelity through virtual delivery in the same manner as her non-disabled peers.

A school district must implement a student's IEP by making special education and related services available to the child in accordance with the IEP. (34 C.F.R. § 300.323(c)(2); see also Ed. Code, § 56345, subd. (c).) When a student alleges the denial of a FAPE based on the failure to implement an IEP, to prevail, the student must prove that any failure to implement the IEP was material, which means that the services provided to a disabled child fell significantly short of the services required by the child's IEP. (*Van Duyn v. Baker School Dist.* 5J (9th Cir. 2007) 502 F.3d 811, 822 (*Van Duyn*).) There is no statutory requirement of perfect adherence to the IEP, or any reason rooted in the statutory text to view minor implementation failures as denials of a FAPE. (*Id.* at p. 821.)

A brief gap in the delivery of services, for example, may not be a material failure. (*Sarah Z. v. Menlo Park City School Dist.* (N.D. Cal., May 30, 2007, No. C 06-4098 PJH) [2007 WL 1574569, *7].) The materiality standard does not require that the child suffer demonstrable educational harm to prevail. However, the child's educational progress, or lack of it, may be probative of whether there has been more than a minor shortfall in the services provided. (*Van Duyn, supra*, 502 F.3d at p. 822.)

From mid-March 2020 through the beginning of the following 2020-2021 school year, the COVID-19 pandemic placed school districts under orders from federal, State and local health agencies to implement the IEPs of students with disabilities through alternative means that prioritized the health and safety of students, teachers and service providers. Here, the issue is whether distance learning or a hybrid of distance and in person learning was, in and of itself, a failure to implement. This Decision holds that it was not.

As stated above, when Irvine closed its schools in March 2020, it did not change Student's placement or services, but instead provided instruction and related services through a virtual delivery model. Student remained in the BSLC classroom, with the same peers and the same adults, with instruction provided virtually. There was no persuasive evidence Student was offered any less than the specialized academic instruction or related services minutes required by her April 19, 2019 IEP, as amended, resulting in a material failure to implement.

Guidance issued by the US DOE and the CDE in March 2020 and April 2020 acknowledged flexibility in implementing IEPs, and recommended that during the COVID-19 pandemic special education and related services be delivered without in-person contact between students, school staff, or service providers. Both agencies encouraged the use of virtual instruction. (See *CDE Guidance* 4/9/20 (April 9, 2020.) This guidance was consistent with important cases such as *Rowley* and *Mercer Island* which held that school districts have discretion in the methodology used to implement IEPs and that courts should not substitute their judgement for that of educational professionals, and with the Ninth Circuit's recognition that California schools were required to provide instruction through distance learning. (*Brach, supra*, 6 F.4th at p. 911.) Irvine's administrators, teachers and service providers determined that emergency distance learning could be used to implement each child's IEP, as did educational agencies throughout California. Student's argument that a distance learning model is automatically a failure to implement the IEP is unpersuasive.

As Irvine acknowledged in its frequent update letters to special education parents, distance learning could be a hardship on parents and student alike. However, the IDEA does not require school districts to implement IEPs using the best methodology, or the methodology preferred by parents. (*Rowley, supra*, 458 U.S. at

p. 204.) It requires school districts to implement an IEP reasonably calculated to enable a child to make educational progress appropriate in light of the child's circumstances. (See *Endrew F.*, *supra*, 580 U.S. ____ [137 S.Ct. 988, 1000].) Irvine was not required to provide instruction through the delivery model that was the very best for Student, or through in-person learning during a pandemic because that was Parents' preference. Irvine was required to enable Student to make educational progress in light of her circumstances, and during the COVID-19 pandemic that included taking government mandated health precautions against transmission of the COVID-19 virus.

Through the second half of the 2019-2020 school year and extended school year, Irvine schools remained closed and delivery of instruction was through distance learning. During distance learning in 2019-2020, Student accessed and enjoyed her online classes and passed all of her classes. Irvine's educationally related mental health services, or ERMHS, specialist Haile provided online counseling to Student. Student trusted Haile, and Haile was instrumental in encouraging Student to participate in her online classes. Haile also acted as an intermediary between Student and Parents in confirming Student's distance learning schedule for spring 2020. Student's speech provider, Ashley Essen, credibly testified Student was working on a pragmatics goal during distance learning. Student made progress on and met her speech goal. Particularly during early distance learning in spring 2020, Student may have missed some minutes when logging on, but her educational progress during distance learning demonstrated that the transition from in-person to distance learning and missed minutes when Student was upset and did not log on, or logged in late, did not result in a material failure to implement her IEP during the 2019-2020 school closures.

Parents consented to a May 6, 2020 IEP amendment to Student's April 19, 2019 IEP, which was agreed to without a meeting. The amendment offered individual

counseling for 30 minutes per week for the extended school year during summer 2020. The logs for extended school year 2020 established that Student attended her online individual counseling sessions each week, except for one week when the therapist was available, but Student did not log on. At an IEP team meeting in fall of the 2020-2021 school year, on October 29, 2021, Student had met all three social emotional goals. This demonstrated that Student was able to maintain the coping strategies learned during the 2019-2020 school year over the summer and received educational benefit from extended school year online counseling services.

In CDE guidance to school districts preparing for the 2020-2021 school year issued July 17, 2020, the CDE mandated that schools reopen only after the local health jurisdiction in which they were located had remained off the county COVID-19 monitoring list for at least 14 days. As of July 17, 2020, Orange County was still on the monitoring list, and Irvine notified parents that the 2020-2021 school year would start in a distance learning format until conditions improved.

On August 24, 2020, the California Department of Public Health, called the CDPH, issued guidance for the reopening of schools during the pandemic when monitoring conditions permitted. The CDPH recommended that in-person instruction take place only if students were isolated into small groups, called cohorts. Schools were directed to limit cohort size, restrict cohort mixing, and maintain proper physical distancing, masking, cleaning, and other safety measures. Different cohorts could attend school on different days. Cohorts were to operate so that students and supervising adults within each cohort had physical proximity only to members of their own cohort during the school day. Collaboration between school staff was to be done remotely. Schools were expected not to exceed 25 percent of their capacity at any one time. The goals of the cohort model were to decrease opportunities for exposure or transmission, facilitate

contact tracing, and limit the need for post-exposure testing and quarantine. (*California All-Providing Targeted, Specialized Support and Services at School* (CDPH August 24, 2020, as updated September 4, 2020.)

In-person instruction in cohorts began at Irvine on September 24, 2020. Student was in fourth grade and returned to an in-person BSLC cohort of six students in Marietoni Rosure's first through fourth grade class for a full day five days per week. Due to cohort restrictions, Student's mainstreaming for indoor general education classes was done online. BSLC students mainstreaming into general education classes would go to a separate classroom with one of their BSLC adult instructional assistants and attend the classes online using their laptops.

Student contends that despite her return to in-person instruction for the 2020-2021 school year, her IEP was not fully implemented because Student was virtually mainstreamed into general education classes. During the second semester, on April 6, 2021, Parents instructed Irvine to stop Student's online mainstreaming, as they preferred in-person mainstreaming. On April 6, 2021, Student tried to use her laptop camera to record her BSLC classmates and had a tantrum when the instructional assistant paused Student's camera. Other than this one behavioral incident, there was no evidence that Student was unable to access the general education curriculum by online mainstreaming.

On December 2, 2020, Student was moved to Kristi Smolinski's fourth grade in-person BSLC classroom when sufficient fourth grade students returned to in-person instruction to create a fourth grade cohort. Student was making progress in general education English language arts, and Smolinski credibly testified that Student benefitted from mainstreaming with peers during reading in English language arts, which Student

enjoyed. Student was on track to meet year-end standards in reading for all three trimesters of the 2020-2021 school year, although reading comprehension remained an area of concern. Accordingly, mainstreaming into general education classes over an online platform while Irvine maintained students in physically isolated cohorts was not a failure to implement the mainstreaming portions of Student's IEPs.

There was no evidence that Irvine failed to implement the accommodations called for in Student's IEP, either during distance learning or cohort in-person learning. Such IEP accommodations as

- visual daily schedules;
- embedded breaks;
- prompts to assist with focus and attention;
- weighted choices;
- chunking assignments;
- adult support for mainstreaming;
- and others

were implemented online and during cohort in-person learning. Smolinski and Haile explained at hearing that such accommodations could be implemented regardless of the delivery model. Student's accommodations were implemented throughout the 2019-2020 and 2020-2021 school years.

Student did not meet her burden of proving by a preponderance of the evidence that Irvine denied Student a FAPE by failing to provide Student with her last agreed-upon and implemented IEP placement, services, and accommodations during the COVID-19 pandemic.

ISSUE 4: DID IRVINE DENY STUDENT A FAPE BY FAILING TO HAVE AN IEP IN PLACE FOR HER AT THE BEGINNING OF THE 2020-2021 SCHOOL YEAR?

Student contends that Student was denied a FAPE because an updated IEP was not in place for the beginning of the 2020-2021 school year. Student contends that her annual IEP was due on or before April 18, 2020, but was not convened until October 29, 2020, and that Student did not have updated present levels, new goals, placement, services and supports for the start of the 2020-2021 school year that denied Student a FAPE. Irvine contends that Parents requested postponement of Student's annual IEP review, and it continued to implement Student's April 19, 2019 IEP with fidelity and had frequent communications with Parent regarding Student's educational programming so there was no loss of educational opportunity.

A school district must have an IEP in effect for each student with a disability at the beginning of each school year. (20 U.S.C. §1414(d)(2)(A); 34 C.F.R. § 300.323(a); Ed. Code, § 56344, subd. (c).) This comports with the statutory requirement that a student's IEP team must meet at least annually to review the student's IEP. (20 U.S.C. § 1414(d)(4)(A)(i); Ed. Code, §§ 56043, subd. (d), 56341.1, subd. (d) and 56343, subd. (d).) As part of the annual IEP review, the IEP team must look at the student's progress, whether the annual goals are being achieved, the appropriateness of the placement, and make any necessary revisions. (Ed. Code, §§ 56043, subd. (j); 56380, subd. (1).)

Student's annual IEP was due on April 18, 2020. When Irvine sent its prior written notice to all parents on March 25, 2020, informing them that distance learning would continue until at least May 1, 2020, it gave parents of students with IEP reviews due in April 2020 the choice of either a virtual IEP team meeting or postponement of the annual review until within 30 days of schools reopening. On April 1, 2020, Irvine

informed all parents that schools would be closed through the end of the 2019-2020 school year. After the April 1, 2020 announcement, Parents responded to Irvine when it tried to schedule Student's virtual annual IEP team meeting in April that they wanted to postpone the IEP. Because the school closures were extended, and Irvine schools did not reopen until late September 2020, Student's annual IEP review did not take place until October 29, 2020.

The IDEA has many provisions for parents and school districts to agree to continue or waive an otherwise required event. For example, a parent and school district may agree in writing to forego or extend the time for an assessment. (20 U.S.C. § 1414(a)(1)(C); Ed. Code, §§ 56043, subds. (c) & (f), 56302.1, subd. (a).). Parents may agree in writing to excuse a mandatory IEP team member from the IEP team meeting. (34 C.F.R. § 300.321(e).) Parents and school districts can agree in writing to an IEP amendment without an IEP team meeting. (34 C.F.R. § 300.324(a)(4) & (6).) However, there is no statute or regulation permitting a parent and school district to waive the requirement that an IEP be in effect at the beginning of the school year.

Had schools reopened on May 1, 2020 and Student's annual IEP team review been held within 30 days of May 1, 2020, such a minor delay, under such unique circumstances, would have been no more than a minor inconvenience, and likely would not have constituted a material procedural error. However, as of April 1, 2020, Irvine was aware that schools would not reopen before the beginning of the 2020-2021 school year, and Student would not have a current IEP in place when the next school year started. Student's April 19, 2019 IEP, by its own terms, expired on April 18, 2020, and the meetingless May 6, 2020 amendment did little more than offer additional counseling sessions for the 2020 extended school year. Parents' request for a

postponement of the IEP review until school reopened did not relieve Irvine of its obligation to have an IEP in effect at the beginning of the 2020-2021 school year.

The IDEA requires that a due process decision be based upon substantive grounds, unless a procedural violation impedes the child's right to a FAPE, significantly impedes the parent's opportunity to participate in the decision-making process regarding the provision of a FAPE to their child, or causes a deprivation of educational benefits. (20 U.S.C. § 1415(f)(3)(E); Ed. Code, § 56505, subd. (j); *Rowley, supra*, 458 U.S. at pp. 206-207.) Procedural violations which do not result in a loss of educational opportunity or which do not constitute a serious infringement of parents' opportunity to participate in the IEP process are insufficient to support a finding that a student has been denied a FAPE. (*W.G. v. Board of Trustees of Target Range School Dist. No. 23* (9th Cir. 1992), 960 F.2d 1479, 1482.)

Here, Irvine did not have an IEP in place at the beginning of the 2020-2021 school year on August 20, 2020, and did not develop an IEP until October 29, 2020, more than two months into that school year. That was a clear procedural error under the IDEA. The question is whether that procedural error cause Student a substantive educational harm or seriously infringed on Parents' right to participate in the development of Student's IEP.

As the delay in developing the IEP was at Parents' request, it did not seriously infringe on Parents' right to participate in the development of Student's IEP. However, Irvine's failure to have an IEP in place at the beginning of the 2020-2021 school year resulted in Student working on outdated goals for over two months in 2020-2021. The goals in the outdated April 19, 2019 IEP were written when Student was in second grade to second grade standards, and Student was in fourth grade in October 2020. The April

2019 IEP had academic goals in math calculation, written expression, and reading fluency, and it had social emotional goals in pragmatics, coping skills, utilizing emotional language, and self-regulation. Although Student had met her social emotional and communication goals by October 2020, she was still at the first-grade level in math and needed intervention in English language arts. Student clearly lost educational opportunity in academics by not having an up to date IEP, with updated goals, instruction and services in place when the 2020-2021 school year began.

Student met her burden of proving that Irvine denied Student a FAPE from August 20, 2020 through October 29, 2020 by failing to have an IEP in place for her at the beginning of the 2020-2021 school year. The remedies awarded are discussed at the end of this Decision.

ISSUE 5: DID IRVINE DENY STUDENT A FAPE BY FAILING TO HOLD AN IEP TEAM MEETING IN RESPONSE TO STUDENT'S INCREASING NEEDS DURING THE 2020-2021 SCHOOL YEAR?

Student contends that Student demonstrated increasingly maladaptive behaviors and a lack of anticipated progress between December 2020 and June 2021, and that Irvine denied her a FAPE by failing to convene an IEP team meeting with Parents' participation to address those behaviors. Irvine contends it was not required to convene an IEP team meeting prior to March 22, 2021, and that Parents refused to agree to IEP proposals made to address Student's behaviors.

Reviewing and revising a child's IEP is an important step in the IEP process because the needs of a student with a disability often change throughout the course of the student's educational career. The IEP must be responsive to those changes to

ensure FAPE is provided. (20 U.S.C. § 1414(d)(4)(A) and (B).) A school district must ensure that a child's IEP team reviews the IEP periodically, but not less than annually, to determine if the annual goals are being achieved. (34 C.F.R. § 300.324(b)(1)(i).) An IEP team meeting must be held when a student demonstrates a lack of anticipated progress. (34 C.F.R. § 300.324(b)(1)(ii)(A); Ed. Code, § 56343, subd. (b).)

Although Irvine's 2020-2021 school year began with distance learning, Student's BSLC classroom transitioned to in-person instruction five days per week on September 24, 2020. Student contends that her behaviors began to escalate in December 2020, after she was moved to Ms. Smolinski's classroom. To put Student's behavior in context, a summary of the IEP developed on October 29, 2020 is helpful. Mother consented to the October 29, 2020 IEP on November 9, 2020, and the appropriateness of the offer of special education and related services in the October 29, 2020 IEP is not in dispute.

Student began the 2020-2021 school year in Rosure's first through fourth grade BSLC classroom. At the IEP team meeting of October 29, 2020, Parents reported that Student had low frustration tolerance and anxiety at home due to being a perfectionist, which made completing homework a challenge. However, Rosure reported that Student was helpful and compliant in the classroom, followed class rules, was easily re-directed when necessary, and demonstrated an interest in academics. Student was well-liked by peers with a core group of friends.

Academically, Student had met her reading fluency goal. However, she had not met her math and written expression goals although she had made progress on them, and required continued specialized academic instruction. In the area of communication, Student was age-appropriate in her understanding and use of language and had met

her April 2019 pragmatics goal to identify the size of a problem and appropriate reactions and solutions. Behaviorally, Student had made significant progress with school-based counseling, and met her goals in identifying coping strategies, describing her emotions and demonstrating self-regulation. The biggest concern among her teachers and service providers was that Student would engage in immature behavior like baby talk during unstructured times to seek attention, although she was easily redirected.

Student responded well to the point and level system used by the BSLC program. In October 2020, Student generally earned daily points in the gold range, and by all school staff reports was a pleasure to have in the BSLC classroom. Student required the embedded behavioral, social, language, and communication supports that gave the program its name, but with these supports she was doing well.

The October 29, 2020 IEP team adopted academic goals for writing, math calculation and reading comprehension, and a social emotional goal for Student to seek attention appropriately. The BSLC staff gathered behavioral data on its students as part of the behavioral support component of the BSLC program, and in October 2020, Student was seeking attention from adults and peers appropriately by using appropriate words, an appropriate voice, and appropriate topics 40 percent of the time. The attention goal sought to improve that to 80 percent.

The October 29, 2020 IEP placed Student in the BSLC program, with 1,320 minutes per week of specialized academic instruction in the BSLC classroom and 150 minutes per week as support for mainstreaming in general education reading. Related services were offered with group speech services for 20 minutes per week, group counseling at 30 minutes per week, and individual counseling at 30 minutes every

two weeks. Related services were offered for 30 weeks per year. Haile reported at the IEP team meeting, and testified convincingly at hearing, that Student's counseling minutes were reduced in the October 29, 2020 IEP because Student had met her April 2019 social emotional goals, and Student was consistently earning gold levels.

The cohort model and social distancing limited class size, and as more fourth graders returned to in-person learning, on December 2, 2020, Irvine created a new BSLC classroom exclusively for fourth grade students, taught by Smolinski. Student was moved into Smolinski's class. Student generally behaved well in Smolinski's classroom, although Student called a peer names on her first day there.

Student continued earning gold levels in Smolinski's class, but on December 14, 2020, Smolinski reported to Mother that Student had entered the bathroom with a peer and showed the peer her private body parts. Mother responded that Student took off her clothes during tantrums at home, but Parents would speak with her. Student continued to earn gold levels before Winter Break and after her January 4, 2021 return to school. One incident of disrobing in the bathroom was insufficient reason to hold an IEP team meeting to address Student's behaviors through December 2020.

Student earned gold levels consistently through January 2021, and Irvine suggested to Parents that it might be a good time to increase Student's mainstreaming opportunities. However, on January 27, 2021, Student earned bronze level by being inappropriate with one peer and kicking another. Smolinski reported to Mother that Student was particularly irritable that day. Mother replied that Parents were adjusting Student's medications. Student was on a regime of six to eight daily medications and very sensitive to the side effects of medication changes. Student earned silver level the

next day for slapping a peer who had tattled on Student. On both days Student responded well to staff's BSLC interventions and did well in class. Parents adjusted Student's medications again in response to the two reports. Irvine did not have any reason to hold an IEP to address Student's behaviors in January 2021, particularly as medication changes were a reported likely cause of Student's behaviors.

In February 2021, Student earned mostly gold and silver levels, but with a bronze level about once per week. During the first and second weeks of February 2021, Student called a peer names and refused to do her work. On Friday, February 12, 2021, Student was upset that she had not earned enough points to participate in the Fun Friday activity, and pushed items off her desk, tore papers, and marked her clothes with a marker. The following week, Mother requested an informal meeting with Smolinski and ERMHS specialist Haile to discuss Student's bronze level days. Mother reported that Student's in-home applied behavior analysis therapist was leaving, and Student was very emotional about it. The next day, February 18, 2021, Student tantrumed in class and drew a picture of a firearm with words that she would kill a classmate, called ClassmateA. Haile confirmed that Student made the threat because she was angry and had no intention of harming Classmate A. Student earned a bronze level on February 23, 2021, by kicking a peer in the leg, throwing a rock, and pounding on the classroom doors and windows. Throughout February 2021, the daily reports reflected that Student generally earned gold and silver levels, and often showed interest in and performed well on her academic assignments. Student responded well to BSLC behavior interventions when incidents occurred, although Student could be agitated for 30 minutes at a time. Student's few short tantrums did not warrant an IEP team meeting to address her behavior in February 2021.

On March 2, 2021, Student called her peers names and had a large tantrum, earning her a bronze level. When reported to Mother, Mother responded that Student was going through another medication change. The following week of March 8, 2021, Student had a two-hour tantrum, and for most of the remaining week earned bronze level for name-calling and noncompliance. On March 12, 2021, Student had a tantrum that included taking her peers' things, trying to stab her peers and classroom adults with a pencil, kicking peers and staff, and running off campus onto an adjacent public playground. Irvine does not have fenced campuses. The incident lasted over 25 minutes, Smolinski wrote a behavior report, and Student was suspended for one day, March 15, 2021. On Wednesday, March 17, 2021, Parents requested an IEP, which Irvine promptly scheduled for the following Monday.

On March 18, 2021, Student got off the bus and laid on the ground and refused to go to class. She eventually went to class but was hyperactive and very irritable. After recess, Student kicked staff, lunged at peers, tore papers off the wall, and tore books. Student eventually calmed down but became upset again after lunch and ran out of the classroom to find her younger sister, a kindergartener who went home earlier than Student. Student wanted to go home when her mother picked up her sister. Student returned to the class and was calm for a while, but then ran out of the classroom, took off her shoes and socks, and ran off campus followed by staff. Student returned to campus but missed the bus and had to be picked up by Father.

Irvine convened an IEP team meeting on March 22, 2021, to discuss the recent behavior incidents. Mother reported that Student was on a new medication. Irvine team members proposed modifying Student's attention seeking goal to apply to unstructured times, and adding additional social emotional goals for self-esteem, self-

awareness, seeking attention appropriately in structured times, and problem solving. The BSLC classroom data from the prior two to four weeks showed that Student had started to exhibit problems in these areas. Haile proposed a Tier 2 behavior plan, and the team proposed to increase Student's individual counseling to 30 minutes per week, from the 30 minutes every two weeks in the October 29, 2020 IEP. The additional counseling was to support Student's new social emotional goals. The IEP also offered 90 minutes per year of parent counseling. Parents requested a functional behavior analysis and an assistive technology assessment. Parents did not consent to the March 22, 2021 IEP amendment to the October 29, 2020 IEP.

Three days later, on March 25, 2021, Student tantrumed when she arrived at the classroom, carved curse words in the classroom door, threw her backpack in the trashcan, took off her socks and shoes and ran off campus followed by staff. Student was stopped and returned by the police. The next day, March 26, 2021, Irvine sent Parents a letter requesting that Student's triennial assessments be started immediately and that Student's triennial IEP review take place in Spring 2021 rather than waiting until it was due in November 2021. Irvine enclosed an assessment plan proposing to conduct assessments in the areas of academic achievement, health, language and speech, social emotional and behavior, adaptive behavior, and intellectual development to be assessed by alternative means. The plan also included the functional behavior analysis and assistive technology assessment requested by Parents. Students were on Spring Break from March 29 through April 2, 2021. Mother signed the assessment plan and returned it on April 5, 2021, when the students returned.

Student earned gold level on April 5, 2021, but earned silver level the next day when she was goofing off during online mainstreaming for a general education class

and became angry and threw her laptop to the ground when the BSLC instructional assistant paused the camera on Student's laptop. Student also threw magnets at her peers and was physically aggressive. That day, April 6, 2021, was the day Mother requested that Irvine discontinue online mainstreaming.

Student earned gold and silver the following week, but as Parents had not given consent to the new goals, services, or behavior plan offered in the March 22, 2021 IEP amendment, Irvine asked Parents on April 9, 2021, if they would like another IEP team meeting to discuss the offer and any questions the Parents had.

Student earned gold and silver levels for most of the remainder of April 2021. However, Student had a tantrum on the playground on April 19, 2021, where she kicked and shoved peers. Student tantrumed again in the classroom and tried to fight a peer, pulled other students' work and classroom decorations off of the walls, drew on classroom furniture, and wrote that she would kill Classmate A and another classmate. Staff were able to calm Student down, and Student helped them clean up the classroom afterwards. Student was taken to another room to finish her classwork separately, which was recorded in the attendance records as an in-school suspension. The following day, April 20, 2021, Irvine again tried to schedule another IEP team meeting with Parents or get consent to implement the March 22, 2021 IEP offer. Irvine also moved Student back to Rosure's first to third grade BSLC classroom on April 21, 2021.

Irvine convened another IEP team meeting attended by Mother on April 27, 2021. Mother reported that Parents were struggling to get Student to school. Irvine team members proposed social work services, called WRAP services, for 300 minutes, or 5 hours, per week, during the regular school year and extended school year 2021. These were intensive in-home services to support Student and her family through individual,

parent and family counseling. Mother indicated that the family was exhausted with Student in the home, and wanted Student placed in a 24-hour residential treatment center. Irvine team members responded that they believed the BSLC program with the additional services in the March 22 and April 27, 2021 offers to amend the IEP of October 29, 2020 would be sufficient to meet Student's educational needs, and the meeting was adjourned. The April 27, 2021 IEP amendment offer expressly stated that Irvine would contract with an outside agency for WRAP services, and those services could take up to 14 business days to start.

In May 2021, Student tantrumed almost daily. Some days consisted of mild noncompliance, and others involved hitting staff or peers, destroying classroom property, and once, running off campus to the adjacent playground. Irvine repeatedly requested that Parents agree to the new goals and services in the pending IEP amendment offers. On March 14, 2021, exactly 14 business days before the end of the school year, Parents consented to only the five hours per week of WRAP services component of the April 27, 2021 IEP amendment. Irvine promptly contracted with social service agency Seneca, and Seneca contacted Parents on May 21, 2021, to begin conducting an evaluation and prepare a treatment plan. However, Mother informed Seneca that her schedule was too busy and declined Seneca's services.

After Parents consented to WRAP services, but before they could be implemented, Student had two major behavior incidents on May 25 and 26, 2021. On May 25, 2021, Student became very angry at the end of the day when she had not earned gold level. Student ran out of the classroom and across the campus kicking backpacks and yelling at peers. Student was eventually restrained by BSLC staff, calmed down, and got on the bus to go home. On May 26, 2021, Student became angry with peers who did not want to play with her, kicked one peer, chased peers into the

classroom, banged on the door and windows of the classroom, ran off campus and pulled off her shirt, and laid on the sidewalk. Student yelled at a pedestrian and told Rosure, who had followed Student, that she would kill her with a knife. School staff surrounded Student with yoga mats for privacy, and Student attempted to kick and bite them. Student then got up and ran back onto and around the school campus until restrained by school staff. Student eventually put on her clothes and had lunch in the school cafeteria.

Student's triennial assessments were completed and reviewed at an IEP team meeting on June 2, 2021 attended by Parents. The June 2, 2021 IEP offer and the assessments are discussed in more detail at Issues 10 and 16. That same day, Student had a huge tantrum in the classroom, kicking and throwing and tearing students' work and school property. The BSLC staff intervened and Student did not leave the classroom, but she kicked staff and called them names. Student had another tantrum on the last day of school, June 4, 2021, which started on the playground. Student yelled and chased peers and ran into a neighborhood adjacent to the school. Student kicked and hit several cars with her fist and attempted to kick and hit the BSLC staff following her. Staff was able to calm Student down, and Student returned to the classroom.

Mother informed Seneca representatives at the June 2, 2021 IEP team meeting that she wanted WRAP services over the extended school year, and Seneca began to provide WRAP services on June 11, 2021.

Student failed to meet her burden of proof on Issue 5. Irvine timely held IEP team meetings in response to Student's increasing behaviors. Prior to March 2021, Student's disrobing in the bathroom for a peer in December and occasional mild tantrums in February did not warrant calling an IEP team meeting. Student had a history

of emotional disturbance and was in the BSLC program for the behavioral and social emotional supports it provided. Student's behaviors through the end of February 2021 were well within the scope of the BSLC program and sufficiently addressed with Student's October 29, 2020 IEP goals of seeking attention appropriately, problem solving, coping skills and self-regulation.

The increase in the size and intensity of Student's tantrums in March 2021 warranted an IEP team meeting, which was timely convened by Irvine on March 22, 2021. At that meeting, Irvine IEP team members recommended additional behavior goals and increased individual counseling to work on those goals, with parent counseling and a Tier 2 behavior plan to address Student's emerging behaviors.

Even without the additional supports offered in the March 22, 2021 IEP amendment, Student earned mostly gold and silver levels in April 2021, with only two incidents. However, Student threatened to kill two classmates, and although these were empty threats, Student was moved to Rosure's classroom. Irvine timely convened an IEP team meeting on April 27, 2022, to address any concerns Parents had with regard to the proposed goals, services and behavior plan in the March 22, 2021 IEP amendment offer. The April 27, 2021 amendment additionally offered five hours per day of WRAP services to provide Student and Parents with in-home therapy and assistance to address Student's dysregulation in transitioning from home to school.

Despite Student's increased behaviors in May 2021, Parents declined to consent to the additional goals, services and behavior plan offered in the March and April 2021 amendments to the October 29, 2020 IEP, except for five hours of WRAP services. Nonetheless, Irvine timely assessed Student and convened an IEP team meeting on June 2, 2021, to review assessments and again address Student's behavioral needs.

In summary, Irvine timely convened IEP team meetings and developed IEPs to address Student's increased maladaptive behaviors as they appeared during the period from December 2020 through June 2021. Student did not meet her burden of proving by a preponderance of the evidence that Irvine denied Student a FAPE by failing to hold an IEP team meeting in response to Student's increasing needs during the 2020-2021 school year.

ISSUE 6: DID IRVINE DENY STUDENT A FAPE BY FAILING TO MAKE AN APPROPRIATE OFFER OF PLACEMENT AND SERVICES IN THE IEP DEVELOPED ON MARCH 22, 2021?

Student contends that by March 22, 2021, Irvine should have considered Parents' preference that Student be placed in a residential treatment center and offered that placement in the March 22, 2021 IEP amendment instead of the BSLC classroom. Student also contends that Irvine delayed in collecting data on Student's maladaptive behaviors by proposing a Tier 2 behavior intervention plan rather than a functional behavior analysis, and that the March 22, 2021 amendment did not meet Student's behavior, communication, or academic needs. Student argues that Irvine added an aide to Student's bus but did not include that in Student's IEP. Irvine contends the BSLC program was appropriate to address the behaviors Student had demonstrated up to that point and that Student failed to prove the March 2022 offer of special education and related services failed to address Student's needs.

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, supra*, 195 F.3d at p. 1149.) An IEP

is a snapshot, not a retrospective. (*Id.* at p. 1149, citing *Fuhrmann v. East Hanover Board of Education* (3rd Cir. 1993) 993 F.2d 1031, 1041.) It must be evaluated in terms of what was objectively reasonable when the IEP was developed. (*Ibid.*)

Both federal and state law require a school district to provide special education in the least restrictive environment appropriate to meet the child's needs. (20 U.S.C. § 1412(a)(5); 34 C.F.R. § 300.114(a) (2006); Ed. Code, § 56040.1.) The IDEA provides that each state must establish procedures to assure that, to the maximum extent appropriate, children with disabilities are educated with children who are not disabled, and that special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily. (20 U.S.C. §§ 1412(a)(5)(A) and (B); see also 34 C.F.R. § 300.114(a)(2)(ii) (2006); Ed. Code, § 56040.1.) This provision sets forth Congress's preference for educating children with disabilities in regular classrooms with their peers. (*Sacramento City Unified School District v. Rachel H.* (9th Cir. 1994) 14 F.3d 1398, 1402 (*Rachel H.*), citing *Department of Educ. v. Katherine D.* (9th Cir.1983) 727 F.2d 809, 817, cert. denied, (1985) 471 U.S. 1117 [105 S.Ct. 2360].)

In light of this preference for the least restrictive environment, the Ninth Circuit has adopted a balancing test that requires the consideration of four factors to determine whether a child can be placed in a general education setting:

- (1) the educational benefits of placement full time in a regular class;
- (2) the non-academic benefits of such placement;
- (3) the effect the student would have on the teacher and children in the regular class; and

- (4) the costs of mainstreaming the student. (*Rachel H.*, *supra*, at p. 1403; [adopting factors identified in *Daniel R.R. v. State Board of Ed.* (5th Cir. 1989) 874 F.2d 1036, 1948-1050 (*Daniel R.R.*)].)

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

The continuum of the program options includes, but is not limited to:

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

In determining the educational placement of a child with a disability, a school district must ensure that the placement decision is made by a group of persons, including the parents, and other persons knowledgeable about the child, the meaning of the evaluation data, and the placement options, who consider the requirement that children be educated in the least restrictive environment. (34 C.F.R. § 300.116.) It must ensure that placement is determined annually, is based on the child's IEP and is as close

as possible to the child's home, and unless the IEP specifies otherwise, the child must attend the school that he or she would if non-disabled. (*Ibid.*) In selecting the least restrictive environment, consideration must be given to any potential harmful effect on the child or on the quality of services that he or she needs, and the child with a disability must not be removed from education in age-appropriate regular classrooms solely because of needed modifications in the general education curriculum. (*Ibid.*)

Here, the parties do not dispute that Student cannot be educated full-time in a regular education environment. Therefore, a *Daniel R.R.* analysis of placement requires a determination of whether Student was mainstreamed to the maximum extent appropriate on March 22, 2021.

The March 22, 2022 virtual IEP team meeting was attended by many team members familiar with Student. This included:

- Mother;
- Student's lay advocate;
- Student's in-home ABA board certified behavior analyst;
- Stefanie Cachola the school psychologist associated with the BSLC program;
- special education teacher Smolinski;
- Student's speech pathologist Essen; and
- Student's school counselor and ERMHS specialist associated with the BSLC program, Haile;

among others.

Mother reported that the behaviors the school was now seeing had been occurring at home for years, and Student was seeing a psychiatrist, Dr. Nisha Warikoo,

for medication management. Mother also reported that Parents were worried about hurting Student when she was restrained at home, and Dr. Warikoo had advised them to call the police when Student was beyond their control, although Parents had not yet done that. Mother told the IEP team that she was looking into 24-hour residential treatment centers for Student, but there weren't many that would accept 10-year-olds.

Haile explained at the IEP team meeting that Student's behaviors were well within the scope of behaviors intended to be handled by the BSLC program. Haile also testified at hearing. Her demeanor was calm and professional demeanor, she answered all questions thoroughly, and her answers were informative and well-reasoned. As set out in Issue 16, Haile had extensive credentials and experience in counseling children with autism and emotional difficulties, and in crisis intervention. She worked with Student in the BSLC classroom and as Student's counselor for two years. Her testimony regarding Student's emotional and educational needs, goals and objectives to address those needs, and the services that would enable Student to make progress in light of her circumstances was given great weight. Her opinion that the trained BSLC staff, and the structure and support of the BSLC program, could effectively address the behaviors Student exhibited during the 2020-2021 school year was logical and persuasive. Haile credibly opined that the BSLC program, with the October 29, 2020 IEP and additional goals, counseling services, parent counseling and Tier 2 behavior plan offered in the March 22, 2021 IEP amendment would have enabled Student to make educational progress and constituted an appropriate offer of placement and services.

Student's expert, Dudley Wiest, Ph.D., was critical of the March 22, 2021 IEP. Dr. Wiest was a highly qualified and licensed neuropsychologist, however, his testimony was less persuasive than Haile's testimony. Dr. Wiest had never seen the BSLC program and was unfamiliar with its components. Dr. Wiest had not spoken to Student's teachers

or any Irvine staff. Although Parents had given Dr. Wiest Student's IEPs to review, he did not know which ones had been consented to and implemented or not. He relied primarily on Parent report and reports from Children's Hospital of Orange County, called Children's Hospital, and the San Diego Children's Center, called SDCC, which were prepared well after the IEP team meetings of March 22, April 27, and June 2, 2021. Dr. Wiest also failed to produce the documents he relied upon in forming his opinions in response to Irvine's subpoena, or to provide a complete list of documents reviewed in his assessment report. This also raised a reasonable inference that the documents, or lack of documents, did not support his opinions or he would have produced them. (See Evid. Code, § 600, subd. (b); See also Evid. Code § 412, *Vallbona v. Springer* (1996) 43 Cal.App.4th 1525, 1537 [if a party provided weaker evidence when it could have provided stronger evidence, you may distrust the weaker evidence].)

Dr. Wiest was not persuasive when he opined that as early as January 2021 Student's emotional state was analogous to a full blown forest fire, and she needed placement in a more restrictive setting of some sort because specialized instruction, behavior intervention and medications had failed. He asserted that school staff could not get a handle on Student's behaviors, but his opinion was not reasonable considering the limited behaviors Student had exhibited at that time and the many days of gold and silver levels Student was then earning. The BSLC staff's success in handling Student's behaviors through March 22, 2021, was reflected in the behavior reports, which included not just a report of Student's behaviors, but the appropriateness of the responses of the BSLC team. In each incident, BSLC staff was able to calm Student down, bring her back to baseline, and have her return to learning in the classroom. There was no need for a functional behavior analysis at that time.

Throughout the 2020-2021 school year, BSLC staff implemented PROACT crisis response strategies, which deferred using physical restraint unless Student was a clear danger to herself or others. There was no persuasive evidence that Student kicked or shoved any other children hard enough to injure them, and there was no evidence that Student was running anywhere but on campus, in the adjacent playground, or on sidewalks surrounding the campus, and had any intent to injure herself. Dr. Wiest opined that eloping, property damage, and physical aggression were not normal, but that was precisely why Student was placed in the BSLC program. The preponderance of evidence established that additional goals and services proposed at the March 22, 2021 IEP were designed to address exactly those behaviors.

Dr. Wiest had a professional demeanor and answered questions readily and thoroughly. However, both in his responses on direct and cross-examination, it was clear that he had been provided with limited information by Parents and did not have a complete picture of events or the placement, services, or accommodations offered to Student. His incomplete and necessarily skewed information undermined the persuasiveness of his testimony, and his opinions were discounted accordingly.

It is worth noting here that Mother testified with a tendency to exaggerate which adversely affected her credibility. For instance, instead of testifying that Student slapped or kicked someone, she said instead that Student assaulted someone. When Student cut her own hair one night to emulate an admired peer, Mother testified about how dangerous the situation would have been if Student possessed sharp scissors instead of safety scissors, although there was no evidence that Student had ever engaged in cutting herself or other self-harm. Much of Mother's testimony was speculative, about how things could have been worse than they actually were. Examples

Mother gave of Student's in-home conduct characterized as dangerous seemed less extreme, such as Student throwing a water bottle, throwing her laptop to the ground, or pushing things off of her desk.

Mother repeatedly testified that Student had broken her sister's arm, and that Mother feared for the sister's safety. However, the evidence showed that Student's sister had fallen and broken her arm after Student pushed her, when Student was around five years old and Student's sister was only one year old. The incident was remote in time and Mother's vague reference appeared to be intended to imply a recent event and present danger. In July 2021, Mother reported to SDCC that Student pushed her sister down a flight of stairs resulting in her sister's broken arm, an additional detail not included in other reports or Mother's testimony regarding the incident, suggesting a more sinister version of what occurred. Dr. Wiest testified that Mother reported to him that in first grade Student had broken her sister's arm, indicating that Mother again changed the facts to make the event closer in time and to suggest that Student was more mature when the act occurred.

Mother's own testimony was that whenever she called the police, Student was calm by the time they arrived, and when she took Student to Children's Hospital, they refused to admit Student because she was not a danger to herself or others. All of this evidence was inconsistent with Mother's characterization of Student's in-home conduct as a danger to Student and others and undermined her credibility. Mother had a calm demeanor, and was often complimentary to Irvine staff, but her use of extreme terminology, unsupported by factual accounts, coupled with her admitted willingness to go to great lengths to get her way, left an impression that her testimony was carefully crafted to create an exaggerated picture of Student's behaviors in the home.

Smolinski's testimony about Student's behaviors and her progress in academics persuasively supported Irvine's position regarding the appropriateness of the March 2021 IEP. Smolinski was a credentialed special education teacher with experience working with autistic and emotionally disturbed children and was Student's teacher from December 2020 through April 2021. Smolinski opined at the March 22, 2021 IEP team meeting and at hearing that the BSLC program with its embedded behavior supports was an appropriate placement for Student on March 22, 2021. Student's profile matched that of a typical child in the BSLC program who had not built up their capacity for using coping strategies but was working on it. The positive reinforcement, broken down tasks, frequent movement breaks, adjacent cool down room, and reward and level system were motivating and highly reinforcing for Student. The addition of goals to address the emerging behaviors, with additional counseling and a Tier 2 behavior plan offered in the March 2021 IEP was reasonably calculated to ensure that Student made educational progress in the BSLC program. The increase in counseling services to address the behaviors occurring in March 2022 would have enabled Student to be successful in the BSLC program, just as she had been with that level of service under the April 19, 2019 IEP. The IEP team discussed the potential harmful effect of placing Student in a residential treatment center. The team was concerned that Student would be exposed to children with much worse behaviors than hers, as residential placements were typically made for students who were suicidal or homicidal.

Irvine ensured that the placement decision at the March 22, 2021 IEP team meeting was made by a group of persons, including Parents, knowledgeable about Student, the meaning of the data kept as part of the BSLC program, and possible placement options. The IEP team carefully deliberated the continuum of options, including residential treatment, and Irvine IEP team members reasonably concluded that

Student could be placed in the lesser restrictive BSLC program with the supports offered in the March 22, 2021 proposed amendment, with mainstreaming in general education classes and at lunch and recess, and that Student should not be removed to a medical and institutional setting when the BSLC program could meet Student's educational needs with the additional services in the March 22, 2021 IEP amendment.

Finally, as discussed in more detail at Issue 8, there was no evidence that Irvine assigned an aide to accompany Student on the school bus. Irvine was not required to include as part of Student's March 2021 IEP amendment that a general aide was assigned to the school bus for the benefit of all children riding on the same bus Student rode to and from school. In addition, there was no persuasive evidence that Student required an aide on the bus to receive a FAPE in the March 2021 IEP.

In accordance with *Daniel R.R.*, the March 22, 2021 IEP team considered a continuum of placements and determined that the BSLC program with adult assistance for mainstreaming into general education classes and at lunch and recess provided Student with the maximum mainstreaming appropriate. The placement and services offered in the March 22, 2021 amendment to the October 29, 2020 IEP were reasonably calculated to enable Student to make progress appropriate in light of her circumstances, and so offered her a FAPE.

Student did not meet her burden of proving by a preponderance of the evidence that Irvine denied Student a FAPE by failing to make an appropriate offer of placement and services in the IEP developed on March 22, 2021.

ISSUE 7: DID IRVINE DENY STUDENT A FAPE BY FAILING TO FULLY IMPLEMENT THE OCTOBER 29, 2020 ANNUAL IEP?

Student contends that in April 2021, at Parents' request, Irvine stopped Student's online mainstreaming into several general education classes, and denied her a FAPE by not sending her into general education classes in-person instead. Student argues that her October 29, 2020 IEP required that Student be in general education activities which Irvine failed to implement after it ceased Student's online mainstreaming. In addition, Irvine changed Student's classroom teacher without changing Student's IEP or obtaining Parents' consent. Irvine contends that it fully implemented Student's October 20, 2020 IEP at all times.

During the 2020-2021 school year, Irvine re-opened schools using a cohort model that incorporated small classes socially distanced from other classes to reduce the risk of transmission of the COVID-19 virus. The October 29, 2020 IEP offered Student the BSLC program, with 30 minutes daily, or 140 minutes per week, of BSLC program support for mainstreaming into a general education setting for reading in English language arts. Student was also mainstreamed for recess, lunch, Physical Education and Music, so that 70 percent of her school day was in special education and 30 percent of her school day was in general education. In April 2021, Students from the BSLC classroom would go with an adult BSLC instructional assistant to a separate room to mainstream into general education classes online using their laptops. On April 6, 2021, Parent requested that Irvine discontinue Student's online mainstreaming after receiving a report about an incident on April 5, 2021 about Student's behavior.

Student's argument that Student demonstrated difficulty accessing the general education setting through distance learning was not supported by the evidence.

Although Mother testified repeatedly and convincingly that Parents had difficulty getting Student to log on to virtual classes while Student was in the home, there was no evidence that Student had difficulty logging in for mainstreaming with her small group from the BSLC class at school. Student misbehaved during mainstreaming on April 5, 2021, but one behavior incident fell far short of establishing that Student could not access her mainstream reading class through a virtual platform.

Student participated appropriately in 150 minutes per week of virtual mainstreaming into general education reading classes during the 2020-2021 school year. Mother's testimony about her unpleasant experiences at home with Student before and after virtual classes in spring 2020 was not persuasive evidence that Student could not access instructional content by virtual means at school in accordance with her October 20, 2020 IEP, particularly with the assistance of adult BSLC staff.

Mainstreaming has as its purpose exposing Student to nondisabled peers in the general education program. During mainstreaming into general education reading classes for 150 minutes per week, Student received the same instruction as nondisabled peers and participated in classroom discussions with nondisabled peers. The October 29, 2021 IEP team chose mainstreaming in reading because Student had strengths in that area and was a fluent reader. Student also received push-in specialized academic instruction during mainstreaming in reading, with an adult instructional assistant from the BSLC program. Student benefitted from mainstreaming with general education peers online. Parents may have preferred that Student attend reading classes with nondisabled peers in person, but a district does not have to provide Parents' preferred methodology. [See *Rowley, supra*, 458 U.S. at p. 204.)

Parents could not force Irvine to adopt a different methodology by declining to allow their child to mainstream into general education reading through an online platform. This was a particularly illogical request by Parents during the COVID-19 pandemic, where indoor social distancing protocols were important not only to prevent the transmission of a highly contagious virus, but to ensure that large groups of students were not required to quarantine if exposed to an infected child. Student received academic and social benefit from online mainstreaming. Irvine was not required to switch to in-person mainstreaming for reading because Parents preferred in-person mainstreaming, or because Student might have gained more educational benefit from in-person interactions.

Student did not prove that Irvine failed to implement the October 29, 2020 IEP when it discontinued online mainstreaming at Parents' request. A parent may consent to less than all components of an IEP, and the school district must implement only those portions of the IEP to which the parent has consented. (Ed. Code, §56346, subd. (e)). Irvine was required to discontinue 150 minutes per week of online mainstreaming into general education reading classes when Parents withdrew consent to that portion of the October 28, 2020 IEP. Student continued to access general education through lunch, recess, Physical Education and Music. Accordingly, Irvine did not fail to implement the October 29, 2020 IEP when it discontinued mainstreaming Student after Parents withdrew consent.

Student, in her closing brief, argues that discontinuing the mainstreaming into general education reading placed Student in special education for 100 percent of her school day, and failed to comply with the October 29, 2020 IEP. This argument fails to account for Student's continued interaction with general education peers during recess, lunch, Physical Education and Music, which were not designated as special education

minutes in the October 29, 2020 IEP. There was no evidence that outdoor activities such as these were online, and that discontinuing 150 minutes per week of mainstreaming into general education reading classes impacted these activities. More importantly, if these activities had been online and discontinued because Parents withdrew consent to Student's participation in online activities, Irvine would have continued to implement only those portions of the IEP consented to and in compliance with the October 29, 2020 IEP.

Although not argued in Student's closing brief, the amended complaint alleges that Student's move from Rosure's class to Smolinski's class in December 2020, and from Smolinski's class back to Rosure's class in April 2021, were changes in placement without parental consent that took place outside of the IEP process. Parents generally have no right to compel an assignment of particular teachers or other educational personnel to implement the IEP. These decisions are normally within the discretion of the school district. (*Student v. Moreno Valley Unified School District* (2009) OAH Case Nos. 2008120288, 2009010604 and 2008120285, p. 38, citing *Letter to Hall*, 21 IDELR 58 (OSEP 1994), and *Rowley, supra*, 458 U.S. at pp. 207-208.) Here, both classrooms were not only BSLC classrooms, but the return to Ms. Rosure's classroom moved Student into the very classroom Student had originally been assigned before distancing guidelines had required the classes be broken up into smaller cohorts. Student received specialized academic instruction at her own level in both classes, and there was no evidence that the classes provided any difference in program. The change in classrooms was not a change of placement.

At hearing, Parent and Dr. Wiest opined that moving Student back to Rosure's classroom with first to third graders promoted immaturity and baby talk. There was no evidence that the other students in Rosure's class engaged in baby talk, or any other

immature conduct copied by Student. In fact, Parents and multiple reports indicated that Student sucking her thumb and using baby talk was self-soothing and possibly the result of trauma prior to her adoption. There was no evidence that these behaviors had anything to do with the ages of Student's classroom peers.

Student did not meet her burden of proving by a preponderance of the evidence that Irvine denied Student a FAPE by failing to fully implement the October 29, 2020 Annual IEP.

ISSUE 8: DID IRVINE DENY STUDENT A FAPE BY FAILING TO PROVIDE PARENTS WITH A PRIOR WRITTEN NOTICE IN RESPONSE TO PARENTS' REQUEST FOR A CHANGE IN STUDENT'S PLACEMENT, AND THE ADDITION OF ADDITIONAL SUPPORT DURING THE 2020-2021 SCHOOL YEAR?

Student contends that by placing an aide on Student's bus, changing Student's teacher back to Rosure and adding a classroom aide without an IEP amendment or prior written notice, Irvine denied Student a FAPE by depriving Parents of the opportunity to effectively participate in designing Student's educational program. Irvine argues that any and all changes to Student's IEP were only made at IEP team meetings with a full discussion and documented in the IEP documents themselves.

A child's parents are not entitled to choose teachers or other instructional personnel. The IDEA permits districts to treat these matters as administrative decisions, which are made by school personnel. (*Letter to Wessels* (OSEP 1990) 16 IDELR 735.) A number of unpublished Ninth Circuit court decisions, while not precedent, provide guidance on this issue and have held that if the assigned personnel are qualified to perform the designated services, the allocation of qualified personnel to provide the

services of adult assistance is in the administrative discretion of the agency. (See *Blanchard v. Morton School Dist., et al.* (9th Cir. 2010) 385 F.Appx 640, 640-41, affirming *Blanchard v. Morton School Dist.* (W.D.Wash 2009) 2009 WL 481306; *Gellerman v. Calaveras Unified School Dist.* (9th Cir. 2002) 43 F.Appx 28, 31; *Zasslow v. Menlo Park City School Dist.* (9th Cir. 2003) 60 F.Appx. 27, 28.)

School districts have discretion to assign personnel, and there was no evidence that Irvine assigned Student a one-to-one aide on the bus, or that the bus aide was anything other than another adult to assist the bus driver. Irvine would have been well within its authority to assign an adult to ride the bus for a day or a week just to investigate Parents' claim that Student might be afraid of some unknown person or thing on the bus. The same analysis applies to Irvine's assignment of an additional classroom aide to Rosure's classroom after April 21, 2021. Student's evidence did not prove that the aide in Rosure's classroom was assigned as a one-to-one aide for Student, rather than as classroom personnel to help Rosure, another student, or all the classroom's students. Irvine did not assign an aide on the bus or to Rosure's classroom as part of the services offered to Student as a FAPE, or as any component of Student's educational program, so there was no need for prior written notice to Parents.

As discussed at Issue 7, the changes in BSLC classrooms, with the move to Smolinski's class on December 2, 2020, and back to Rosure's class on April 21, 2021, were not changes in placement or any component of Student's educational program. The same analysis applies to the change in Student's teacher. Both Smolinski and Rosure were credentialed and experienced special education teachers, and the assignment of Student's teacher was within Irvine's administrative authority. Therefore, the change in BSLC classrooms and teachers did not require prior written notice.

When Parents demanded that Irvine discontinue mainstreaming into general education reading classes, Irvine was neither proposing to change to Student's educational program or refusing to change to Student's program. Rather, Irvine was required to cease mainstreaming upon Parents' April 6, 2021 withdrawal of consent to that component of Student's October 29, 2020 IEP. It was Parents, not Irvine, making decisions about Student's program, and Parents did not require an opportunity to object to the cessation of mainstream services when Parents themselves were demanding that change. Student's argument that the Parents were deprived of an opportunity to participate in the development of Student's educational program because Irvine did not give them prior written notice that Parents had withdrawn consent to online mainstreaming is specious, at best.

Accordingly, Student did not meet her burden of proving by a preponderance of the evidence that Irvine denied Student a FAPE by failing to provide Parents with a prior written notice in response to Parents' request for a change in Student's placement, and the addition of additional support during the 2020-2021 school year.

ISSUE 9: DID IRVINE DENY STUDENT A FAPE BY FAILING TO MAKE AN APPROPRIATE OFFER OF PLACEMENT AND SERVICES IN THE IEP DEVELOPED ON APRIL 27, 2021?

Student contends that in light of her increase in childish behaviors, Irvine's change of classroom in April 2021 to one with younger peers denied her a FAPE. Student also contends that she needed a residential treatment center to access her education by April 2021, and Irvine's April 27, 2021 IEP offer of less restrictive options failed to address Student's behavioral and academic needs, and denied Student a FAPE.

Irvine contends that it added WRAP services in the April amendment that appropriately addressed Student's increase in behaviors, and that Student did not require a residential placement to receive a FAPE.

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., supra*, 811 F.2d at p. 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 parents preferred another program and even if the parents' preferred program would have resulted in greater educational benefit. (*Ibid.*)

A school district must provide a residential placement if such a placement is necessary to provide a student with a disability with special education and related services. (34 C.F.R. § 300.104.) Residential placement is, by its nature, considerably more restrictive than day school. (See *Kerkam by Kerkam v. Superintendent, D.C. Public Schools*. (D.C. Cir. 1991) 931 F.2d 84, 87; *G.D. v. Westmoreland School Dist.* (1st Cir.1991) 930 F.2d 942, 948; *Carlisle Area School v. Scott P. By and Through Bess P.* (3d Cir. 1995) 62 F.3d 520, 534, amended (Oct. 24, 1995).) As a result, a therapeutic residential placement is one of the most restrictive placements on the least restrictive environment continuum. (34 C.F.R. § 300.115.) Given its restrictive nature, removal of a student with disabilities to a residential setting complies with the least restrictive environment mandate in only extremely limited situations for students with severe disabilities who are unable to receive a FAPE in a less restrictive environment. (*Carlisle Area School Dist. v. Scott P., supra*, 62 F.3d at p. 523.)

A district's responsibility under the IDEA is to remedy the learning-related symptoms of a disability, not to treat other, non-learning related symptoms. (*Forest Grove School District v. T.A.* (9th Cir. 2011) 638 F.3d 1234, 1238-39 [no abuse of discretion in denying parent reimbursement where district court found parent sought residential placement for student's drug abuse and behavior problems] (*Forest Grove*).) An analysis of whether a residential placement is required must focus on whether the placement was necessary to meet the child's educational needs. (*Clovis Unified School District v. California Office of Administrative Hearings* (9th Cir. 1990) 903 F.2d 635, 643).) If the placement is a response to medical, social, or emotional problems, quite apart from the learning process, then it cannot be considered necessary under the IDEA. (*Ibid.*; accord *Ashland School Dist. v. Parents of Student R.J.* (9th Cir. 2009) 588 F.3d 1004, 1009.)

Student was moved to Rosure's classroom on April 21, 2021, just a week before the April 27, 2021 IEP team meeting. The IEP team discussed pros and cons of Student's move to Rosure's classroom. Because that class now had students from first to fourth grade, as it had originally, Student was motivated to be a leader in the class. She continued to have behaviors but was also earning gold levels. Rosure reported a regression in maturity, with increased whining, crying and baby talk, but the IEP team hoped to address those behaviors with the social emotional goals and behavior plan in the March 22, 2021 IEP amendment to which Parents had not yet consented. The proposed March 22, 2021 IEP goals targeted attention seeking appropriately during structured and unstructured times, using positive self-talk and coping strategies, identifying feelings and using pro-social communication with peers, and learning to problem solve. The IEP team wanted Student's individual and group counseling to focus on these goals, which would address the whining, crying and baby talk.

As discussed at Issue 7, the change in classrooms was not a change in placement and there was no evidence that Student's childish behaviors were reflective of, or caused by, similar behavior by the younger students in Rosure's classroom. Student's use of whining, crying, and baby talk was well documented prior to the 2020-2021 school year and in Smolinski's classroom. Student's argument that an increase in these behaviors was due to the age of Student's peers in Rosure's classroom was nothing more than unfounded speculation. Student was making academic progress in Rosure's classroom, and the change in classroom did not deny her a FAPE.

The April 27, 2021 IEP built on the March 22, 2021 amendment to the October 29, 2020 IEP by adding five hours per week of WRAP services. WRAP services used a multidisciplinary team of professionals to evaluate the dynamics of the home environment and create a plan to address barriers to education in the school setting. The WRAP team provided in-home therapeutic supports to address a student's IEP goals. Parents reported that they were having trouble getting Student ready for school in the morning, and the Irvine members of the April 27, 2021 IEP team felt that help with this process would help get Student to school on time, and teach her how to generalize the coping skills learned in-school to the home environment. The April amendment discontinued the 90 minutes per year of parent counseling offered in the October 29, 2020 IEP as duplicative, because WRAP services would provide ongoing counseling to Parents through a parent partner.

Student did not require a residential treatment center to receive academic benefit. Student was making progress on her academic goals in math calculation, writing and reading comprehension, and throughout April 2021 had been earning gold and silver levels. The daily reports going home to Parents demonstrated that Student was having success in her academic lessons.

Dr. Wiest's opinion that Student could not make academic gains in April 2021 because her limbic system was so dysregulated was unpersuasive for several reasons. Dr. Wiest relied on Parents' report of Student progress and did not review Student's daily reports or speak with special education teacher Rosure. Student's daily reports from December 2020 through April 2021 included a plethora of references to Student's good behaviors and progress in academic areas. Although Student did have behaviors that took her out of the classroom, they were a small percentage of the total school weeks and months. Student deescalated after even the severest of her behavior episodes and was able to return to learning in the classroom.

Dr. Wiest unpersuasively pointed to Student's increasing behaviors for his opinion that BSLC staff was unable to handle Student, but he was unaware that Irvine was prevented from implementing the new social emotional goals, counseling services and Tier 2 behavior plan in the March 22, 2021 IEP amendment offer because Parents had not consented to it. Dr. Wiest did not speak with Student's school counselor Haile or the classroom behavior interventionist. His opinion on Student's performance in school was flawed because it was based primarily on Parents' report, the behavior reports of Student's most extreme behavioral episodes, and speculation that Student exhibited the same behaviors at school that she exhibited in-home. The lack of a complete picture of Student's educational program and performance rendered his opinions less persuasive than those of the BSLC witnesses.

Dr. Wiest referred to the WRAP in-home services as doubling down on applied behavior analysis, and conceded that he was not a behavior specialist and did not have an opinion on whether the additional WRAP services would have helped. All of this adversely affected the validity of his opinions.

In contrast, Haile was convincing when she opined that the BSLC program was designed to address behaviors such as those exhibited by Student, and that on April 27, 2021, the BSLC program could meet Student's educational needs with the new social emotional goals, the behavior support plan, and the WRAP services offered. On that date, Student's behaviors consisted mostly of peer taunting, hitting and kicking, minor property destruction while tantruming, and running off campus while taking off her shirt. Much of the behavior reported in the incident reports and daily reports was simply whining, crying, noncompliance and sitting on the ground. These were not behaviors that warranted removing a child from her home and placing her in a 24-hour residential treatment center.

Student had threatened to kill Classmate A on February 18, 2021, and to kill Classmates A and B two months later on April 19, 2021. However, Student told Haile, and later the staff of Children's Hospital and the SDCC that she never intended anybody any harm, never had any plan to harm others, and did not have the means to harm others. Student explained that she just said these things when angry. In light of this, even Student's extreme threats did not rise to the level of requiring residential treatment. Similarly, the evidence that Student tried to stab a peer with a pencil during one tantrum on March 12, 2021 did not establish that Student otherwise targeted her classmates for harm and was a danger to others beyond hitting, kicking, slapping, and throwing or overturning classroom materials. These behaviors were of the type that the BSLC staff was trained to, and did, intervene in to prevent serious harm to students.

It is undisputed that Student had an autism diagnosis and misread social cues, and that she had difficulty regulating her emotions, particularly when presented with nonpreferred tasks or denied access to preferred items or activities. It was also clear

that there were many problems at home and Mother was overwhelmed by her emotional child. However, Student's social emotional difficulties that interfered with access to education were appropriately addressed in the March 22, 2021 IEP amendment, as supplemented by the April 27, 2021 IEP amendment, by an offer of placement in the BSLC program, with the goals, behavior plan, individual counseling, group counseling and WRAP services.

The April 27, 2021 IEP team was attended by Mother, Student's advocate, and a team of Irvine staff familiar with Student, including Smolinski, Student's general education reading teacher until mainstreaming into her classroom was discontinued, Haile, Essen, a behavior intervention specialist, and an assistive technology specialist. The meeting was also attended by Christina Reyes, the coordinator of ERMHS services who worked closely with residential treatment centers. The team discussed the continuum of placements, particularly Mother's request that Student be placed outside of the home in residential treatment. Reyes cautioned the IEP team that residential placements were often traumatic for children, and not to be made if other less restrictive options were available. Student's BSLC team and service providers opined that Student's needs could be met in the BSLC program with the additional offered supports. Parents had also consented to triennial assessments on April 5, 2021, and Irvine team member reasonably sought to avoid an unnecessarily restrictive residential placement until the pending comprehensive assessments were completed in approximately 30 days. Mother reported that Student's psychiatrist Dr. Warikoo recommended a residential placement, but Dr. Warikoo had not spoken or provided documentation to Irvine staff.

Irvine ensured that the placement decision at the April 27, 2021 IEP team meeting was made by a group of persons, including Parents, knowledgeable about Student, the information gathered about Student, and possible placement options. The IEP team carefully deliberated the continuum of options, particularly residential treatment. Irvine IEP team members reasonably concluded that Student could be placed in the lesser restrictive BSLC program with the supports offered in the March 22, 2021 and April 27, 2021 IEP amendment offers, and that Student should not be removed to a medical and institutional setting when the BSLC program could meet Student's educational needs.

Student did not meet her burden of proving by a preponderance of the evidence that Irvine denied Student a FAPE by failing to make an appropriate offer of placement, services in the IEP developed on April 27, 2021.

ISSUE 10: DID IRVINE DENY STUDENT A FAPE BY FAILING TO MAKE AN APPROPRIATE OFFER OF PLACEMENT AND SERVICES IN THE IEP DEVELOPED ON JUNE 2, 2021?

Student contends that Irvine's multidisciplinary assessment over-reported Student's academic skills, that Student's teachers over-reported Student's social skills, and that Student's assessors and the June 2, 2021 IEP team downplayed Student's extreme and dangerous behavioral issues. Student argues that she should have been found eligible for special education as a child with autism. Student contends that the placement offered in the June 2, 2021 IEP was based on flawed information and that the public school environment was no longer Student's least restrictive environment. Irvine contends that the June 2, 2021 IEP team relied on accurate and comprehensive information and offered Student a FAPE in the least restrictive environment.

In May 2021, Student experienced a fairly equal amount of good and bad days in Rosure's class, until several days before the IEP. On May 25, 2021, Student taunted peers and ran around campus, and had to be restrained by BSLC staff. On May 26, 2021, Student again taunted peers, but

- kicked a peer in the stomach;
- banged on classroom doors;
- ran off campus;
- pulled off her shirt and leggings;
- yelled at a pedestrian; and
- threatened to kill Rosure with a knife while Rosure assisted the behavior interventionist in restraining Student.

Student then deescalated and enjoyed lunch in the cafeteria. On May 14, 2021, Parents consented to the WRAP services offered in the April 27, 2021 IEP amendment only, but had not consented to the pending March 22, 2021 IEP amendment offer of additional social emotional goals and services, or implementation of the Tier 2 behavior plan.

ACCURATE ASSESSMENT INFORMATION

As discussed at Issue 16, the multidisciplinary assessment by Irvine provided accurate, comprehensive, and reliable information to the June 2, 2021 IEP team. Student unpersuasively argues that Smolinski overreported Student's academic scores by using a test measure that reported academic scores in ranges that did not coincide with the Universal Classification of Performance. However, the results of Smolinski's academic assessment were remarkably consistent with prior academic assessments and Dr. Wiest's February 2022 academic assessment. It identified that Student needed intervention in reading, particularly reading comprehension, which was not unexpected in light of

Student's autism and difficulty with non-literal and figurative language. It also identified that Student needed urgent intervention in all areas of math, so Student's argument that her academic skills were overstated is difficult to comprehend. The Irvine academic assessment also identified writing as an area of need, and its assistive technology assessment recommended devices, programs, and accommodations that would assist Student in producing more and more complex written work.

Similarly, Irvine's extensive and thorough social emotional and behavioral assessment reported significant and complex social emotional components to Student's behaviors, including:

- anxiety;
- emotional distress;
- worrying;
- social problems;
- academic difficulties;
- language deficits;
- hyperactivity;
- separation fears;
- compulsive behavior;
- sensory sensitivity; and
- others.

It included two pages of educational implications and treatment considerations. Haile was one of the assessors and was very familiar with Student and her social emotional state, as she had provided weekly individual and group counseling to Student since the fall of 2019. The social emotional and behavioral assessment did not underreport Student's behaviors or the social emotional component.

Student unconvincingly takes issue with Rosure's report that Student:

- had at least one friend;
- socialized appropriately in class;
- used manners;
- would play with friends during recess and breaks;
- could work well in a group setting;
- joined conversations appropriately; and
- showed awareness of her behaviors on others.

However, a thorough reading of the daily reports and Smolinski's testimony established that Student could be very well-behaved and a pleasure to have in class. Student responded well to the restorative justice approach used by the BSLC staff. Haile testified persuasively that Student was aware that her behaviors were inappropriate and struggled to implement learned strategies for coping with disappointment and frustration.

BEHAVIOR ISSUES ACCURATELY REPORTED

Prior to the June 2, 2021 IEP and as part of its comprehensive assessment, Irvine also conducted a functional behavior analysis that specifically addressed Student's most severe behaviors of elopement, property destruction, and physical aggression. The functional behavior analysis looked at patterns of behavior for antecedents that triggered the behaviors, and consequences that reinforced the behaviors, and also noted that Student's behaviors likely had a social emotional and medication component. Irvine did not underreport Student's behaviors. Quite to the contrary, most of the multidisciplinary assessment was devoted to Student's behaviors. Also, the June 2, 2021 IEP team meeting was attended by no less than 10 educational professionals from Irvine

familiar with Student, as well as Parent, Student's advocate, and Student's in-home behavior intervention supervisor, so the team had the benefit of input from numerous sources if any reporting errors or inconsistencies were presented.

Dr. Wiest's testimony was not persuasive on Issue 10. At hearing, Dr. Wiest acknowledged that Student was obviously learning academics but opined that teaching Student social emotional skills would not be enough because Student was violent when dysregulated. He also opined that Student was autistic and not naturally empathetic, which led to her feeling entitled and could lead to criminal conduct in the future. He reasoned that Irvine had tried "everything but the kitchen sink" and it didn't help. Again, Dr. Wiest was unaware that Parents had not consented to the March and April 2021 IEP amendments that added additional supports for Student. He also incorrectly opined that if goals were not met, a student must necessarily be placed in a more restrictive environment. The basis for Dr. Wiest's opinions were incorrect. Irvine was obligated by law to offer the least restrictive approach to address Student's behaviors, and had not had an opportunity to do so because Parents had not consented to the March 22 and April 27, 2021 IEP amendments, with the exception of WRAP services. Even as to WRAP services, Seneca had contacted Mother on May 21, 2021, and Mother had declined the services.

Moreover, Student was not as violent at school as characterized by Dr. Wiest. Although Student had had increasing episodes of elopement and property damage, her behavior towards peers had generally consisted of taunting, chasing, shoving, and hitting or kicking without serious injury. The opinions of Haile and Marissa Rogate, the behavior specialist who conducted the functional behavior analysis, that Student's behaviors could be addressed in the BSLC program were more informed and persuasive than that of Dr. Wiest and given greater weight.

Dr. Wiest acknowledged that the goals in the June 2, 2021 IEP were appropriate and addressed the fact Student had autism and couldn't read facial expressions or interpret intentions properly. He was critical of goals seeking to reduce Student's maladaptive behaviors by less than 100 percent, but his opinions did not establish that these goals were inappropriate. Annual goals are designed to approximate the progress a Student can make on a goal over a one-year period, and Student's evidence was not persuasive that Student's goals should have been written to extinguish all of her maladaptive behaviors within one year.

AUTISM ELIGIBILITY NOT REQUIRED

Student argues that Rosure under-reported the severity of Student's symptoms of autism in the educational environment, and that Student should have been found eligible for special education under the category of autism in the June 2, 2021 IEP. For eligibility purposes, autism does not apply if a child's educational performance is adversely affected primarily because the child has an emotional disturbance (Cal. Code Regs., tit. 5, §3030, subd. (b)(1)(A)), and there was ample evidence that Student's educational performance was adversely affected primarily due to her emotional disturbance. In fact, during Haile's triennial assessment interview with Parents, they revealed that Parents had tried many therapies directed at autism and social skills without success. As such, the weight of evidence supported Haile's opinion that a mental health approach, with social emotional goals, was reasonably calculated to be more effective in addressing Student's behaviors.

More importantly, as long as a child remains eligible for special education and related services, the IDEA does not require that the child be placed in the most accurate disability category. Nothing in the IDEA requires that children be classified by their

disability so long as each child who has a disability listed in the IDEA and who, by reason of that disability, needs special education and related services and is regarded as a child with a disability. (20 U.S.C. § 1412(a)(3)(B); Ed. Code, §56301, subd. (a).) The US DOE has advised that a child's entitlement is not to a specific disability classification or label, but to a FAPE to address that child's needs. (*Letter to Fazio* (OSEP 1994) 21 IDELR 572, 21 LRP 2759.) Whether or not Student was found eligible for special education under the category of autism is irrelevant to the determination of whether Student was offered a FAPE.

BSLC PROGRAM THE LEAST RESTRICTIVE PLACEMENT

At the time of the June 2, 2021 IEP team meeting for Student's annual IEP review, Student had not met her annual goals. However, those annual goals were only written on October 29, 2020, and Student had not had a full year to work on them. Academically, Student was at the end of third grade/start of fourth grade in reading, and lower in writing because Student did not produce a lot of written work. Student was at the second grade level in math. The June 2, 2021 IEP offered appropriate academic goals in the areas of

- reading comprehension;
- writing;
- math multiplication problems;
- math subtraction problems;
- math multiplication and division expressions; and
- math word problems

to address Student's academic needs.

Student had language deficits in the areas of figurative language and interpreting disguised thoughts, such as sarcasm. The IEP team developed and adopted appropriate communication goals in figurative language and interpreting disguised thoughts, as well as social emotional goals in self-awareness, positive self-talk, and problem solving, to address those deficits. The June 2, 2021 IEP also offered appropriate behavior goals in:

- coping strategies;
- social interactions;
- functional communication for attention;
- tolerating denied access;
- reduction of property destruction;
- reduction of elopement; and
- reduction of disrobing.

The function of Student's behaviors was generally to gain attention, and to a lesser degree to access preferred tangibles and activities and escape from nonpreferred tasks, and Irvine IEP team members appropriately adopted a behavior intervention plan to address Student's behavior issues.

To support Student in making progress on her goals and to promote generalization of behavioral strategies across settings, the June 2, 2021 IEP offered Student:

- 1,515 minutes per week of specialized academic instruction in the BSLC program;
- mainstreaming at lunch, recess and Physical Education for the remaining 21 percent of her school day;
- a bell-to-bell one-to-one behavioral aide;
- 30 minutes per week of small group speech services;

- 30 minutes per week of push-in speech services broken into two 15-minute sessions during the school day in school settings;
- 30 minutes per week of group counseling;
- 30 minutes per week of individual counseling, and ;
- 300 minutes per week, of WRAP services.

For extended school year 2021 over four weeks in summer, the June 2, 2021 IEP offered Student four hours of specialized academic instruction for five days per week in Irvine's summer program, 30 minutes per week of group speech services, 30 minutes per week of individual counseling, and 300 minutes per week of WRAP services.

The BSLC program, with the instruction, supports, and accommodations in the June 2, 2021 IEP, was an appropriate placement for Student for the regular and extended school years. Student had a history of success in the BSLC program and had responded well when staff were able to act proactively. With a behavior intervention plan in place and a one-to-one aide, the BSLC program was reasonably calculated to ensure that Student would make meaningful educational progress. A one-to-one aide would bridge the gap to help Student better cope in the moment and address Parents' safety concerns.

If, as here, it is determined that a child cannot be educated in a general education environment, the least restrictive environment analysis requires determining whether the child has been mainstreamed to the maximum extent that is appropriate in light of the continuum of program options. (*Daniel R.R., supra*, 874 F.2d at pp. 1048-1050.) Student was not required to be removed from her home and placed in a very restrictive residential placement isolated from nondisabled peers to learn. The BSLC program with the services offered in the June 2, 2021 IEP, while mainstreaming Student during recess,

lunch and Physical Education for 21 percent of her school day, was designed to address Student's unique educational needs, and was reasonably calculated to ensure Student made educational progress appropriate in light of her circumstances. This proposed placement was in keeping with the least restrictive environment analysis of *Rachel H.* and *Daniel R.R.*

Generally, to determine whether a residential placement under the IDEA is necessary to provide a student a FAPE, the relevant analysis in the Ninth Circuit must focus on whether the residential placement may be considered necessary for educational purposes, or whether the placement is a response to medical, social, or emotional problems that is necessary quite apart from the learning process. (*M.S. v. Los Angeles Unified School Dist.* (9th Cir. 2019) 913 F.3d 1119, 1136; citing *Ashland School Dist. v. Parents of Student E.H.* (9th Cir. 2009) 587 F.3d 1175, 1185, and *Clovis, supra*, 903 F.2d at p. 643).

Here, Irvine was responsible for addressing the learning-related symptoms of Student's disabilities, and not to remediate or treat non-learning related symptoms. The BSLC program was reasonably calculated to meet Student's educational needs and was a far less restrictive placement than a residential treatment placement, particularly in light of its location on a public school campus with mainstreaming for lunch, recess and Physical Education. A residential placement to ease the burden on Parents when Student exhibited behaviors at home was not necessary to meet Student's educational needs. She had a history of success in the BSLC program, and multiple experienced educational professionals who were familiar with Student opined that the June 2, 2021 IEP placement was the least restrictive environment for Student. Dr. Wiest's opinion that Student required a residential placement because her behaviors were too extreme and dangerous for BSLC staff to handle was not well-informed and unpersuasive.

Student's psychiatrist, Dr. Warikoo, recommended a residential treatment center when contacted by Reyes as part of the triennial assessment, due to increasing behavioral and academic challenges across settings. Student did not call Dr. Warikoo on direct to give an opinion on Student's educational needs in spring 2021, or to explain the basis for her recommendation. Dr. Warikoo was only called on rebuttal to clarify her statements in response to an inquiry from Reyes. There was no evidence that Dr. Warikoo had read any school records or spoken to anyone at Irvine other than responding to Reyes' inquiry. There was no evidence that Dr. Warikoo had ever observed Student in an educational environment, had knowledge of the BSLC program, or was aware of the behavioral interventions that had been tried or proposed by Student's IEPs. As the multidisciplinary assessment report had not been completed, Dr. Warikoo did not have the benefit of a comprehensive educational assessment to inform her opinion. Without sufficient information on Student's educational performance, IEPs, or the BSLC program, Dr. Warikoo's recommendations were necessarily a limited response to Student's medical, social, or emotional problems apart from the learning process.

Dr. Warikoo wrote a letter on September 28, 2021 that was given to Irvine on October 5, 2021, that recommended that Student be placed in residential treatment given the level of aggression and safety concerns across the school and home settings. However, that letter was received many months after the June 2, 2021 IEP, and could not have been considered by the June 2, 2021 IEP team. Dr. Warikoo met with Student on a weekly basis from March 2021, and would have received Parent reports of Student's progress in school, but without evidence of the basis for her opinions on Student's ability to make progress in school appropriate in light of her circumstances, Dr. Warikoo's recommendation was unpersuasive and given little weight.

Irvine ensured that the placement decision at the June 2, 2021 IEP team meeting was made by a group of persons, including Parents, knowledgeable about Student, the meaning of the assessment information reviewed at that meeting, and possible placement options. The IEP team carefully deliberated the continuum of options, including residential treatment, and Irvine IEP team members reasonably concluded that Student could be placed in the lesser restrictive BSLC program with the supports offered in the June 2, 2021 IEP, and that Student did not need to be placed in a restrictive residential setting for educational purposes, because the less restrictive BSLC program with offered supports could meet Student's educational needs.

The June 2, 2021 IEP was reasonably calculated to enable Student to make educational progress appropriate in light of Student's circumstances. Accordingly, Student did not meet her burden of proving by a preponderance of the evidence that Irvine denied Student a FAPE by failing to make an appropriate offer of placement and services at the IEP developed on June 2, 2021.

ISSUE 11: DID IRVINE DENY STUDENT A FAPE BY FAILING TO MAKE AN APPROPRIATE OFFER OF PLACEMENT AND SERVICES IN THE IEP DEVELOPED ON AUGUST 24, 2021?

Student contends that in August 2021, Student required continued placement in a residential treatment center, and Irvine denied Student a FAPE by offering a nonpublic school in the August 24, 2021 IEP. Irvine contends that it offered Student a FAPE.

The last day of Irvine's 2020-2021 school year was June 4, 2021. Student had two behavior incidents after the June 2, 2021 IEP team meeting. On June 2, 2021, Student had a tantrum in the cool out room adjacent to and opening into Rosure's classroom.

Student removed her shirt and pants and moved into the classroom, stomping on her peers' backpacks, squirting cleaning oil in the carpet, pushing over desks and chairs, and climbing on the cabinets. Student was restrained before she could leave the classroom but kicked the behavior interventionist restraining her several times. The tantrum stopped when Student slipped and hit her knee on a filing cabinet and asked for an ice pack. On June 4, 2021, at morning recess, Student became upset when someone was on her preferred swing. Student ran at peers, banged on classroom doors, cried behind some portables for five minutes, ran into a neighborhood adjacent to the school and hit several cars, and had to be restrained. Student returned to school after calming down, but the entire incident lasted 45 minutes.

Mother had declined WRAP services when initially contacted by Seneca on May 21, 2021, but at the June 2, 2021 IEP team meeting indicated that she would like the WRAP services to begin after all. The June 2, 2021 IEP specified that WRAP services for the regular school year would pause on the last day of school and start again two weeks before the next school year began. For the extend school year, services were written to start within 14 business days of June 21, 2021, the first day of the extended school year. However, Irvine arranged for Seneca to begin in-home WRAP services with Student and Parents on June 11, 2021.

Parents did not consent to the June 2, 2021 IEP, but the October 29, 2020 IEP remained in effect. The October 29, 2020 IEP offered counseling services for extended school year, so Irvine provided counseling services in extended school year 2021. Parents had also consented to five hours per week of WRAP services as offered in the April 27, 2021 IEP amendment to the October 29, 2020 IEP. Therefore, Irvine also arranged for WRAP services during extended school year 2021.

In June 2021, Parents privately placed Student in a therapeutic day camp that provided art therapy and equine therapy from June 8, 2021 through June 30, 2021.

On July 1, 2021, Student was admitted to Children's Hospital for 48 hours. Mother testified that Parents took Student to Children's Hospital because she could not control Student, and that Children's Hospital admitted Student on a psychiatric hold. No person from Children's Hospital testified at hearing. Student offered into evidence Children's Hospital's discharge instructions that did little more than list Student's medications and state that Student's had pre-existing diagnoses of autism, ADHD, disruptive mood disorder, and anxiety that were unchanged. The discharge instructions referenced a discharge plan, but the discharge plan was not offered into evidence. Without documented evidence of why Children's Hospital admitted Student or the opinions of any treating physicians, this hospitalization record was of no value in supporting or establishing any relevant fact. It did not even establish that Student was admitted for a mental, rather than a physical, problem.

WRAP services provider Seneca completed its clinical assessment on July 9, 2021. Parents reported risk factors of:

- self-harm;
- aggressive or assaultive behavior;
- traumatic experience;
- danger to others;
- disordered eating or body image concerns;
- property destruction or damage;
- high-risk sexual behaviors;
- social issues;
- severe hopelessness;

- impulsive behaviors; and
- suicide attempts.

Parents reported that Student would kick, knock things off the counter, occasionally bite and throw things, and occasionally verbalize homicidal threats. Mother reported that Student most often engaged in property damage, such as putting holes in walls or breaking her tablet. Mother reported highly sexualized behavior, described as disrobing during tantrums, playing family, and saying that she wanted to be a teenage mom. Mother reported that Student had tried to stab herself in the second grade, which Mother characterized as a suicide attempt. Seneca staff hypothesized that Student had an internal working model of herself that she did not fit in, which was confirmed when she was told that her behavior was unacceptable. Seneca prepared a treatment plan to be implemented by a therapist, behavior interventionist and parent partner. The plan sought to disconfirm Student's internal working model, assist Parents to strengthen parenting skills, and teach Student strategies to remain safe, regulate impulsive behaviors, identify triggers, and develop effective coping skills to improve overall functioning in the school, home, and social settings. Seneca's licensed clinical social worker diagnosed Student with reactive attachment disorder, with which Mother vehemently disagreed.

Beginning as early as April 2021, Mother contacted many residential treatment centers as potential placements for Student, but most would not admit students under 12 years of age. However, on July 22, 2021, Student was admitted to San Diego Children's Center, called SDCC, for residential treatment. Student did not offer into evidence any admission documents, but Father testified convincingly that Parents' health insurance paid for Student to remain at SDCC through September 27, 2021, raising a reasonable inference that Student was admitted for medical reasons. Mother

testified that the SDCC doctors wanted to adjust Student's medications, and even try eliminating some, but decided not to do so because Parents' insurance approved Student's stay in seven-day intervals, and the doctors did not want to send Student home without 24-hours per day of medication monitoring. No SDCC treatment plan was offered into evidence, so Student's treatment goals at SDCC were unknown at the time of the hearing. No treating physician or credentialed therapist from SDCC testified as to the purpose of Student's admission or her progress.

Julia Bauer, an unlicensed residential therapist working under the supervision of a clinical supervisor at SDCC, worked with Student for a part of Student's stay there. Student did not attend extended school year on admission, because the extended school year in San Diego ended two days after Student's admission and the schools associated with SDCC were no longer holding classes.

Student was housed in a cottage for 10 to 12-year-olds. Student ripped down posters, banged on walls, called peers derogatory names, sometimes wouldn't speak to SDCC staff, eloped out of her assigned area almost daily, and often would not calm down for hours. It was Bauer's opinion that this type of behavior was not unusual for patients with autism. Bauer gathered information from Mother, who told her that Student had broken her sister's arm and the family did not feel safe with Student in their home. Bauer testified that Student needed time in SDCC because Student's behaviors were interfering with her family's ability to have a safe home.

While Student was in SDCC, Seneca continued to provide WRAP services to help Parents deal with the absence of Student in the home. However, Mother told Seneca on August 18, 2021 that they no longer needed WRAP services. Parents contacted Irvine in

August 2021 and requested that Irvine convene an IEP team meeting to discuss placement. Parents wanted Irvine to place Student at SDCC for the following 2021-2022 school year.

Parents asked Bauer to make a summary of incident reports regarding Student's behavior at SDCC which was admitted at hearing. However, the actual reports were not offered into evidence, and the entries were very abbreviated, referencing such activities as disruption of the milieu, assault (defined at one point as a shove, punch, or kick), item thrown, flipping off a peer, and an attempted head butt. Moreover, Bauer was not familiar with the incidents, and had no independent recall of the reports. Accordingly, the summary was of little value in establishing behaviors that occurred at SDCC or how they were addressed. Even so, only four reports pre-dated the August 24, 2021 IEP team meeting, including disruption of the milieu, throwing an item at a peer that did not require a physical hold, kicking a peer in the back that did not result in a physical hold, and hitting, kicking and scratching a staff member that did require a physical hold.

Mother attended the IEP team meeting on August 24, 2021, with Student's lay advocate. Also in attendance were the SDCC clinical manager, Bauer, and a parent partner, therapist and behavior interventionist from Seneca. Irvine staff in attendance included:

- behavior intervention specialist Rogate;
- Haile;
- Smolinski;
- Reyes;
- school psychologist Stefanie Cachola; and
- an administrative designee.

Mother reported to the team that Student had been on a psychiatric hold at Children's Hospital and subsequently admitted to SDCC. She stated that Student was continuing to engage in maladaptive behaviors at SDCC, but that Mother was happy with the current placement because it was a closed facility, and because Student was there 24 hours a day so Student's sister was safe and the family no longer endured the trauma of having Student in their home.

Bauer reported to the team that Student had had several incident reports, and in general was not connecting with peers, stayed in her room and often did not respond to staff redirection. Student's tantrums would last for 45 to 90 minutes and longer.

The IEP team discussed placements, including the BSLC program, a nonpublic school, and SDCC. The SDCC clinical manager recommended continued residential placement to monitor Student's medication regime. Reyes explained to the IEP team the difference between an educationally related recommendation and a recommendation for medical purposes. Irvine team members opined that the placement and supports in the June 2, 2021 IEP would enable Student to make educational progress, but in light of Student being in a very restrictive medical setting, they recommended that she be transitioned to the less restrictive setting of a nonpublic school placement with an increase in the WRAP services to eight hours per week. The Irvine IEP team members recommended a nonpublic school placement after carefully considering the placement and services necessary for Student's transition from a residential treatment center to a day school placement. A nonpublic school would have a day program similar to the BSLC program but be on a smaller campus more like the environment at SDCC. They also reasoned that a fenced nonpublic school campus would address Parents' safety concerns. The nonpublic school named in the August 24, 2021 IEP amendment was Olive Crest.

Mother was very upset by the offer of a day program nonpublic school placement. According to the IEP notes and Mother's testimony, Mother told the team that she absolutely would not allow Student to return to the family home. Mother would not allow her family to be subjected to Student's behaviors. Mother stated that Student's absence had been a break for the family, and if Student returned home, Mother would call the police or take Student to the hospital every day to keep Student out of the house. Mother then left the meeting and the meeting was adjourned, to be continued to a later date. Parents subsequently told Irvine on August 27, 2021 that they did not want to schedule a second meeting. Parents did not consent to the August 24, 2021 IEP amendment.

Student's evidence did not establish that Student required a residential placement on August 24, 2021 to make educational progress. Student did not establish why Student had been admitted to Children's Hospital or SDCC. As Parents' insurance was paying for SDCC, it is more likely than not that Student had been admitted for medical reasons rather than educationally-related reasons. At the time of the August 24, 2021 IEP team meeting, Reyes had made multiple attempts to contact Student's treating psychiatrist Dr. Warikoo to discuss recent events, but Dr. Warikoo did not return her calls. Prior to the IEP team meeting, Reyes spoke with the director of the therapeutic summer camp that Student attended in June 2021, and reported that he had said Student had trouble with social interactions. The SDCC incidents reported to the team at that time were not beyond the scope of training by the BSLC staff, however, Irvine team members appropriately agreed to offer a nonpublic school because it offered a stepped transition between residential treatment and the BSLC program, and addressed concerns of Student eloping from the school campus.

In addition to the nonpublic school placement, the Irvine team members continued to recommend the one-to-one behavior aide offered in the June 2, 2021 IEP to ensure that Student was able to work on her goals and use learned strategies and coping skills in real time. They also recommended increasing the WRAP services to eight hours per week to assist Student and Parents with Student's return to the family home. Reyes opined at the IEP team meeting and was convincing in her testimony at hearing that Student's educational needs could be met in a day program at a nonpublic school which had a format similar to BSLC. The IEP team did not recommend a residential placement because Student's educational needs could be met in a less restrictive setting.

Dr. Wiest's opinion that Student required residential placement on August 24, 2021 was not persuasive. He asserted that a nonpublic school would not have been enough for Student, but he did not explain the basis for his opinion, other than to say that Student was dangerous in all settings, including on the way to school and on the way home. The reports to the August 24, 2021 IEP team of Student's behaviors in SDCC were similar to the behaviors the team saw in the BSLC program, and as discussed at Issue 10, there was compelling evidence that Student's behaviors could be addressed, and she could make educational progress in, the less restrictive environment of the BSLC program with the supports included in the August 24, 2021 amendment to the June 2, 2021 IEP.

Notably, Bauer testified that Student should not be placed in a residential treatment center for more than six months, or aggression would inevitably increase. She opined that a residential treatment center is a short-term program for stabilization, a decrease in behaviors, and control of medications, and admitted students should be returned to their homes within six months.

In accordance with *Daniel R.R.* and IDEA requirements, Irvine ensured that the placement decision at the August 24, 2021 IEP team meeting was made by a group of persons, including Parents, knowledgeable about Student, the impact of the information provided, and possible placement options. The IEP team carefully deliberated the continuum of options, including residential treatment. The Irvine IEP team members reasonably concluded that Student's educational needs could be met in the less restrictive nonpublic school placement with the supports offered in the June 2, 2021 IEP and increased WRAP services, and Student did not need a residential treatment placement.

The program offered in the August 24, 2021 amendment to the June 2, 2021 IEP was designed to address Student's unique educational needs and was reasonably calculated to ensure Student made educational progress appropriate in light of her circumstances. Therefore, it offered Student a FAPE. Irvine was not required to offer Student placement in a residential treatment center in response to Student's alleged need for 24-hour medication monitoring, the social and emotional problems Student was exhibiting in the home, or to make the family feel safe. These constituted needs separate and apart from the learning process.

Student did not meet her burden of proving by a preponderance of the evidence that Irvine denied Student a FAPE by failing to make an appropriate offer of placement and services in the IEP amendment to the June 2, 2021 IEP developed on August 24, 2021.

ISSUE 12: DID IRVINE DENY STUDENT A FAPE BY FAILING TO FULLY IMPLEMENT THE OCTOBER 29, 2020 IEP AS AMENDED ON APRIL 27, 2021?

Student contends that when Student was discharged from SDCC on November 22, 2021, Irvine denied her a FAPE by failing to immediately implement the WRAP social work services added to Student's October 29, 2020 IEP on April 27, 2021.

When Seneca contacted Parents in August 2021 about providing five hours of WRAP services per week at the beginning of the 2021-2022 school year, as required by the October 2020 IEP as amended in April 27, 2021, Mother responded on September 9, 2021, by once again declining WRAP services. This was because Parents retained an attorney on September 7, 2021, to seek reimbursement from Irvine in the event Parents had to pay to keep Student in SDCC after their insurance ran out, and Mother did not want Seneca reporting to Irvine about Student or the family during the pending due process proceeding.

Parents informed Irvine on November 17, 2021, that Student would be discharged from SDCC on November 22, 2021. Irvine responded with a prior written notice that Parents had not consented to the June 2, 2021 IEP or the August 24, 2021 amendment that offered nonpublic school placement, but upon Student's discharge Irvine stood ready to implement the October 29, 2020 IEP as amended with five hours of WRAP services by the April 27, 2021 IEP amendment to which Parents had consented.

Parents subsequently notified Irvine that Student had been accepted into Ocean View, a nonpublic school, and requested an IEP amendment without a meeting to change the nonpublic school named in the August 24, 2021 IEP amendment. Irvine

agreed and sent Parents an amendment to the June 2, 2021 IEP, dated November 23, 2021, placing Student at Ocean View. The November 23, 2021 IEP amendment stated that the only change was in the nonpublic school named, but it also incorporated the services offered in the August 24, 2021 IEP amendment, including eight hours per week of WRAP services.

Parents consented to the November 23, 2021 IEP amendment on November 28, 2021, but continued to decline to consent to the June 2, 2021 IEP or the August 24, 2021 amendment.

Irvine contacted Parents on December 1, 2021, to clarify that Parents were also consenting to the increase in WRAP services to eight hours per week originally offered in the August 24, 2021 IEP amendment, but reflected in the November 23, 2021 IEP amendment. Parents responded that same day that the number of hours of WRAP services offered in the August 24, 2021 IEP amendment was one of the subjects of Student's due process filing against Irvine, and Parents wanted only the five hours of WRAP services as previously provided under the October 20, 2020 IEP.

Student's WRAP services through Seneca were immediately arranged upon Parents' consent to the November 23, 2021 amendment, at the five hours per week requested by Parents. Within 14 days of Parents' November 28, 2021 consent, five hours of WRAP services were consistently offered, although Parents often canceled. Any failure to access the full five hours of services was due to Parents declining the service. Irvine arranged the prompt start of WRAP services, and approximately one hour per week of WRAP services was spent coordinating with the staff at Ocean View regarding

Student's WRAP treatment plan goals. Indirect consultation with the nonpublic school was consistent with the description of WRAP services in the November 23, 2021 IEP amendment, which read in part:

[WRAP service are] Intensive in-home services to support the family and the student's progress in their education program through individual/parent/family counseling, social work services, and behavior intervention services (this is determined based on student's needs) ... This includes call-in support. Services will include a combination of direct services (face to face with student and family) and indirect services (consultation/case management) which can be divided up by family/service provider as seen fit over the month.

Mother testified that Parents and Student did not get the full five hours of WRAP services per week after November 23, 2021, but her recall of the type of services provided by Seneca and the length of sessions was uncertain and frequently changed. Mother also testified that she did not consider services provided at Ocean View to be accountable as part of the five hours of WRAP services offered in the June 2, 2021 IEP. She was similarly dismissive of phone calls from Seneca's parent partner. Mother's testimony did not establish that Irvine had not made five hours per week of WRAP services available after Parents' consent to the November 23, 2021 IEP amendment, as limited to five hours by Mother's December 1, 2021 correspondence.

Student did not meet her burden of proving by a preponderance of the evidence that Irvine denied Student a FAPE by failing to fully implement the October 29, 2020 IEP as amended on April 27, 2021 by failing to provide WRAP services immediately upon Student's discharge from SDCC.

ISSUE 13: DID IRVINE DENY STUDENT A FAPE BY FAILING TO MAKE AN APPROPRIATE OFFER OF SERVICES IN THE IEP DEVELOPED ON NOVEMBER 23, 2021?

Student contends that the development of the November 23, 2021 IEP without an IEP team denied Parents the opportunity to participate in the development of Student's educational program. Student also contends that she was not offered sufficient WRAP services, a transition plan from SDCC, or sufficient support services for a nonpublic school placement. Irvine contends that Student failed to present any evidence that Irvine failed to identify Student's educational need or address them in the June 2, 2021 IEP as amended on November 23, 2021.

Parents contacted Irvine on November 17, 2021, after receiving SDCC's discharge plan to discharge Student on November 22, 2021. Parents indicated that they were looking at different nonpublic schools from the one Irvine recommended in the August 24, 2021 IEP amendment to the June 2, 2021 IEP. Irvine sent a prior written notice letter to Parents on November 22, 2021, that Parents had not consented to the June 2, 2021 IEP or the August 24, 2021 IEP amendment, and until consent was received, Irvine stood ready to implement Student's October 29, 2020 IEP with five hours of WRAP services in the April 27, 2021 amendment to which Parents had consented.

Instead, Parents contacted Irvine after receiving the November 22, 2021 notice and informed Irvine that Student had been accepted to Ocean View and requested that Irvine send them an amendment without a meeting offering Ocean View in lieu of Olive Crest. On November 23, 2021, Irvine prepared the amendment at Parents' request and sent it to Parents, who signed consent right after the Thanksgiving Break, on November 28, 2021. Irvine was on Thanksgiving break from November 24 through

November 26, 2021, but due to Irvine's prompt response to Parents, Student began attending Ocean View on November 29, 2021.

The regulations implementing the IDEA expressly permit parents and school districts to amend an IEP without an IEP team meeting. (34 C.F.R. § 300.324(a)(4) & (6)). Parents did just that by requesting the November 23, 2021 IEP amendment without a meeting and consenting to that amendment. Irvine did not deprive Parents of an opportunity to participate in the development of Student's educational program by agreeing to their request for an amendment to name Ocean View as the recommended nonpublic school for placement.

Student contends that SDCC's discharge instructions included continuing with therapeutic services, WRAP services, behavioral interventions, psychiatry services, and medications to address Student's mental health needs, but the November 23, 2021 IEP amendment did not include these components in a plan to transition Student from residential treatment to a nonpublic school, and so denied her a FAPE.

Student's evidence did not establish that Irvine failed to offer Student a FAPE by not having a transition plan in the November 23, 2021 IEP amendment. First, no person familiar with the SDCC discharge plan testified as to school-based recommendations. Bauer had not observed Student at school during her hospitalization at SDCC and had no opinion on the amount of WRAP services necessary to meet Student's educational needs. Bauer, an unlicensed intern therapist, testified that SDCC often recommended 10 to 12 hours per week of wrap services upon discharge, but was not qualified to say if that was appropriate for Student.

Second, Dr. Wiest admitted he did not know what WRAP services entailed and offered no opinions on the sufficiency of the WRAP services offered at the time of the November 23, 2021 IEP.

Third, Student's extensive IEP team of educational professionals familiar with Student had considered Student's transition from residential treatment to a nonpublic school at the August 24, 2021 IEP team meeting held expressly to consider Student's post-discharge placement. Student's evidence did not establish that Student's educational needs were any different on November 23, 2021, than they were on August 24, 2021. If anything, the serious incident summary prepared by Bauer established that Student's behaviors from August 25, 2021 through November 22, 2021 were essentially the same as from July 22, 2021 through August 24, 2021. In fact, Student's behaviors had decreased to zero serious behavior incidents in October 2021, and the SDCC discharge plan indicated that Student's social emotional functioning was more stable.

Lastly, Student did not prove that Parents provided a copy of the discharge plan with SDCC's treatment recommendations to Irvine for consideration. Student put in evidence a number of letters from Student's attorney and correspondence from Mother relaying information to Irvine, but SDCC's discharge plan was not referenced or included in any of them.

This decision finds at Issue 11 that the June 2, 2021 IEP, as amended on August 24, 2021, offered Student a FAPE, including placement and services to address Student's transition from a residential treatment center. Student's evidence did not establish that Student's educational needs had changed between the August 24, 2021 IEP amendment and the November 23, 2021 IEP amendment. Accordingly, Student did

not meet her burden of proving by a preponderance of the evidence that Irvine denied Student a FAPE by failing to make an appropriate offer of services in the IEP developed on November 23, 2021.

ISSUE 14: DID IRVINE DENY STUDENT A FAPE BY FAILING TO FULLY IMPLEMENT THE NOVEMBER 23, 2021 AMENDMENT IEP?

Student contends that when Parents consented to the November 23, 2021 IEP, Irvine's WRAP provider failed to implement the services as intended. Irvine contends that Seneca provided Student the five hours of WRAP services per week consented to by Parents.

Mother testified that Seneca did not provide WRAP services as intended because it completed another assessment of Student's social work needs and prepared a new treatment plan, and was not open to providing in-home services to ensure that Student got to school at Ocean View each day. Student points to the notes of the January 11, 2022 IEP as support for Mother's testimony.

As discussed at Issue 12, Mother's testimony regarding Seneca's provision of services was vague, confused, and showed a disregard and misunderstanding of the WRAP services offered, despite an express explanation of those services in the November 23, 2021 IEP amendment. Her testimony was not credible or persuasive as to the number of hours and types of WRAP services provided.

The IEP of January 11, 2022 does not corroborate Mother's testimony. It contradicts Mother's testimony by stating in the IEP notes that Seneca reported that it

had been working with the family for the prior month, building relationships, and working to address Student's morning routine as the primary challenge with consistent family engagement.

Student's argument that Seneca should not have been conducting a new assessment of Student's social work needs and preparing a new treatment plan is also illogical. Student was discharged from residential treatment at SDCC on November 22, 2021. Student returned home and began attending a day program at Ocean View on November 29, 2021. Seneca had previously delivered services as Student was ending the 2020-2021 school year at the BSLC program, and during the extended school year 2021 just as Student entered residential treatment. A new assessment and treatment plan were necessary to determine Student's social work needs for attendance in a day program after four months of intervening residential treatment. The assessment of Student's needs and preparation of a treatment plan were well within the express definition of WRAP services contained in the November 23, 2021 IEP amendment.

The notes of the January 11, 2022 IEP corroborate Reyes' testimony that Seneca began providing five hours per week of WRAP services in December 2021. Irvine's Winter Break was from December 20 through December 31, 2021, and the November 23, 2021 IEP amendment, signed by Parents on November 28, 2021, expressly stated that WRAP services could take up to 14 days to be put in place. The January 11, 2022 IEP notes that Seneca had started working with the family demonstrated a reasonable timetable for services with the start of an assessment for development of a treatment plan in December 2021.

Irvine promptly began providing five hours per week of WRAP services after Parents consented on November 28, 2021 to the November 23, 2021 IEP amendment,

and clarified to Irvine on December 1, 2021 that Parents were consenting to only five hours of WRAP services per week. Student did not meet her burden of proving by a preponderance of the evidence that Irvine denied Student a FAPE by failing to fully implement the November 23, 2021 amendment IEP.

ISSUE 15: DID IRVINE DENY STUDENT A FAPE BY FAILING TO MAKE AN APPROPRIATE OFFER OF SERVICES IN THE IEP DEVELOPED ON JANUARY 11, 2022?

Student contends that the offer in the January 11, 2022 IEP did not adequately address extended school year services, WRAP services, and transition supports. Student also contends that Student should have been offered extended school year services at Student's nonpublic school in January 2022. Irvine contends that no evidence was presented to challenge the adequacy of the program offered in the January 11, 2022 IEP, and Student's own expert testified to the program's appropriateness.

Student began attending Ocean View a few weeks before the 2021 Winter Break, and Irvine convened a 30-day IEP team meeting to review Student's progress at Ocean View on January 11, 2022. Student's teacher and school counselor at Ocean View reported to the IEP team that Student was adjusting well. Seneca reported that its WRAP team was working with Student and Parents on Student's morning routine, and Student's teacher reported that Student was joyful and happy when she arrived at school. Student's speech services provider at Ocean View reported that Student readily participated in speech therapy sessions. The teacher and staff from Ocean View indicated that the behavior supports embedded in their program and the behavior intervention plan they used in their program were sufficient to address Student's behaviors, as Student was easily redirected. Ocean View staff did not request any

changes to the offer of goals, specialized academic instruction, related services or accommodations in the June 2, 2021 IEP, as amended to offer the nonpublic school of Ocean View in the November 23, 2021 IEP amendment.

Mother reported that she was adjusting Student's mediations, and both Parents indicated that they believed Student was in a honeymoon period with Ocean View and worried that Student's behaviors would soon escalate. However, Dr. Wiest observed Student in her placement at Ocean View a month later in February 2022 and opined that Student was still doing very well there. Student was generally calm and compliant. Although she could be immature, impulsive, oppositional, and argumentative, she was not experiencing meltdowns. Significantly, at hearing, Dr. Wiest admitted that the services offered in the January 11, 2022 IEP were fine. Student was doing well at Ocean View and Parents' concerns were speculative. Irvine was not required to change its offer to address Parents' speculative concerns. Student did not establish that Student was denied educational benefit because the January 11, 2022 IEP offer was not changed to address Parents' concerns that Student might begin misbehaving at some point in the future.

As discussed at Issues 12 and 14, Seneca provided five hours of WRAP services per week after Parents' consent to the November 23, 2021 IEP amendment, as clarified by Mother on December 1, 2021.

Student unpersuasively argues that attendance at a public school program for extended school year 2022 would have been too jarring for Student after a semester in nonpublic school, and that for consistency Irvine should have offered extended school year at Ocean View. However, at the time of the January 11, 2022 IEP, Student had only been attending Ocean View for approximately 30 days, and it was premature for

Student's IEP team to revisit whether or not Student would need extended school year, let alone at Ocean View. The IEP notes documented that the IEP team discussed extended school year and that the offer of extended school year would be revisited at Student's annual IEP review in April 2022. Irvine's 2021-2022 school year was not scheduled to end until June 3, 2022, and Student's claim that Irvine's failure to change the offer of extended school year services in January 2022 denied her a FAPE is premature.

Student did not meet her burden of proving by a preponderance of the evidence that Irvine denied Student a FAPE by failing to make an appropriate offer of services in the IEP developed on January 11, 2022.

ISSUE 16. WAS IRVINE'S JUNE 2, 2021 MULTIDISCIPLINARY ASSESSMENT REPORT APPROPRIATE, SUCH THAT IRVINE IS NOT REQUIRED TO FUND INDEPENDENT EDUCATIONAL EVALUATIONS OF STUDENT AT PUBLIC EXPENSE?

Irvine contends that its multidisciplinary assessment was timely conducted with Parents' consent in compliance with statutory requirements and elicited accurate and helpful information for the June 2, 2021 IEP team for use in developing an appropriate educational program for Student. Student contends that the assessment report was not an accurate reflection of Student's needs, and independent educational evaluations are necessary to determine Student's unique and significant needs.

NOTICE AND CONSENT

Reassessment generally requires parental consent. (20 U.S.C. § 1414(c)(3); Ed. Code, § 56381, subd. (f)(1).) To start the process of obtaining parental consent for a

reassessment, the school district must provide proper notice to the student and his or her parents. (20 U.S.C. §§ 1414(b)(1), 1415(b)(3) & (c)(1); Ed. Code, §§ 56321, subd. (a), 56381, subd. (a).) The notice consists of the proposed assessment plan and a copy of parental rights and procedural safeguards under the IDEA and companion State law. (Id.) The assessment plan must be in language easily understood by the general public, be provided in the native language of the parent, explain the types of assessments the district proposes to conduct, and state that an IEP will not result from the assessment without the consent of the parent. (Ed. Code, § 56321, subds. (b)(1)-(4).) The school district must give the parent 15 days to review, sign, and return the proposed assessment plan. (Ed. Code, § 56321, subd. (a).)

Here, Irvine provided Parents with sufficient notice of the proposed assessments and obtained Parents' prior written consent. The assessment plan, dated March 26, 2021, sought consent to evaluations in the areas of:

- academic achievement;
- health;
- language and speech communication development;
- social emotional and behavioral functioning;
- adaptive behavior; and
- alternative assessment of Student's intellectual development;

as well as a functional behavior analysis and assistive technology assessment requested by Parents. The assessment plan enclosed a copy of parental rights and procedural safeguards under the IDEA and companion State law. It was in language easily understood by the general public, in Parents' native language of English, explained each

type of assessment Irvine proposed to conduct, and stated that no special education services would be provided to Student without Parents' written consent. Parents reviewed and signed the assessment plan within 15 days on April 5, 2021.

TIMELINESS OF ASSESSMENT

An IEP required as a result of an assessment must be developed within a total time not to exceed 60 days, not counting days between the student's regular school sessions, terms, or days of school vacations in excess of five school days, from the date of receipt of the parent's written consent for assessment, unless the parent agrees to an extension in writing. (Ed. Code, § 56344, subd. (a).)

Here, Parents consented to assessment plan on April 5, 2021. The assessments were conducted, the multidisciplinary assessment report completed, and an IEP team meeting was timely held to review the assessment results on June 2, 2021, within 60 days of Parents' written consent.

ASSESSMENT REQUIREMENTS

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

School district assessors must review existing evaluation data on the child, including information provided by the parents, current classroom based, local or State assessments, classroom-based observations, and observations by teachers and related service providers. (20 U.S.C. § 1414(c)(1); 34 C.F.R. §300.305(a)(1).)

When conducting assessments, assessors must use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information, including information provided by the parent. (20 U.S.C. § 1414(b)(2)(A); 34 C.F.R. § 300.304(b)(1).) No single measure or assessment shall be the sole criterion for determining whether a child is a child with a disability. (20 U.S.C. § 1414(b)(2)(B); 34 C.F.R. § 300.304(b)(2); Ed. Code, § 56320, subd. (e).) Assessments must be sufficiently comprehensive to identify all of the child's special education and related service needs, whether or not commonly linked to the disability category of the child. (34 C.F.R. § 300.304(c)(6).) The assessor must use technically sound testing instruments that demonstrate the effect that cognitive, behavioral, physical, and developmental factors have on the functioning of the student. (20 U.S.C. § 1414(b)(2)(C); 34 C.F.R. § 300.304(b)(3).)

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

Assessments must be selected and administered so as to best ensure that, if the child has impaired sensory, manual or speaking skills, the assessment results accurately reflect the child's aptitude or achievement level or other factors the test purports to measure, rather than reflecting the child's impaired sensory, manual or speaking skills, unless those skills are the factors the test purports to measure. (34 C.F.R. §300.304(c)(3); Ed. Code, § 56320, subd. (d).) Assessment tools and strategies must provide relevant information that directly assists persons in determining the educational needs of the child. (20 U.S.C. § 1414(b)(4); 34 C.F.R. §300.304(c)(7); see also Ed. Code, § 56320, subd. (b)(1).)

The personnel who assess the student shall prepare a written report that must include whether the student may need special education and related services, and the basis for making that determination. It must include the relevant behavior noted during observation of the student in an appropriate setting, the relationship of that behavior to the student's academic and social functioning, and the educationally relevant health, development, and medical findings, if any. If appropriate, the report must include a determination of the effects of environmental, cultural, or economic disadvantage and, consistent with superintendent guidelines for low incidence disabilities (those effecting less than one percent of the total statewide enrollment in grades K through 12), the need for specialized services, materials, and equipment. (Ed. Code, § 56327; see also 34 C.F.R. § 300.305(1) and (2).) The report must be provided to the parent at the IEP team meeting regarding the assessment. (Ed. Code, § 56329, subd. (a)(3).)

A student may be entitled to an independent educational evaluation if the student or parent disagrees with an evaluation obtained by the school district and requests an independent evaluation at public expense. (20 U.S.C. § 1415(b)(1); 34 C.F.R. §300.502 (a)(1); Ed. Code, §§ 56329, subd. (b) and 56506, subd. (c).) If a parent requests

an independent educational evaluation, the school district must either fund the evaluation at public expense, or file a due process complaint and obtain a final decision that its evaluation was appropriate. (34 C.F.R. § 300.502(2); Ed. Code, § 56329, subd. (c).)

ANALYSIS COMMON TO ALL ASSESSMENTS AT ISSUE

Irvine had consent to assess Student in the areas of:

- academic achievement;
- health, language and speech communication development;
- social emotional and behavioral functioning;
- adaptive behavior;
- functional behavior;
- assistive technology; and
- an alternative assessment of intellectual development.

As Student identified as African-American and White, California law prohibited Irvine from using standard assessments of intelligence, which had been found to be racially discriminatory. (See *Larry P. v. Riles* (9th Cir. 1984) 793 F.2d 969, 984.)

All of Irvine's assessors were qualified to conduct the assessments.

- School psychologist Stefanie Cachola;
- school nurse Julia Monarch;
- special education teacher Smolinski;
- school counselor Haile;
- speech provider Essen;
- behavior specialist Rogate; and
- assistive technology specialist Sarah Low;

were each properly licensed or credentialed and had the necessary experience to conduct assessments in their respective areas of expertise. Each of Irvine's assessors was familiar with Student's disabilities of autism, ADHD, anxiety and emotional disturbance, and had experience assessing children with these disabilities. Each assessor chose their assessment instruments and procedures based upon their knowledge of Student and were trained and knowledgeable in them.

The assessors used multiple assessments and a variety of assessment tools including records review, observation, interview, and standardized and non-standardized instruments to evaluate Student in the areas of:

- health and development;
- academic achievement;
- communication development;
- assistive technology;
- social emotional and behavioral functioning;
- adaptive behavior; and
- the functions of Student's behaviors.

The assessment instruments chosen were designed to gather information on Student's functional, developmental and academic levels to guide Student's IEP team in determining Student's special education eligibility and designing an educational program to meet her needs. Each assessor was aware of Student's history of social communication difficulties, attention deficits, and recent increases in inappropriate behaviors in the school setting and chose assessment instruments or strategies appropriate in light of Student's disabilities, and to ensure accurate results.

The assessments were not racially, sexually, or culturally biased, were given in Student's primary language of English, administered in accordance with instructions, and were valid for the purpose for which they were used. Student's hyperactivity and inattention sometimes affected her test results, as when she clicked hurriedly through a computer-based test of reading, or was fidgety on the day Cachola used purely auditory tests without a visual focal point. At such times, the assessors adhered to the test protocols, and noted that Student's behaviors had to be considered when interpreting results as possibly not reflective of Student's true ability. None of the assessors relied upon a single measure or criterion, and together, the components of the multidisciplinary assessment were sufficiently comprehensive to identify all of Student's educational needs, whether or not linked to Student's disabilities.

The test instruments used were technically sound, and as a whole demonstrated the effect of cognitive, behavioral, physical, and developmental factors on Student's functioning. The assessment results were valid, and provided useful information regarding Student's:

- social communication;
- social emotional functioning;
- behavioral functioning;
- adaptive behavior;
- academic achievement;
- cognitive processing; and
- use of assistive technology.

The assessment results demonstrated that Student had overall low to below-average cognitive abilities, had made progress in some academic areas but still needed intervention in others, had trouble with figurative language and reading social context

cues, and had engaged in aggression and noncompliance to gain attention and escape demands, all of which adversely affected Student's educational progress and performance.

The multidisciplinary assessment report included the assessors' conclusions that Student needed special education and related services, and their basis for making that determination. The disciplinary report included reports by multiple assessors of observations of Student in a variety of school and test settings, and the relationship of Student's behavior to academics and social functioning. The assessors reported the relationship of Student's behavior to her academic and social functioning, and educationally relevant health, development, and medical findings, particularly Student's diagnoses of autism, ADHD, anxiety and mood dysregulation disorder. Parents reported a possible history of abuse or trauma prior to Student's adoption at two weeks of age, and the assessments reported no concerns with environmental, cultural, or economic disadvantage. Student did not have a low incidence disability.

At or before the June 2, 2021 IEP team meeting, Parents were timely provided with the multidisciplinary assessment report that explained all of the assessments, the results, and included recommendations for Student's education. The report was discussed at an IEP team meeting that was attended by all necessary people and in which Parents fully participated.

Student put on no evidence to contradict the results of the

- health and development;
- academic achievement;
- communication development;
- assistive technology;

- adaptive skills;
- functional behavior; or
- alternative assessment of intellectual development portions of the multidisciplinary assessment.

Student's expert, Dr. Wiest, did take issue with Smolinski's report of academic scores using the Cross Battery Classification of Performance rather than the Universal Classification of Performance, and interpreted Student's social emotional results as needing a higher level of intervention. But despite the difference in interpretation, Irvine's assessment results were consistent with prior testing and remarkably similar to those obtained by Dr. Wiest in February 2022.

HEALTH AND DEVELOPMENTAL UPDATE

Monarch was well-qualified and competent to assess Student in the area of health and development. Monarch was a registered nurse and credentialed school nurse, as well as a certified school audiometrist. She had been a registered nurse for almost 20 years, and a school nurse for eight years when Student was assessed.

Student passed both the vision and hearing screenings. Monarch listed Student's medications and provided a developmental history and family history as reported by Mother. Student's use of medications, and its possible effect on such things as attention and behavior, were noted throughout the multidisciplinary report. Student's developmental and family history, as relevant, was also discussed in various components of the multidisciplinary report, particularly in the social emotional and behavioral component.

ACADEMIC ACHIEVEMENT

Smolinski was well-qualified and competent to assess Student in areas of academic achievement. She was a credentialed special education teacher and had experience working with children with various disabilities, including autism and emotional disturbance. Smolinski was particularly familiar with Student and her disabilities, as she had been Student's teacher for most of the 2020-2021 school year.

Smolinski gathered information on Student's academic needs and abilities from a variety of sources and did not rely on any one measure. Smolinski reviewed Student's existing assessments, spoke to Mother about her concerns, and spoke with special education teacher Rosure about Student's present levels and progress. Smolinski observed that Student liked one-to-one engagement in the classroom and thrived in small group interactions with frequent redirections from instructional staff. Smolinski assessed for all of Student's academic needs, whether or not related to Student's disability, by administering a variety of standardized instruments in the areas of academic performance. Smolinski noted that Student was fidgety, restless, and distracted often, across multiple testing sessions. Student was comfortable and confident on simpler tasks but typically tended to give up as tasks became more difficult.

On one test of achievement, Student scored in the average to high-average in most areas of reading, with low-average scores in sentence reading fluency and reading comprehension, with low-average scores in writing overall, and very low scores in all areas of math. On a guided reading assessment, Student was able to read at

grade-level text at a slow pace, comprehend the text, recall key details, and draw inferences. However, on a computer-based reading assessment to screen for the need for intervention, Student scored with an urgent need for intervention, and on a computer-based math screening, Student also scored with an urgent need for intervention. Smolinski concluded that Student could read and understand grade level text that was not too difficult and could write simple but adequate sentences. However, Student had limited understanding of grade level math tasks, and still counted on her fingers.

Dr. Wiest was critical of Smolinski's report of some assessment results using a scale that captured a much larger range of average performance. However, on Dr. Wiest's own February 2022 academic tests scored on a universal standard, Student was also generally in the average range for reading and writing, with low-average scores in math. Notably, at hearing Dr. Wiest opined that Student had been learning academics and that the academic goals in the June 2, 2021 IEP in reading comprehension, writing, and math developed from the academic assessment were appropriate. Dr. Wiest's primary concern was in the area of social communication, which was impacted by Student's autism.

COMMUNICATION DEVELOPMENT

Essen was well-qualified and competent to assess Student in the areas of communication development. She was a licensed language and speech pathologist, and had experience working with children with various disabilities, including speech disorders, autism, and emotional disturbance. Essen was particularly familiar with

Student and her disabilities, as she had provided speech therapy to her for 30 minutes per week in a small group during the 2019-2020 and 2020-2021 school years, both in-person and online during school closures.

Essen gathered information on Student's speech and language needs and abilities from a variety of sources and did not rely on any one measure. Essen reviewed Student's existing assessments, spoke to Mother about her concerns, and obtained responses from Mother and special education teachers Rosure and Smolinski on a rating scale of language, speaking, and listening. Essen observed Student during her assessment of Student's language and speech. She assessed for all of Student's speech and language needs, whether or not related to her disability, by administering a variety of standardized instruments to test Student in the areas of pragmatic skills, often referred to as social skills, and metalinguistics or using context to make appropriate inferences. Test results showed that Student had strengths in making inferences, understanding multiple meanings of words, basic conversation skills, using nonverbal cues and being aware of social routines. However, she had difficulty understanding figurative language, reading contextual clues, and understanding nonverbal cues. Consistent with Mother and teacher reports, Student often misread the intentions of others, causing frustration and leading to peer conflict. Student's knowledge of appropriate social skills was stronger than her ability to consistently demonstrate those social skills.

Essen used measures relevant to Student's educational needs and designed to provide Student's IEP team with information on how Student's language needs impacted her education in relation to academic and social functioning. Essen identified pragmatic language as an area of concern that required support.

Essen's testimony concerning her assessment and Student's communication needs and the special education and related services to meet those needs was persuasive, and no other language and speech pathologist was called to contradict her conclusions.

ASSISTIVE TECHNOLOGY

Low was well-qualified and competent to assess whether assistive technology would support Student's educational program. She held an assistive technology specialist certificate and had experience conducting 12 to 15 assistive technology assessments per year for Irvine since 2017.

Low gathered information on how Student accessed curriculum from a variety of sources, including informal tools and measures, input from teachers, Mother and Student, and observation in the classroom, and did not rely on any one measure. Low conducted a non-standardized trial of assistive technology devices and programs in a one-to-one setting, to gauge Student's ability and comfort with different levels of assistive technology. Mother reported that Student was easily frustrated with reading and writing and would not complete work. Teachers reported concerns with Student reading longer passages, increasing her comprehension, her ability to use proper grammar and punctuation, and in the areas of multi-paragraph composition, math calculation and task initiation.

Student liked using technology-based platforms, although she actually wrote faster than she typed. Student was able to access all of the different technology trialed and demonstrated a willingness to complete written tasks when the writing tasks were

broken down and she was given choices on how to complete those tasks. Low reviewed her assessment at the June 2, 2021 IEP team meeting. The IEP team adopted her accommodation recommendations, as well as her recommendation for 90 minutes per year of assistive technology consultation to manage technology subscriptions and platforms used by Student, to provide staff training at the site level, and to offer Student and her family assistance.

Low's opinions concerning her assessment, and assistive technology that she determined supported Student's access to education was persuasive, and no other certificated assistive technology specialist was called to contradict her conclusions.

SOCIAL EMOTIONAL AND BEHAVIORAL FUNCTIONING

Cachola and Haile were well-qualified and competent to assess Student in areas of social emotional and behavioral functioning. Cachola was a licensed educational psychologist and had been a credentialed school psychologist for over 10 years. Cachola had a Bachelor of Arts in psychology and a masters' degree in educational psychology. She was certified in restorative justice practices, crisis intervention and recovery, and PROACT assault crisis training. Haile was a licensed clinical social worker with a pupil personnel credential in social work. She held certificates in identification of child abuse and maltreatment, trauma-focused cognitive behavior therapy, managing and adapting practice and clinical supervision.

Haile had worked in youth and family counseling since 2006, including 24 on-call crisis coverage, and had been a school-based therapist with experience conducting social emotional assessments for 15 years prior to assessing Student. Haile had many

years and extensive hours of training in many areas of disability, including autism and emotional disabilities, in addition to crisis training and courses in supporting students with emotional disabilities. In addition, Haile had been Student's educationally related mental health services therapist since fall 2019. The evidence clearly established that Student liked and trusted Haile and relied on Haile for support.

Cachola and Haile gathered information on Student's social emotional and behavioral needs from a variety of sources and did not rely on any one measure. They reviewed Student's existing assessments, spoke to Mother about her concerns, and spoke with Rosure about Student's present levels and progress. They were aware of and reviewed Student's behavior reports, and Haile was familiar with Student's behaviors as reported because she was the school counselor associated with Student's BSLC classroom and was herself involved in addressing the March 25 and May 25, 2021 behaviors. Cachola observed Student on the playground on April 28, 2021, during which time Student became upset that another student called her names, and another student that was on the swing that Student wanted. Cachola saw Student returned to the classroom and the cool down room. Likewise, Haile observed Student at recess on April 29, 2021, during which time Student acted appropriately during a movement break, transitioned calmly from the classroom to the playground, and Student interacted appropriately with her peers while organizing and playing a game of tag. On an inventory of executive functioning, Mother scored Student low in all areas, but both Mother and Rosure ranked Student as having difficulty in regulating her emotions, particularly in staying calm when handling small problems and reacting with the appropriate level of emotion. Student also had poor ability to control behavior or impulses, including thinking about consequences before acting. On an autism rating

scale, Mother ranked Student's behaviors similar to youth diagnosed with autism as very elevated, although Rosure rated Student's behaviors as slightly elevated. The responses of both indicated that Student had problems with peer socialization, atypical language, behavior rigidity, and sensory sensitivity.

On a rating scale of behavior, both Mother and Smolinski reported Student's behaviors as very elevated in the areas of:

- emotional distress;
- separation fears;
- social anxiety;
- defiant and aggressive behaviors;
- academic difficulties;
- language;
- hyperactivity;
- perfectionist and compulsive behaviors; and
- violence potential.

On an anxiety scale completed by Student, she rated herself as having moderate problems with physiological anxiety, worry, and social anxiety. A self-report clinical inventory intended to identify psychological problems in pre-adolescents, indicted that Student sought reassurance from others but expected to lose their support. Student felt that significant relationships had become increasingly insecure and in response she became moody and withdrawn, interspersed with periods of cognitive difficulty, unruly behavior, and angry outbursts. Student's cognitive difficulties complicated matters, including attention deficits, learning deficits, inattentiveness, and hyper-distractibility. Rebellious and disruptive acts and noncompliance were prominent in Student's behavior

pattern. The clinical inventory recommendation was not to set goals too high or press changes too quickly because Student could not tolerate demands or expectations well. Cachola and Haile concluded that Student had a mental health condition that was driving physically aggressive behaviors, as well as anxiety related to peer socialization, behavior rigidity, and emotional dysregulation that negatively impacted Student's ability to access her education.

Student's expert, Dr. Wiest opined that autism was the best explanation for Student's behaviors, but also opined that the part of Student's brain responsible for emotions was dysregulated, and that Student was so emotional and inattentive that it would be hard for her to follow teacher instructions, read longer texts, or complete work assignments. Dr. Wiest's primary concern was in the area of social communication, which was impacted by Student's autism. Dr. Wiest interpreted the results of the social emotional and behavioral assessment differently from Cachola and Haile. However, his overall view of Student's behavioral difficulties was similar to theirs, although he concluded that the results of the assessment indicated that Student would be more violent than Cachola and Haile concluded. Dr. Wiest's slightly differing opinion was insufficient to demonstrate that the social emotional and behavioral component of the multidisciplinary assessment was incorrect, insufficient, or otherwise not in compliance with the legal requirements for a school assessment.

ADAPTIVE SKILLS

School psychologist Cachola was well-qualified and competent to assess Student in area of adaptive skills. She gathered information on Student's adaptive skills from a variety of sources and did not rely on any one measure. Cachola had Mother and Smolinski complete behavior scales that rated adaptive and maladaptive behaviors.

Mother scored Student low in communication, daily living skills, and socialization. Mother also rated Student high in internal emotional problems and external behavior such as acting out. Smolinski gave Student an average communication score, but also ranked Student low in daily living skills and socialization. She similarly rated Student with elevated internal and external maladaptive behaviors. Cachola concluded that Student possessed age-appropriate skills to perform activities of daily living but struggled to initiate and perform these tasks when dysregulated, indicating a performance deficit rather than a skill deficit.

Dr. Wiest's own testing showed that Student was below-average in adaptive behavior. Although he opined that Student's adaptive skills deficits were due primarily to Student's autism rather than emotionally based, his opinion did not establish that Irvine's adaptive skills assessment was inadequate or improperly performed in any way.

FUNCTIONAL BEHAVIOR ASSESSMENT

Rogate was well-qualified and competent to conduct a functional behavior analysis of Student. She possessed a bachelor's degree in psychology and elementary education, and a master's degree in counseling psychology. She had worked as a behavior therapist providing in-home behavioral intervention to children with autism for seven years and was the program supervisor for individual behavioral therapy programs for another four years until obtaining a board certified behavior analyst certificate in 2018. Rogate had been a behavior intervention specialist with Irvine since 2019 and worked with the BSLC program one to four times per week, as needed. She was also a PROACT trainer. Rogate was familiar with Student because the BSLC program had asked her for extra support in March 2021, just prior to Mother's consent to the triennial assessment.

Rogate gathered information on the functions of Student's behavior from a variety of sources and did not rely on any one measure. She conducted a direct and indirect assessment, a Parent interview, a teacher interview, and developed data sheets for Rosure and the BSLC staff to gather data on Student's behavior, for which she trained them. Rogate collected data from May 6 through May 18, 2021, across all educational settings. She determined the target behaviors of elopement, property destruction, and physical aggression in conjunction with Student's IEP team. She observed Student and interviewed Student, although Student did not exhibit the targeted behaviors on the day she observed Student in school.

Rogate concluded that Student's target behaviors were maintained by attention, and to a lesser degree by access to tangibles and activities or escape from non-preferred tasks. Rogate recommended and proposed a behavior intervention plan outlining function-based proactive and reactive strategies to address the target behaviors. She also recommended goals to reduce the target behaviors and strengthen replacement behaviors and skills. Rogate acknowledged that a functional behavior assessment was based solely on patterns of behavior, but based on the interviews she conducted, she concluded that Student's behavior was likely impacted by Student's mental health as well as medications.

Dr. Wiest admitted that he was not a behavior specialist and conceded that he did not know if additional behavior intervention would have adequately addressed the behaviors Student was exhibiting in March through June 2021. No behavior intervention specialist testified to contradict Rogate's opinion on the functions of Student's behavior and the services and program components proposed to address Student's elopement, property destruction, and physical aggression.

The weight of evidence established that each component of the multidisciplinary assessment complied with all statutory requirements and provided accurate and valuable information to the June 2, 2021 IEP team. The health assessment eliminated vision and hearing problems and provided developmental and medication information that informed other portions of the assessment. The academic assessment identified Student's academic deficits in reading, writing, and math. The communication development assessment identified pragmatic and metalinguistic deficits that impacted Student's ability to interact appropriately with peers and comprehend text and word problems. The assistive technology assessment identified areas where technology and accommodations could improve Student's access to curriculum, particularly in fostering independence in reading, writing, and spelling.

The social emotional and behavioral functioning assessment was particularly extensive and thorough, and identified all of Student's educationally related mental health needs that impacted her access to education. The assessment of adaptive skills identified Student's challenges with daily living that impacted her education. The functional behavior assessment identified the function of Student's elopement, property destruction, and physical aggression, and recommended proactive and reactive strategies to reduce those behaviors and replace them with appropriate behaviors.

Irvine proved its assessments were appropriate. Student's evidence did not demonstrate that the multidisciplinary assessment failed to identify any of Student's educational needs or was inaccurate in its reporting or results.

In summary, Irvine met its burden of proving by a preponderance of the evidence that all components of Irvine's June 2, 2021 multidisciplinary assessment and report

were appropriately conducted. Therefore, Student is not entitled to any independent educational evaluations based on that assessment.

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.

STUDENT'S ISSUES

ISSUE 1:

Irvine did not deny Student a FAPE by failing to provide Parents with a prior written notice in response to their request from June 6, 2019 for clarity regarding the specialized academic instruction minutes offered in the May 23, 2019 IEP.

Irvine prevailed on Issue 1.

ISSUE 2:

Irvine did not deny Student a FAPE by failing to send Parents a prior written notice in compliance with and addressing the specific requirements of 34 C.F.R. § 300.503 in response to the closures related to the COVID-19 pandemic.

Irvine prevailed on Issue 2.

ISSUE 3:

Irvine did not deny Student a FAPE by failing to provide Student with her last agreed-upon and implemented IEP placement, services, and accommodations during the COVID-19 pandemic.

Irvine prevailed on Issue 3.

ISSUE 4:

Irvine denied Student a FAPE by failing to have an IEP in place for her at the beginning of the 2020-2021 school year.

Student prevailed on Issue 4.

ISSUE 5:

Irvine did not deny Student a FAPE by failing to hold an IEP team meeting in response to Student's increasing needs during the 2020-2021 school year.

Irvine prevailed on Issue 5.

ISSUE 6:

Irvine did not deny Student a FAPE by failing to make an appropriate offer of placement and services in the IEP developed on March 22, 2021.

Irvine prevailed on Issue 6.

ISSUE 7:

Irvine did not deny Student a FAPE by failing to fully implement the October 29, 2020 Annual IEP.

Irvine prevailed on Issue 7.

ISSUE 8:

Irvine did not deny Student a FAPE by failing to provide Parents with a prior written notice in response to Parents' request for a change in Student's placement, and the addition of additional support during the 2020-2021 school year.

Irvine prevailed on Issue 8.

ISSUE 9:

Irvine did not deny Student a FAPE by failing to make an appropriate offer of placement and services in the IEP developed on April 27, 2021.

Irvine prevailed on Issue 9.

ISSUE 10:

Irvine did not deny Student a FAPE by failing to make an appropriate offer of placement and services in the IEP developed on June 2, 2021.

Irvine prevailed on Issue 10.

ISSUE 11:

Irvine did not deny Student a FAPE by failing to make an appropriate offer of placement and services in the IEP developed on August 24, 2021.

Irvine prevailed on Issue 11.

ISSUE 12:

Irvine did not deny Student a FAPE by failing to fully implement the October 29, 2020 IEP as amended on April 27, 2021.

Irvine prevailed on Issue 12.

ISSUE 13:

Irvine did deny Student a FAPE by failing to make an appropriate offer of services in the IEP developed on November 23, 2021.

Irvine prevailed on Issue 13.

ISSUE 14:

Irvine did not deny Student a FAPE by failing to fully implement the November 23, 2021 amendment IEP.

Irvine prevailed on Issue 14.

ISSUE 15:

Irvine did not deny Student a FAPE by failing to make an appropriate offer of services in the IEP developed on January 11, 2022.

Irvine prevailed on Issue 15.

IRVINE'S ISSUE

ISSUE 16:

Irvine's June 2, 2021 multidisciplinary assessment report was appropriate, such that Irvine is not required to fund independent educational evaluations of Student at public expense.

Irvine prevailed on Issue 16.

REMEDIES

Student prevailed on Issue 4, because Irvine did not have an IEP in place for Student at the beginning of the 2020-2021 school year.

Under federal and state law, courts have broad equitable powers to remedy the failure of a school district to provide a FAPE to a disabled child. (20 U.S.C. § 1415(i)(1)(C)(iii); Ed. Code, § 56505, subd. (g); see *School Committee of the Town of Burlington, Massachusetts v. Dept. of Education* (1985) 471 U.S. 359, 369 [105 S.Ct. 1996].) This broad equitable authority extends to an administrative law judge who hears and decides a special education administrative due process matter. (*Forest Grove, supra*, 557 U.S. 230, 244, n. 11.)

School districts may be ordered to provide compensatory education or additional services to students who have been denied a FAPE. (*Parents of Student W. v. Puyallup School Dist. No. 3* (9th Cir. 1994) 31 F.3d 1489, 1496. (*Puyallup*)). These are equitable remedies that courts may employ to craft appropriate relief for a party. (*Ibid.*) An award of compensatory education need not provide a day-for-day compensation. (*Id.* at p. 1497.) The conduct of both parties must be reviewed and considered to determine whether equitable relief is appropriate. (*Id.* at p. 1496.)

An award to compensate for past violations must rely on an individualized assessment, just as an IEP focuses on the individual student's needs. (*Reid ex rel. Reid v. District of Columbia* (D.D.C. Cir. 2005) 401 F.3d 516, 524.) The award must be fact-specific and be reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place. (*Ibid.*)

Here, Student did not have a current IEP in place from the beginning of the 2020-2021 school year on August 20, 2020 through the date of the IEP held on October 29, 2020, a period of 10 weeks. To address Student's academic weakness, the October 29, 2020 IEP team increased the specialized academic instruction minutes Student received weekly from 935 to 1,320, an increase of 385 minutes per week. This amount multiplied by 10 weeks is 3,850 minutes, or just over 64 hours of missed specialized academic instruction.

Student's instruction in the BSLC classroom was frequently provided in a group, at a student-to-teacher ratio of two-to-one. As compensatory specialized academic instruction will be provided exclusively on a one-to-one basis, per *Puyallup*, the amount

may be reasonably reduced. Accordingly, the amount of missed specialized academic instruction will be reduced by approximately half, to a total award of 35 hours of compensatory specialized academic instruction.

The levels of support for Student's related services, including speech services and counseling, were not increased in the October 29, 2020 IEP. Student had met her speech and social emotional goals, and was regularly earning gold levels. The evidence did not establish that a 10 week delay in adopting new speech and social emotional goals resulted in a loss of educational benefit.

ORDER

1. Irvine will provide Student with 35 hours of compensatory education in the form of direct one-to-one intensive specialized academic instruction with a credentialed special education teacher.
2. Irvine will provide and fund the award of compensatory specialized academic instruction through its own staff, Special Education Local Plan Area contractors or a non-public agency, at Parents' discretion. Student has one year from the date of this Order to use the services, and any unused services will be forfeited.
3. Irvine is not required to fund independent educational evaluations of Student at public expense based upon its June 2, 2021 Multidisciplinary Assessment Report.

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/

Alexa Hohensee

Administrative Law Judge

Office of Administrative Hearings