

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

CASE NO. 2021100053

PARENTS ON BEHALF OF STUDENT,

v.

BELLFLOWER UNIFIED SCHOOL DISTRICT.

DECISION

MAY 16, 2022

On September 30, 2021, Student filed a due process hearing request, called a complaint, with the Office of Administrative Hearings, State of California, naming Bellflower Unified School District. The Office of Administrative Hearings is called OAH. Bellflower Unified School District is called Bellflower. On January 27, 2022, OAH granted Student's request to file an amended complaint. OAH granted continuances in the case on March 17, and 23, 2022.

Administrative Law Judge Tara Doss presided over the hearing via videoconference using the Microsoft Teams application, on March 15, 16, 17, 22,

and 23, 2022. An Administrative Law Judge is called ALJ. Attorneys David Grey and Barbara Grey represented Student. Parent and Student attended all hearing days. Attorneys Richard Brady and Marcia Brady represented Bellflower. Matthew Adair, Director of Special Education, attended all hearing days on Bellflower's behalf.

At the request of the parties, OAH granted a continuance to April 22, 2022, to file written closing briefs. OAH closed the record and submitted the case for decision on April 22, 2022.

ISSUES

In this Decision, a free appropriate public education is called a FAPE and an individualized education program is called an IEP. The terms pupil and student have the same meaning and are used interchangeably. On March 14, 2022, Student withdrew Issues 2 and 3, as stated in the March 7, 2022 Order Following Prehearing Conference. The remaining issues were renumbered. Additionally, for clarity, the ALJ separated Issue 1 into two sub-issues. The ALJ did not make any substantive changes to the issues. (*M.C. v. Antelope Valley Union High School Dist.* (9th Cir. 2017) 858 F.3d 1189.)

1. Did Bellflower deny Student a FAPE, from October 4, 2019, through the date Student's amended complaint was deemed filed on January 27, 2022, by failing to:
 - a. consider Student's needs as a blind pupil; and
 - b. address Student's needs as a blind pupil?

2. Did Bellflower deny Student a FAPE, from February 11, 2020, through the date Student's amended complaint was deemed filed on January 27, 2022, by failing to implement Student's IEPs?

JURISDICTION

This hearing was held under the Individuals with Disabilities Education Act, called IDEA, 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 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 related 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) and (f); 34 C.F.R. § 300.511 (2006); 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, 56-62; and see 20 U.S.C. § 1415(i)(2)(C)(iii).) Here, Student has the

burden of proof. The factual statements below constitute the written findings of fact required by the IDEA and California law. (20 U.S.C. § 1415(h)(4); Ed. Code, § 56505, subd. (e)(5).) All references to the Code of Federal Regulations are to the 2006 version, unless otherwise noted.

Student was 17 years old and in the 12th grade at the time of hearing. Student resided within Bellflower's attendance boundaries at all relevant times. Student was eligible for special education under the primary category of visual impairment and the secondary category of speech or language impairment. Student was completely blind at six months old from microphthalmia, a congenital deformation of the eyes, and retinal dysplasia, which prevented the retina from developing appropriately. Student learned and interacted with the world using senses other than vision.

On April 30, 2022, Student turned 18 years old. Because the ALJ is unaware of whether Parent or Student holds Student's education rights, the Decision uses the term educational rights holder, where applicable.

ISSUES 1A AND 1B: DID BELLFLOWER DENY STUDENT A FAPE FROM OCTOBER 4, 2019, THROUGH JANUARY 27, 2022, BY FAILING TO CONSIDER OR ADDRESS STUDENT'S NEEDS AS A BLIND PUPIL?

Student narrowly contends in Issues 1a and 1b, that from October 4, 2019, through January 27, 2022, Bellflower failed to consider, and address Student's academic and functional needs related to Student's blindness. Student did not allege Bellflower denied Student a FAPE with respect to the special education, related services, and supports offered in Student's IEPs that were not related to Student's

blindness. Accordingly, this Decision will only address the specific aspects of Student's special education program and Bellflower's offer of FAPE that Student alleged were inappropriate.

ISSUE 1A: BELLFLOWER CONSIDERED STUDENT'S NEEDS AS A BLIND PUPIL

Student contends Bellflower failed to consider Student's needs as a blind pupil. Specifically, Student contends Bellflower failed to consider Student's blindness when determining the special education, related services, and supports Student required to receive a FAPE. Bellflower contends it considered Student's needs as a blind pupil through reviewing assessments, holding IEP team meetings, and documenting Student's present levels of performance and unique needs in IEP documents.

A FAPE means special education and related services provided to a child with a disability at public expense, that meet state educational standards and conform with the child's IEP. (20 U.S.C. §§ 1401(9) and 1412(a)(1); 34 C.F.R. §§ 300.17 and 300.101(a).) Parents and school personnel develop an IEP for an eligible student based upon state law and the IDEA. (20 U.S.C. §§ 1401(14) and 1414(d)(1); 34 C.F.R. §§ 300.320, 300.321, and 300.501; see Ed. Code, §§ 56031, 56032, 56341, 56345, subd. (a), and 56363, subd. (a).)

Special education is instruction specially designed to meet the unique needs of a child with a disability. (20 U.S.C. § 1401(29); 34 C.F.R. § 300.39; Ed. Code, § 56031.) Related services are transportation and other developmental, corrective, and supportive services that are required to assist the child in benefiting from special

education. (20 U.S.C. § 1401(26); 34 C.F.R. § 300.34; Ed. Code, § 56363, subd. (a).) An IEP is a written statement for each child with a disability that is developed, reviewed, and revised based upon state law and the IDEA. (20 U.S.C. §§ 1401(14), 1414(d)(1); 34 C.F.R. § 300.320; Ed. Code, § 56032.)

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 Educ. of the Hendrick Hudson Central School Dist. v. Rowley* (1982) 458 U.S. 176, 201-204; *Endrew F. v. Douglas County School Dist. RE-1* (2017) 580 U.S. ____ [137 S.Ct. 988, 1000].)

An IEP describes a student's needs, and academic and functional goals related to those needs. It also provides a statement of the special education, related services, and program modifications and accommodations that will be provided for the student to:

- advance in attaining the goals;
- make progress in the general education curriculum; and
- participate in education with disabled and nondisabled peers. (20 U.S.C. §§ 1401(14), 1414(d)(1)(A); Ed. Code, §§ 56032, 56345, subd. (a).)

In developing an IEP, the IEP team must consider the strengths of a child, the concerns of the parents for enhancing the education of their child, the results of the most recent evaluation, and the academic, development, and functional needs of the

child. (20 U.S.C. § 1414(d)(3)(A); 34 C.F.R. § 300.324(a)(1).) The IEP team must also consider whether the student needs assistive technology devices and services. (20 U.S.C. § 1414(d)(3)(B)(v); 34 C.F.R. § 300.324(a)(2)(v).)

Student did not prove Bellflower failed to consider Student's needs as a blind pupil from October 4, 2019, through January 27, 2022. Bellflower held 11 IEP team meetings between October 4, 2019, and January 27, 2022. Bellflower held IEP team meetings on October 4, 2019, September 8, and 28, 2020, October 16, 2020, March 22, 2021, April 13, 2021, May 5, 11, and 28, 2021, September 10, 2021, and December 1, 2021. Parent attended each meeting. During each meeting, the IEP team considered Parent's input and concerns, and discussed Student's strengths, new evaluation data, and Student's visual impairment and special education needs.

STUDENT'S STRENGTHS, NEEDS, AND INTERESTS

At the September 8, and 28, 2020 IEP team meetings, the IEP team discussed Student's present levels of performance in academics, vocational skills, adaptive and daily living skills, and other areas not related to Student's blindness. The IEP team discussed how Student used braille to read and write, and the methods Student used to learn money and other math skills. The IEP team also discussed how Student navigated the school campus, and the assistive technology Student used to access the curriculum as a visually impaired student. Student's teacher for the visually impaired, Seanarae Smith; Student's special education teacher, Lindsey Hutton; and Student's orientation and mobility provider, Guadalupe Rodriguez; all reported on Student's strengths and academic, developmental, and functional needs. Smith, Hutton, and Rodriguez all had knowledge of Student's needs as a blind pupil.

Also, at the September 2020 IEP team meetings, the IEP team considered Student's interests through the development of an individualized transition plan. Bellflower interviewed Student about post-secondary education, employment, and independent living goals. Student attended the September 8, 2020 IEP team meeting and provided additional input to the IEP team for the transition plan.

PARENT'S CONCERNS

Bellflower considered Parent's concerns at multiple IEP team meetings from October 4, 2019, through January 27, 2022. In March 2020, Bellflower started providing online instruction to all of its students through a distance learning model because of the novel coronavirus, COVID-19, and directives from state and local officials. At the September 8, 2020 IEP team meeting, Parent expressed concern about the effectiveness of online instruction for Student. Student had difficulty signing into the online classroom and pointing the computer's camera in the correct direction. Parent asked if Bellflower could provide a one-to-one aide at home to help Student access online learning. Bellflower's program administrator agreed to follow up with Parent about providing a one-to-one aide at home. At the September 28, 2020 IEP team meeting, Bellflower agreed to provide a one-to-one aide in Student's home.

Also, at the September 8, 2020 IEP team meeting, Parent requested, and Bellflower agreed, to add an orientation and mobility goal that addressed Student's ability to use public transportation. Parent gave input and made requests to enhance Student's special education program at the September 2020 IEP team meetings, and Bellflower appropriately responded to Parent's requests.

Further, Bellflower responded to all of Parent's requests for IEP team meetings to discuss concerns about Student's program from October 4, 2019, through January 27, 2022. The October 16, 2020, September 10, 2021, and December 1, 2021 IEP team meetings were convened specifically for Bellflower to respond to Parent's questions and concerns about Student's program. At each of these meetings, Bellflower listened to Parent's input and concerns and responded appropriately.

RECENT EVALUATION DATA

From October 4, 2019, through January 27, 2022, the only new evaluation data presented to the IEP team was a private assessment conducted by Dr. Sonja Biggs in July, and August 2020. Parent hired Dr. Biggs to conduct assessments of Student in functional vision, learning media, the expanded core curriculum, and orientation and mobility. Bellflower considered Dr. Biggs's assessment results at the March 22, 2021 IEP team meeting. Dr. Biggs was a credentialed teacher for the visually impaired and a certified orientation and mobility specialist. Bellflower's IEP team members listened as Dr. Biggs presented Student's assessment results and asked questions where applicable. Bellflower also incorporated some of Dr. Biggs's input into Student's present levels of performance in the March 22, 2021 IEP.

The evidence showed that from October 4, 2019, through January 27, 2022, Bellflower considered Student's needs as blind pupil. Bellflower held multiple IEP team meetings; documented Student's present levels of academic, developmental, and functional performance; received input from Parent and Student; and incorporated input from Dr. Biggs's assessment into Student's IEP. Therefore, Student did not meet its burden and Bellflower prevailed on Issue 1a.

ISSUE 1B: BELLFLOWER DID NOT ADDRESS STUDENT'S NEEDS AS A BLIND PUPIL

Student contends Bellflower's offers of placement, related services, and supports, from October 4, 2019, through January 27, 2022, did not address the full scope of Student's needs as a blind pupil. Specifically, Student contends Bellflower failed to offer appropriate instruction in braille, failed to offer sufficient braille transcription services, and failed to offer a one-to-one aide fluent in braille. Further, Student contends the offered specialized academic instruction and specialized vision services were inadequate for Student to develop fluency in reading and writing braille.

Bellflower contends it addressed Student's needs as a blind pupil through developing appropriate IEPs. Specifically, Bellflower contends its offers of instruction from a teacher for the visually impaired, a one-to-one aide, orientation and mobility services, and braille transcription services, were all designed to address Student's visual impairment needs.

Student proved Bellflower failed to address Student's needs as a blind pupil from October 4, 2019, through January 27, 2022. Specifically, Student proved Bellflower did not offer Student appropriate specialized academic instruction, specialized vision services, one-to-one aide support, or braille transcription services. Further, Student proved Bellflower should have developed an IEP goal for Student in daily living skills. Student did not prove Bellflower failed to offer appropriate assistive technology.

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

In resolving the question of whether a school district has offered a FAPE, the focus is on the adequacy of the school district's proposed program. (*Gregory K. v. Longview School Dist.* (9th Cir. 1987) 811 F.2d 1307, 1314.) For a school district's offer of special education services to constitute a FAPE under the IDEA, it must be designed to meet the student's unique needs, comport with the student's IEP, and be reasonably calculated to provide the student with educational benefit appropriate in light of the student's circumstances. (*Ibid*; *Endrew F.*, *supra*, 580 U.S. ____ [137 S.Ct. at p. 1000.]

Procedural flaws do not automatically require a finding of a denial of a FAPE. (*W.G., et al. v. Bd. of Trustees of Target Range School Dist.*, etc. (9th Cir. 1992) 960 F.2d 1479,1484, superseded by statute on other grounds by IDEA Amendments of 1997.) A procedural violation only constitutes a denial of FAPE if the violation:

1. impeded the child's right to a FAPE;
 2. significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of a FAPE to the child;
- or

3. caused a deprivation of educational benefits. (20 U.S.C. § 1415(f)(3)(E)(ii); Ed. Code, § 56505, subd. (f)(2).)

Whether an IEP offers a student a FAPE is assessed in light of information available at the time the IEP was developed, not in hindsight. (*Adams v. State of Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149.) An IEP is a snapshot, not a retrospective; it must be evaluated in terms of what was objectively reasonable when the IEP was developed. (*Id.* (quoting *Fuhrmann v. East Hanover Bd. of Educ.* (3rd Cir. 1993) 993 F.2d 1031, 1036.)

While California law does not specifically define specialized academic instruction, the understanding of that term in California is that it has the same meaning as specially designed instruction described in federal law. (See, e.g., Cal. Legislative Analyst, Overview of Special Education in California (Jan. 3, 2013); Cal. Teachers' Assn., Special Education in California (2012).) Specially designed instruction means adapting, as appropriate to the needs of an eligible child, the content, methodology, or delivery of instruction to address the unique needs of the child that result from the child's disability, and to ensure access of the child to the general curriculum, so that the child can meet the educational standards. (34 C.F.R. § 300.39(b)(3).) Supplementary aids and services are aids, services, and other supports that are provided in regular education classes or other education-related settings to enable children with disabilities to be educated with nondisabled children to the maximum extent appropriate. (20 U.S.C. § 1401(33); Ed. Code, § 56033.5.)

Pupils with low incidence disabilities require highly specialized services, equipment, and materials. (Ed. Code, § 56000.5, subd. (a)(2).) Low incidence means a severely disabling condition such as vision impairment. (Ed. Code, § 56026.5.)

In the case of a student who is blind or visually impaired, the IEP team must provide for instruction in braille and the use of braille. (20 U.S.C. § 1414(d)(3)(B); 34 C.F.R. § 300.324(a)(2), Ed. Code, § 56351.) Braille means the system of reading and writing through touch. (Ed. Code, § 56350, subd. (d)(1).) Braille instruction must be provided by a teacher who holds an appropriate credential to teach pupils who are functionally blind or visually impaired. (Ed. Code, § 56352, subd. (d).) Braille instruction may, under the supervision of a credentialed teacher for the visually impaired, be reinforced by a braille instructional aide that is fluent in reading and writing grade two braille and possesses basic knowledge of the rules of braille construction. (Ed. Code, § 56351.5, subd. (a).)

The IEP must include the anticipated frequency, location, and duration of services. (20 U.S.C. § 1414(d)(1)(A)(i)(VII); 34 C.F.R. § 300.320(a)(7).)

BELLFLOWER FAILED TO OFFER APPROPRIATE SPECIALIZED ACADEMIC INSTRUCTION, SPECIALIZED VISION SERVICES, ONE-TO-ONE AIDE SUPPORT, AND BRAILLE TRANSCRIPTION SERVICES

Student proved Bellflower denied Student a FAPE from October 4, 2019, through January 27, 2022. Bellflower failed to offer appropriate specialized academic instruction, specialized vision services, one-to-one aide support, and braille transcription services.

Student had a low incidence disability and required specially designed instruction, services, and materials to receive an educational benefit. Specifically, Student required specialized academic instruction and specialized vision services taught by a teacher who was credentialed to teach core academics subjects to

special education students with visual impairments. Additionally, Student required the assistance of a one-to-one aide proficient in braille and all written coursework to be transcribed into braille. Without appropriate specialized academic instruction, specialized vision services, aide support, and braille transcription services, Student could not access the educational curriculum or meet educational standards.

2018-2019 SCHOOL YEAR

During the 2018-2019 school year, when Student was in ninth grade, education specialist, Carolyn Dail, taught Student's core academics subjects, each school day in a one-to-one setting. Dail held a multiple subject teaching credential, which authorized Dail to teach all subjects in a self-contained class for students in preschool through the 12th grade. Dail also held a specialist instruction credential in special education, which allowed Dail to teach academic instruction to students with visual impairments. Dail created an individualized academic curriculum for Student and adapted Student's instructional materials into braille. Student's academic instructional level was at second to early third grade during the 2018-2019 school year. Student successfully accessed the educational curriculum and made progress using this program model.

Dail retired at the end of the 2018-2019 school year, which left Bellflower without a teacher who was credentialed to teach core academic subjects to special education students with visual impairments. Bellflower held an IEP team meeting on June 14, 2019, to offer placement and services to Student for the 2019-2020 school year. Bellflower offered 165 minutes a day of specialized academic instruction and specialized vision services in a one-to-one setting. The specialized academic instruction and specialized vision services were to be taught by a teacher who, like

Dail, was credentialed to teach core academic subjects to special education students with visual impairments. The specialized academic instruction included instruction in core academic subjects, braille code, technology for visual impairments, and specific instruction for blind students using the expanded core curriculum.

Additionally, Bellflower offered 55 minutes a day of specialized academic instruction taught by a teacher credentialed to teach special education students with moderate to severe disabilities. This specialized academic instruction was taught in a classroom with other students and included support for vocational skills, transition skills, community instruction and daily living skills. Also, Bellflower offered 408 minutes a day of intensive individual services, called a one-to-one aide, and 60 minutes a week for a nonpublic agency to transcribe Student's instructional materials into braille. Finally, Bellflower offered assistive technology, including an electronic braille notetaker. Bellflower offered additional services and supports in the June 14, 2019 IEP that are not at issue in Issue 1b and will not be addressed. Parent consented to the June 14, 2019 IEP on June 22, 2019.

The June 14, 2019 IEP occurred before October 4, 2019, and therefore, was held outside of the relevant time period for Issue 1b. However, the June 14, 2019 IEP was Student's operative IEP during the 2019-2020, and 2020-2021 school years, and will be discussed in that context.

2019-2020 SCHOOL YEAR

Bellflower did not have a teacher qualified to teach core academic subjects to special education students with visual impairments, so it contracted with Montebello Unified School District to provide a qualified teacher for Student in the 2019-2020

school year. However, Montebello also did not have a teacher qualified to teach core academic subjects to special education students with visual impairments. Nonetheless, in August 2019, Montebello assigned teacher, Claoudia Pawluk, to provide specialized vision services to Student. Pawluk was qualified to teach specialized vision services but was not qualified to teach specialized academic instruction to students with visual impairments. Prior to working with Student, Pawluk provided vision support services to visually impaired students in special education classes taught by another teacher.

At a September 3, 2019 IEP team meeting, Bellflower offered two solutions to Pawluk not being able to provide academic instruction to Student. The first recommendation was for Student to attend Hutton's moderate to severe special education class for core academic subjects with Pawluk providing vision support services to Student in Hutton's class. Hutton was not credentialed to teach students with visual impairments. The second recommendation was for Bellflower to hire a resource specialist substitute teacher who could provide specialized academic instruction to Student, in a one-to-one setting, with Pawluk providing vision support services to Student during instruction. Parent rejected both options and requested that Bellflower implement Student's June 14, 2019 IEP as written. Bellflower agreed Student's services for the 2019-2020 school year would remain as agreed upon in the June 14, 2019 IEP.

Shortly after the September 3, 2019 IEP team meeting, Bellflower hired two substitute teachers to provide daily academic instruction to Student in a one-to-one setting. Pawluk supported the substitute teachers and adapted Student's

instructional materials to braille. Hutton, who taught students with moderate to severe disabilities, provided the academic curriculum from the moderate to severe special education program, to the substitute teachers to use with Student.

Bellflower held another IEP team meeting on October 4, 2019, to discuss Parent's concerns about Student's program. Again, Bellflower recommended enrolling Student in Hutton's moderate to severe special education class to receive specialized academic instruction in core academic subjects, but this time, with the support of both a substitute teacher and Pawluk. As discussed, neither Hutton, nor the substitute teacher, were credentialed to teach students with visual impairments. Parent rejected this recommendation and again, requested that Bellflower implement Student's June 14, 2019 IEP as written.

Bellflower's offer of placement changed in the October 4, 2019 IEP. Instead of offering 165 minutes a day of specialized academic instruction and specialized vision services taught by one teacher credentialed to teach core academic subjects to students with visual impairments, Bellflower offered 165 minutes a day of specialized academic instruction and specialized vision services taught by a teacher credentialed to teach students with visual impairments in conjunction with another credentialed teacher. Bellflower's placement offer aligned with how Bellflower implemented Student's specialized academic instruction and specialized vision services since September 2019, with a substitute teacher providing Student's academic instruction and Pawluk providing vision support. Bellflower's offers related to the one-to-one aide and braille transcription services were the same as in the June 14, 2019, and September 3, 2019 IEPs.

Bellflower's offers of placement, one-to-one aide support, and braille transcription services in the October 4, 2019 IEP, were not appropriate. At hearing, Dr. Biggs credibly and persuasively opined as to what an appropriate educational program for Student needed to include. Dr. Biggs considered Student's comprehensive needs as a visually impaired student and opined that Student's specially designed instruction needed to focus on Student's need to function independently, instead of being dependent on a sighted person. To receive a FAPE, Student needed:

- consistent specialized academic instruction and specialized vision services in a one-to-one setting, from a teacher for the visually impaired;
- a one-to-one aide proficient in braille;
- all written materials in braille;
- to learn to read and write in braille, instead of having a human reader and scribe; and
- a BrailleNote.

Further, Dr. Biggs opined that 60 minutes a week of braille transcription services was insufficient. Dr. Biggs opined that transcribing all of Student's academic materials to braille required at least several hours each week. Bellflower did not offer any persuasive evidence that refuted Dr. Biggs's opinion of what Student required to receive a FAPE.

Dr. Biggs's educational background and experience working with students with visual impairments made Dr. Biggs's opinions persuasive. In addition to being credentialed to teach students with visual impairments and provide orientation and

mobility services, Dr. Biggs was credentialed to teach multiple subjects to elementary students and held a doctoral degree in education. For approximately 19 years, Dr. Biggs worked as a teacher for the visually impaired and as an orientation and mobility specialist. For the previous 14 years, Dr. Biggs owned and operated a company that contracted with California school districts to provide assessments, vision support services, orientation and mobility services, and braille transcription services. Dr. Biggs had worked with at least one thousand visually impaired students. Dr. Biggs demonstrated extensive knowledge of the educational and functional needs of visually impaired students, and Student. Therefore, Dr. Biggs's testimony was given significant weight.

Bellflower's offers of placement, one-to-one aide support, and braille transcription services in the October 4, 2019 IEP, did not align with what Dr. Biggs opined Student needed to receive a FAPE. The substitute teachers Bellflower hired in September 2019, were not qualified to teach Student. Neither of the substitute teachers were credentialed to teach students with visual impairments. Neither teacher was proficient in braille and only one of the teachers held a credential to teach specialized academic instruction. Additionally, Bellflower did not offer a one-to-one aide proficient in reading and writing braille at second grade level, as required by California law. Finally, 60 minutes a week of braille transcription services was insufficient to transcribe all of Student's written instructional materials into braille.

More importantly, Bellflower did not propose a change to Student's placement in the October 4, 2019 IEP because it was appropriate for Student. Instead, Bellflower proposed the change because it did not have a teacher qualified

to implement Student's specialized academic instruction as agreed to in the June 14, 2019 IEP. Without appropriate specialized academic instruction, one-to-one aide support, and sufficient braille transcription services to ensure Student's instructional materials were in braille, Student's ability to access the educational curriculum and receive educational benefit were severely impacted. Accordingly, Bellflower's offers of placement, one-to-one aide support, and braille transcription services in the October 4, 2019 IEP, were not designed to meet Student unique needs and were not reasonably calculated to provide Student with educational benefit appropriate in light of Student's visual impairment.

On February 10, 2020, Bellflower hired Smith to provide Student's specialized academic instruction and specialized vision services, in a one-to-one setting. Smith held a credential to teach students with visual impairments but was not credentialed to teach core academic subjects to special education students.

On March 16, 2020, Bellflower closed its schools because of the COVID-19 pandemic. None of Bellflower's students received academic instruction or services for two weeks. From March 30, 2020, through the end of the 2019-2020 school year, Bellflower provided online instruction and independent study, through a distance learning model, to all its students.

2020-2021 SCHOOL YEAR

Bellflower continued the distance learning model in the 2020-2021 school year. The length of the regular school day was shortened from approximately 330 minutes a day, prior to COVID-19, to approximately 240 minutes a day. Bellflower held Student's annual IEP team meeting over three meetings on September 8,

and 28, 2020, and October 16, 2020. Smith provided online specialized academic instruction and specialized vision services to Student in a one-to-one virtual setting throughout the 2020-2021 school year. Student's instructional level remained at the second grade level at the time of the September, and October 2020 IEP team meetings.

At the September, and October 2020 IEP team meetings, Bellflower offered 165 minutes a day of specialized academic instruction and specialized vision services in a self-contained classroom. The IEPs no longer specified that specialized academic instruction and specialized vision services would be provided by a teacher for the visually impaired in conjunction with a credentialed teacher. As discussed, Smith provided both specialized academic instruction and specialized vision services to Student. Therefore, Bellflower's offers of specialized academic instruction and specialized vision services in the September, and October 2020 IEPs, were appropriate. The IEPs continued to offer one-to-one aide support and 60 minutes of braille transcription services, which for the same reasons discussed in relation to the October 4, 2019 IEP, were inappropriate.

Different in the September, and October 2020 IEPs, was Bellflower's offer of FAPE during emergency conditions pursuant to California Education Code sections 41422 and 46392. During distance learning, due to COVID-19, Bellflower offered Student a proportional but unspecified amount of specialized academic instruction and specialized vision services based on the reduced school day, and 45 minutes a week of braille transcription services. Bellflower did not offer one-to-one aide support in the September 8, 2020 IEP. In the September 28, 2020 and October 16, 2020 IEPs, Bellflower offered 200 minutes a day of one-to-one aide support at Student's home.

On March 13, 2020, Governor Newsom issued Executive Order N-26-20, which allowed schools that closed due to COVID-19 to provide educational opportunities to the extent feasible, through distance learning or independent study. The Order also charged CDE and the Health and Human Services Agency to develop and issue guidance to ensure students with disabilities received a FAPE consistent with their IEP.

On March 20, 2020, CDE issued guidance urging local educational agencies to continue providing special education and related services as outlined in a student's IEP, through a distance learning model. (Cal. Dept. of Educ., Special Education Guidance for COVID-19 (March 20, 2020).) In addition to distance learning, CDE's guidance allowed local educational agencies to consider providing services at home, individually at school sites, or other appropriate locations. (*Ibid.*) The delivery of in-person services was discretionary and not required.

On April 9, 2020, CDE issued further guidance about implementation of students' IEPs during the COVID-19 pandemic. Specifically, CDE offered the opinion that

"[u]nder this unique circumstance...it is not necessary for [a local educational agency] to convene an IEP team meeting or propose an IEP amendment...solely for the purpose of discussing the need to provide services away from school, because that change must necessarily occur due to the COVID-19 pandemic."

CDE went on to say, "[t]he IEP that was in effect at the time of physical school closure remains in effect, and [local educational agencies] should, to the greatest extent

possible, continue to provide the services called for in those IEPs in alternative ways.” (Cal. Dept. of Educ., Special Education Guidance for COVID-19 (April 9, 2020).)

On September 28, 2020, the U.S. Department of Education’s Office of Special Education Programs, called OSEP, issued guidance to state and local educational agencies regarding the provision of special education and related services for the 2020-2021 school year. OSEP acknowledged that agencies may need to consider multiple options for delivering instruction, including distance learning, in-person attendance, or the combination of both in a hybrid model. Nevertheless, OSEP made clear that irrespective of the primary instructional delivery approach chosen, state and local educational agencies and IEP teams remained responsible for ensuring FAPE was provided to all children with disabilities. (Office of Special Education Programs, Questions and Answers: Implementation of IDEA Part B Provision of Services in the Current COVID-19 Environment (September 28, 2020).

CDE’s and OSEP’s guidance during the 2019-2020, and 2020-2021 school years, made clear that irrespective of the COVID-19 pandemic and school districts providing instruction through a distance learning model, students were still entitled to FAPE. Neither CDE, nor OSEP recommended reducing special education and related services students received because of emergency conditions. Bellflower did not cite to any law or regulation that allowed it to reduce the special education and related services Student required to receive a FAPE because of the COVID-19 pandemic.

Neither of the California Education Code sections Bellflower cited in Student’s September, and October 2020 IEPs as justification for reducing Student’s services, absolve school districts from the duty to offer students a FAPE. California Education

Code section 41422 allows school districts to receive the same apportionment of state school funding when it is prevented from operating for at least 180 full-length school days because of fire, flood, earthquake, epidemic, or other emergency conditions. California Education Code section 46392 allows school districts to receive the same average daily attendance credits it would have received but for emergency conditions, including COVID-19. Both provisions relate to school funding and not to the provision of special education and related services under emergency conditions.

Bellflower's offers of specialized academic instruction, specialized vision services, one-to-one aide support, and braille transcription services during emergency conditions in the September, and October 2020 IEPs, were not appropriate. If Student required 165 minutes a day of specialized academic instruction and specialized vision services to receive a FAPE when Bellflower's schools closed in March 2020, then, Student still required 165 minutes a day of specialized academic instruction and specialized vision services to receive a FAPE during distance learning.

Additionally, Bellflower failed to specify the frequency and duration of the specialized academic instruction and specialized vision services during distance learning, which procedurally violated the IDEA. The failure to specify the frequency and duration of specialized academic instruction and specialized vision services significantly impeded Parent's opportunity to participate in the decision-making process regarding Student's IEP, and therefore, resulted in a denial of FAPE.

Similarly, Student's need for a one-to-one aide proficient in braille did not go away during distance learning. Nor did Student's need to have instructional

materials transcribed into braille reduce, especially in light of the fact that the 60 minutes a week of braille transcription services Bellflower offered during in-person learning was insufficient.

Bellflower held another annual IEP team meeting for Student on March 22, 2021, April 13, 2021, and May 5, 11, and 28, 2021. Bellflower reviewed the results of Dr. Biggs's August 2020 assessment at the March 22, 2021 IEP team meeting. Dr. Biggs determined Student's reading, writing, and math skills in braille were at the second to third grade level. Dr. Biggs made several recommendations regarding Student's educational program. Relevant to Issue 1b, Dr. Biggs recommended Student receive the following:

- consultative and direct services from a teacher of the visually impaired in all areas of the expanded core curriculum;
- textbooks, tests, worksheets, and handouts in braille and/or auditory formats,
- assistive technology training to make the best use of devices;
- a one-to-one paraeducator trained to work with visually impaired students and who is proficient in braille; and
- all assignments, texts, and materials in a format that Student can access independently at the same time as sighted peers.

At the March, April, and May 2021 IEP team meetings, Bellflower continued to offer the same frequency, duration, and type of specialized academic instruction, specialized vision services, one-to-one aide support, and braille transcription services as in the September, and October 2020 IEPs. Bellflower continued to offer Student a reduced amount of specialized academic instruction, specialized vision services, and

one-to-one aide support during emergency conditions, but increased braille transcription services during emergency conditions from 45 to 60 minutes a week.

For the reasons discussed in relation to the September, and October 2020 IEPs, Bellflower's offers of specialized academic instruction and specialized vision services in the March, April, and May 2021 IEPs were appropriate. Bellflower's offers of one-to-one aide support and braille transcription services were inappropriate. Also, for the reasons discussed in relation to September, and October 2020 IEPs, Bellflower's offers of specialized academic instruction, specialized vision services, one-to-one aide support, and braille transcription services during emergency conditions in the March, April, and May 2021 IEPs, were inappropriate.

From April 19, 2021, through the end of the 2020-2021 school year, Student attended school in-person four days a week. Student completed work independently from home on the fifth day. Bellflower continued to offer a shortened school day of approximately 240 minutes. Smith provided specialized academic instruction and specialized vision services to Student at school.

2021-2022 SCHOOL YEAR

Smith went out on a leave at the beginning of the 2021-2022 school year. Bellflower hired Amy Vickrey, as a substitute teacher to provide specialized academic instruction and specialized vision services to Student in Smith's absence. Vickrey was credentialed to provide specialized vision services. The evidence did not show whether Vickrey was qualified to teach core academic subjects to special education students with visual impairments. Beginning on September 1, 2021, Vickrey provided online instruction to Student for one hour each school day even though Student

attended school in-person. Because Vickrey was not present with Student during instruction, Vickrey could not give Student feedback or correct Student's work written in braille. Instead, Vickrey relied heavily on two instructional aides who were present with Student at school, to reinforce the academic instruction and work with Student when Vickrey was not teaching. Neither aide was proficient in reading nor writing braille at the second grade level, as required by California law. When not working with Vickrey, Student repeated old work. Because the aides were not proficient in braille, they could not give Student feedback, transcribe instructional materials into braille, or correct Student's work. Thus, Student's instructional materials were not consistently provided in braille. As a result, Student's reading, writing, and spelling skills regressed.

Beginning on September 24, 2021, Dail returned temporarily to provide specialized academic instruction and specialized vision services to Student. Due to a family obligation, Dail did not provide instruction to Student from October 5, through 12, 2021. Initially, Dail provided services to Student four to five days a week, but Dail reduced the services to three days a week in January 2022.

Bellflower held IEP team meetings on September 10, 2021, and December 1, 2021, to discuss Parent's concerns, but did not make new offers of specialized academic instruction, specialized vision services, one-to-one aide support, or braille transcription services.

The evidence showed that Bellflower failed to offer Student appropriate specialized academic instruction, specialized vision services, one-to-one aide support, and braille transcription services at the October 4, 2019, September 8,

and 28, 2020, October 16, 2020, March 22, 2021, April 13, 2021, and May 5, 11, and 28, 2021 IEP team meetings. Accordingly, Bellflower denied Student a FAPE.

BELLFLOWER OFFERED APPROPRIATE ASSISTIVE TECHNOLOGY

Student contends Bellflower failed to offer appropriate assistive technology, specifically, a working BrailleNote. Bellflower contends it offered appropriate assistive technology devices to address Student's needs as a blind pupil.

Assistive technology services are any service that directly assists a child with a disability in the selection, acquisition, or use of an assistive technology device, including maintaining and repairing the device. (20 U.S.C. § 1401(2); 34 C.F.R. § 300.6.) The service also includes training or technical assistance for a student, the student's family, and professionals who provide services to, or are otherwise substantially involved in the major life functions of the child. (*Id.*)

From October 4, 2019, through January 27, 2022, Bellflower offered Student appropriate assistive technology. Bellflower offered assistive technology as a program accommodation in each of Student's IEPs. Specifically, Bellflower offered an electronic braille notetaker, called a BrailleNote. Dr. Biggs opined that Student required a BrailleNote to receive a FAPE and Bellflower satisfied that requirement. Student's contention that the BrailleNote did not work properly will be addressed in Issue 2.

GOALS UNDER THE EXPANDED CORE CURRICULUM

Student contends Bellflower failed to consider the full scope of Student's needs under the expanded core curriculum for blind students. Specifically, Student contends Bellflower should have developed goals for daily living skills, recreation and

leisure, visibility skills, and social interaction skills. Bellflower contends it developed appropriate goals for Student and that Student did not require additional goals under the expanded core curriculum to receive a FAPE.

School districts may consider the expanded core curriculum when developing IEPs for students who are blind or visually impaired. (Ed. Code, § 56353, subd. (a).) The expanded core curriculum is a set of knowledge and skills in which instruction or services, or both, may be beneficial to a blind or visually impaired student. (*Id.*) The expanded core curriculum includes compensatory skills such as

- braille,
- orientation and mobility,
- social interaction skills,
- career technical education,
- assistive technology,
- independent living skills,
- recreation and leisure,
- self-determination, and
- sensory efficiency.

(Ed. Code, § 56353, subd. (b).)

IEP goals must be designed to meet the student's needs so that the student can be involved in and make progress in the general education curriculum and meet each of the student's other educational needs. (20 U.S.C. § 1414(d)(1)(A)(i)(II); 34 C.F.R. § 300.320(a)(2)(i).)

Student proved Bellflower should have developed a daily living skills goal at Student's May 11, and 28, 2021 IEP team meetings. Student did not prove Bellflower

should have developed goals in the areas of recreation and leisure, visibility skills, or social interaction skills under the expanded core curriculum from October 4, 2019, through January 27, 2022.

2019-2020 SCHOOL YEAR

The IEP team developed annual goals at a March 26, 2019 IEP team meeting. The goals in the March 26, 2019 IEP were Student's operative goals during the 2019-2020 school year. The appropriateness of the March 26, 2019 IEP goals must be evaluated in light of the information the IEP team had at the time the IEP was developed. (*Adams v. State of Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149.) Because the March 26, 2019 IEP team meeting was held outside of the relevant time period for Issue 1b, whether Bellflower should have offered Student additional IEP goals under the expanded core curriculum will not be addressed for the 2019-2020 school year.

2020-2021 SCHOOL YEAR

Student did not prove Student required goals in recreation and leisure, visibility skills, or social interaction skills in the September, and October 2020 IEPs. The IEP team developed new annual goals at the September, and October 2020 IEP team meetings. Student received special education and related services through a distance learning model from the start of the 2020-2021 school year, until April 19, 2021. Related to Student's visual impairment needs, the IEP team developed goals in orientation and mobility, braille reading, braille writing, assistive technology, math, and adaptive daily living skills. Student did not present evidence that showed Student needed goals developed in recreation and leisure, visibility skills, or social

interaction at the September, and October 2020 IEPs. It is not clear what a goal in visibility skills would include because Student did not offer specific evidence related to a goal in this area, and visibility skills is not a category under the expanded core curriculum.

Student's present levels of performance in the September, and October 2020 IEPs indicated Student was an excellent participant in adapted physical education during in-person learning in the 2019-2020 school year, was well-liked by peers, and had a group of friends who Student hung out with during lunch. Also, during the 2020-2021 school year, Student successfully participated virtually on the pep squad at school. Thus, Student did not meet its burden to show Student required additional goals under the expanded core curriculum in areas of recreation and leisure, or social interaction skills, in the September, or October 2020 IEPs.

Student proved Student required a goal in daily living skills in the May 2021 IEPs. Student did not prove Student required goals in recreation and leisure, visibility skills, or social interaction skills. The IEP team developed new annual goals for Student at the May 11, and 28, 2021 IEP team meetings. Related to Student's visual impairment needs, the IEP team developed goals in braille reading, braille writing, math, assistive technology, and orientation and mobility.

The IEP team did not develop a goal in daily living skills even though Student had a daily living goal in the September, and October 2020 IEPs, and the May 28, 2021 IEP stated Student required an adaptive daily living goal to receive an educational benefit. Also, at the May 5, 2021 IEP team meeting, Parent expressed a

concern that Student's daily living skills had regressed, and Smith indicated Student needed to improve doing common tasks independently. Accordingly, Bellflower should have developed a daily living skills goal in the May 2021 IEPs.

At hearing, Dr. Biggs opined that the goals in Student's May 28, 2021 IEP did not address Student's needs under the expanded core curriculum. In Dr. Biggs's opinion, Student would have benefitted from goals in the areas of daily living skills, social and leisure, and self-advocacy. However, Dr. Biggs's opinion regarding the need for social and leisure, and self-advocacy goals was not supported by Dr. Biggs's August 2020 assessment of Student.

For example, under recreation and leisure in Dr. Biggs's report, Dr. Biggs recommended Student build on positive community experience, such as church. Student did not prove how connecting with a church would help Student be involved in or make progress in the educational curriculum. Also, Dr. Biggs did not opine Student required a social and leisure goal to receive an educational benefit. Finally, the present levels of performance in the May 28, 2021 IEP indicated Student worked well with adults, enjoyed playing games, and spending time with friends.

Under self-determination in Dr. Biggs's report, what Dr. Biggs called self-advocacy at hearing, Dr. Biggs recommended Student work on executive functioning skills. Executive functioning skills describes a set of cognitive processes that are necessary for the cognitive control of behavior, such as organizational skills. Student's assistive technology goal in the May 28, 2021 IEP addressed Student's organizational skills using the planning feature on the BrailleNote. Thus, Bellflower

addressed Student's need to work on executive functioning skills in the May 28, 2021 IEP. Student did not prove Student required any additional goals in self-advocacy or self-determination.

2021-2022 SCHOOL YEAR

Bellflower resumed in-person instruction on a regular school schedule for the 2021-2022 school year. Bellflower held two IEP team meetings, on September 10, 2021, and December 1, 2021. Both meetings were held to discuss Parent's concerns. The IEP team did not develop any new goals at either meeting. Student did not offer any evidence that showed Bellflower should have developed goals under the expanded core curriculum at either of these meetings.

Bellflower's contention that it offered Student appropriate IEPs, from October 4, 2019, through January 27, 2022, that addressed Student's needs as a blind pupil, was not persuasive. The testimonial and documentary evidence overwhelmingly showed Bellflower failed to offer appropriate special education, related services, and supports to allow Student to access the educational curriculum and to make progress appropriate in light of Student's circumstances. Therefore, Bellflower denied Student a FAPE from October 4, 2019, through January 27, 2022, by failing to address Student's unique needs as a blind pupil. Student prevailed on Issue 1b.

ISSUE 2: DID BELLFLOWER FAIL TO IMPLEMENT STUDENT'S IEPS FROM FEBRUARY 11, 2020, THROUGH JANUARY 27, 2022?

Student contends Bellflower materially failed to implement Student's IEPs from February 11, 2020, through January 27, 2022. Specifically, Student contends Bellflower failed to implement 165 minutes a day of specialized academic instruction and specialized vision services consistent with Student's June 14, 2019, and May 28, 2021 IEPs. Student also contends Bellflower did not implement Student's assistive technology, specifically, the BrailleNote.

Student also contends Bellflower failed to implement 110 minutes a week of orientation and mobility services, consistent with the June 14, 2019, and May 28, 2021 IEPs. Student contends Bellflower did not implement any of the orientation and mobility services from March 16, 2020, through the end of the 2019-2020 school year. Further, Student contends Bellflower reduced Student's orientation and mobility services by 73 percent during the 2020-2021 school year. Finally, Student contends that during the 2021-2022 school year, Bellflower did not implement all of the orientation and mobility services offered in Student's May 28, 2021 IEP.

Bellflower contends its implementation of Student's June 14, 2019 IEP, during the 2019-2020 school year, did not deny Student a FAPE. Specifically, Bellflower contends it provided Student with specialized academic instruction and specialized vision services consistent with Student's June 14, 2019 IEP, beginning in February 2020. Further, Bellflower acknowledges that when it failed to implement Student's specialized academic instruction, specialized vision services, and orientation and mobility services, Bellflower offered Student compensatory education to make up for

any gaps in service. Finally, Bellflower contends Student failed to show there was a material variance between what Student's IEPs required and what Student actually received during the 2019-2020, 2020-2021, and 2021-2022 school years.

BELLFLOWER MATERIALLY FAILED TO IMPLEMENT STUDENT'S
SPECIALIZED ACADEMIC INSTRUCTION FROM FEBRUARY 11, 2020,
THROUGH MARCH 13, 2020

A school district violates the IDEA if it fails to provide special education and related services in conformity with a student's IEP. (20 U.S.C. § 1401(9)(D).) When a school district does not conform exactly with the IEP, the district only violates the IDEA if it materially failed to implement the IEP. (*Van Duyn v. Baker Sch. Dist. 5J* (9th Cir. 2007) 502 F.3d 811, 815, 822.) A material failure occurs when there is more than a minor discrepancy between the services provided and those required in the IEP. (*Id.* at p. 822.) However, the materiality standard does not require that the student suffer demonstrable educational harm in order to prevail. (*Ibid.*) The student's educational progress, or lack thereof, may be indicative of whether there was more than a minor discrepancy in the services provided. (*Ibid.*) There is no statutory requirement of perfect adherence to the IEP, nor is there any reason rooted in the statutory text to view minor implementation failures as denials of a FAPE. (*Id.* at p. 821.)

Student proved Bellflower materially failed to implement Student's specialized academic instruction, from February 11, 2020, through March 13, 2020, the last day of school before Bellflower's schools closed as a result of the COVID-19 pandemic.

Student did not prove Bellflower materially failed to implement Student's specialized vision services, orientation and mobility services, or Student's assistive technology from February 11, 2020, through March 13, 2020.

Student's operative IEP during the 2019-2020 school year, was Student's June 14, 2019 IEP. The June 14, 2019 IEP called for the following, along with other services and supports, not at issue in Issue 2:

- 165 minutes a day of individual specialized vision services provided by a teacher of the visually impaired, who would provide specialized academic instruction in core academic subjects, in a separate classroom;
- 110 minutes a week of orientation and mobility services; and
- various assistive technology and low incidence supports, including an electronic braille notetaker.

Smith began providing specialized academic instruction and specialized vision services to Student on February 10, 2020, at a frequency consistent with Student's June 14, 2019 IEP. However, while Smith was credentialed to teach students with visual impairments, Smith was not credentialed to teach core academic subjects to special education students. Thus, Smith was not qualified to teach Student specialized academic instruction to Student. Student required a teacher credentialed to teach core academic subjects to special education students with visual impairments to receive a FAPE. Smith's lack of credential was more than a slight deviation from what Student's June 14, 2019 IEP required.

Accordingly, because Smith did not hold a credential to teach specialized academic instruction, Bellflower materially failed to implement Student's specialized academic instruction services from February 11, 2020, through March 13, 2020. There were 22 days of school from February 11, 2020, through March 13, 2020. Student attended on all days. Therefore, Bellflower failed to implement 3,630 minutes of specialized academic instruction. This was a material deviation from what Student should have received under the June 14, 2019 IEP, and resulted in a denial of FAPE.

Jennifer Ramirez provided orientation and mobility services during the 2019-2020 school year. There was no evidence that Ramirez did not provide the services in conformity with Student's IEP from February 11, 2020, through March 13, 2020. Similarly, there was no evidence that Student did not have use of the BrailleNote from February 11, 2020, through March 13, 2020. Therefore, Student did not meet its burden to prove Bellflower did not implement Student's orientation and mobility services and BrailleNote from February 11, 2020, through March 13, 2020.

STUDENT WAS NOT ENTITLED TO SERVICES FROM MARCH 16, 2020, THROUGH MARCH 27, 2020

In March 2020, the United States Department of Education issued guidance that if a local educational agency closed its schools due to COVID-19 and did not provide any educational services to the general student population, then it would not be required to provide services to student with disabilities. (U.S. Dept. of Educ., Questions and Answers on Providing Services to Children with Disabilities During a COVID-19 Outbreak, Answer to Question A-1 (March 2020).) This guidance was

consistent with the Ninth Circuit ruling in *N.D. v. Hawaii Dept. of Educ.* (9th Cir. 2010) 600 F.3d 1104, which affirmed a district court's order denying a preliminary injunction by special education students to prevent the state from furloughing teachers and providing 17 fewer instructional days to all students. The students argued the school closure constituted a change in placement and, therefore, violated the IDEA's stay-put provision. The court disagreed, holding that "Congress did not intend for the IDEA to apply to system wide administrative decisions," and because the furloughs affected all students, "[a]n across the board reduction of school days...does not conflict with Congress's intent of protecting disabled children from being singled out." (*N.D. v. Hawaii Dept. of Educ., supra*, at p. 1116.) Further, the court held "[t]he IDEA did not intend to strip administrative powers away from local school boards and give them to parents of individual children..." (*Id.* at p. 1117.)

Bellflower closed its schools on March 16, 2020, as a result of the COVID-19 pandemic and guidance from state and local directives. From March 16, 2020, through March 27, 2020, Bellflower did not provide any educational services to any of its students. Thus, Bellflower was not required to provide services to Student during this time period.

BELLFLOWER MATERIALLY FAILED TO IMPLEMENT STUDENT'S IEP FROM MARCH 30, 2020, THROUGH JANUARY 27, 2022

Student proved Bellflower materially failed to implement Student's specialized academic instruction, specialized vision services, orientation and mobility services, and Student's assistive technology, specifically the BrailleNote, from March 30, 2020, through January 27, 2022.

BELLFLOWER MATERIALLY FAILED TO IMPLEMENT STUDENT'S
SPECIALIZED ACADEMIC INSTRUCTION AND SPECIALIZED VISION
SERVICES FROM MARCH 30, 2019, THROUGH JANUARY 27, 2022

2019-2020 SCHOOL YEAR

From March 30, 2020, through the end of the 2019-2020 school year, Bellflower provided instruction to its students through a distance learning model that combined direct online instruction with a teacher or other service provider, with independent work for students to complete at home. Bellflower's instruction through a distance learning model did not change its obligation to implement Student's IEP to the greatest extent possible and to provide a FAPE to Student. Bellflower did not offer evidence that proved it could not implement 165 minutes a day of specialized academic instruction and specialized vision services through a distance learning model. Therefore, Student was still entitled to receive 165 minutes a day of specialized academic instruction and specialized vision services from a teacher credentialed to teach core academic subjects to special education students with visual impairments, as required in the June 14, 2019 IEP.

Smith's lack of a credential to teach specialized academic instruction, resulted in a material failure of Bellflower to implement Student's specialized academic instruction services from March 30, 2020, through the end of the 2019-2020 school year. There were 41 school days between March 30, 2020, and the end of the 2019-2020 school year. Student attended all days. Therefore, Bellflower failed to implement 6,765 minutes of specialized academic instruction. This was a material deviation from what Student should have received under the June 14, 2019 IEP, and resulted in a denial of FAPE.

2020-2021 SCHOOL YEAR

Smith continued to teach Student through a distance learning model until April 16, 2021. Smith taught Student through a hybrid in-person and distance learning model from April 19, 2021, through the end of the 2020-2021 school year. The June 14, 2019 IEP remained Student's operative IEP until Parent consented to the May 28, 2021 IEP on July 28, 2021. Therefore, Bellflower should have provided Student with 165 minutes a day of specialized academic instruction and specialized vision services from a teacher credentialed to teach core academic subjects to special education students with visual impairments. Because Smith did not have a credential to teach specialized academic instruction, Bellflower materially failed to implement Student's specialized academic instruction for the entire 2020-2021 school year. There were 180 days in the 2020-2021 school year. Student attended on all days. Therefore, Bellflower failed to implement 29,700 minutes of specialized academic instruction. This was material deviation from what Student should have received under the June 14, 2019 IEP, and resulted in a denial of FAPE.

2021-2022 SCHOOL YEAR

Bellflower returned to a regular in-person schedule for the 2021-2022 school year. Student's operative IEP dated May 28, 2021, still called for Student to receive 165 minutes a day of specialized academic instruction and specialized vision services. Smith took a leave of absence at the start of the 2021-2022 school year, and Vickrey provided instruction as a substitute teacher for one hour each day until Dail began teaching Student on September 24, 2021. The evidence did not show Vickrey was credentialed to teach core academic subjects to special education students with

visual impairments. Student did not present evidence that showed Dail provided less than 165 minutes of specialized academic instruction and specialized vision services on the days Dail taught Student.

On September 30, 2021, Bellflower sent Parent a letter acknowledging that due to the lack of a qualified service provider from August 17, 2021, through September 23, 2021, Bellflower owed Student 4,455 minutes of specialized academic instruction and specialized vision services. Dail was absent from October 5, through 12, 2021. Because of Dail's absence, Bellflower acknowledged it owed Student an additional 825 minutes of specialized academic instruction and specialized vision services. Further, Dail was absent one day every two weeks through December 2021, and was absent two days a week in January 2022. Considering holidays and days schools were closed, Dail missed approximately eight days from September 24, 2021, through January 27, 2022, not including those already accounted for in early October 2021. Thus, Bellflower failed to implement 1,320 minutes of specialized academic instruction and specialized vision services from September 24, 2021, through October 4, 2021, and from October 15, 2021, through January 27, 2022.

Accordingly, from the beginning of the 2021-2022 school year, through January 27, 2022, Bellflower failed to implement 6,600 minutes of specialized academic instruction and specialized vision services. This was a material deviation from what Student should have received under the May 28, 2021 IEP, and resulted in a denial of FAPE.

In total, the evidence showed that from February 11, 2020, through January 27, 2022, Bellflower failed to implement 46,695 minutes of specialized academic instruction taught by a teacher credentialed to teach core academic subjects to

special education students with visual impairments. This was a material failure to implement Student's June 14, 2019, and May 28, 2021 IEPs, and resulted in a denial of FAPE.

BELLFLOWER MATERIALLY FAILED TO IMPLEMENT STUDENT'S ORIENTATION AND MOBILITY SERVICES

Orientation and mobility services are services provided to blind or visually impaired children by qualified personnel to enable those students to attain systematic orientation to and safe movement within their environments in school, home, and community. (34 C.F.R. § 300.34(c)(7).)

2018-2019 SCHOOL YEAR

Student's claim that Bellflower still owed compensatory orientation and mobility services from extended school year 2019, is not considered in this Decision because the 2018-2019 school year, including extended school year, are outside of the relevant time period in this case.

2019-2020 SCHOOL YEAR

Student did not prove Bellflower failed to materially implement Student's orientation and mobility services from March 30, 2020, through the end of the 2019-2020 school year. The only evidence that supported Student's claim was Parent's assertion, at hearing, that Bellflower inconsistently provided orientation and mobility services when schools were closed as a result of the COVID-19 pandemic. Parent did not provide any details to support this assertion or offer any information to quantify

the amount of orientation and mobility services Bellflower did not provide. Without detailed testimonial or documentary evidence, Parent's assertion, alone, was insufficient to meet Student's burden of proving Bellflower failed to materially implement Student's orientation and mobility services from March 30, 2020, through the end of the 2019-2020 school year.

2020-2021 SCHOOL YEAR

Student proved Bellflower materially failed to implement Student's orientation and mobility services during the 2020-2021 school year. At Student's September 28, 2020 IEP team meeting, Bellflower offered 80 minutes a week instead of 110 minutes a week of orientation and mobility services, citing emergency conditions, pursuant to California Education Code sections 41422 and 46392. Parent did not consent to the reduction in orientation and mobility services.

Pursuant to guidance from CDE and OSEP, Bellflower had a duty to implement Student's orientation and mobility services consistent with the June 14, 2019 IEP, to the greatest extent possible. Bellflower did not present evidence that proved it could not implement 110 minutes a week of orientation and mobility services through a distance learning model. Therefore, Student was entitled to receive 110 minutes a week of orientation and mobility services.

Bellflower continued to offer 80 minutes a week of orientation and mobility services in Student's October 16, 2020 IEP. Parent did not consent to this reduction in orientation and mobility services. In Student's March 22, 2021 IEP, Bellflower

offered 110 minutes a week of orientation and mobility services. Despite not having Parent's consent, the evidence showed that from September 28, 2020, through March 22, 2021, Bellflower failed to implement 30 minutes a week of Student's orientation and mobility services. There were 22 weeks of school from September 28, 2020, through March 22, 2021. Student attended each week. Accordingly, from September 28, 2020, through March 22, 2021, Bellflower did not implement 660 minutes of Student's orientation and mobility services. This was a material deviation from what Student should have received under the June 14, 2019 IEP, and resulted in a denial of FAPE.

2021-2022 SCHOOL YEAR

Student proved Bellflower failed to materially implement orientation and mobility services during the 2021-2022 school year. Student primarily received in-person orientation and mobility services during the 2021-2022 school year. Some services were still provided virtually so that the orientation and mobility specialist could help Student navigate the home environment. According to service logs created by the orientation and mobility specialist serving Student, from November 4, 2021, through January 27, 2022, Student received a net 70 minutes more than the 110 minutes a week required under Student's May 28, 2021 IEP. There were no logs that covered the time period from the start of the 2021-2022 school year, through November 3, 2021, but in a September 29, 2021 letter, Bellflower informed Parent that no orientation and mobility services would be provided for four weeks in October 2021, and that Student was owed 440 minutes of compensatory services.

Subtracting the 70 extra minutes Bellflower provided from 440 minutes, Bellflower failed to implement 370 minutes of orientation and mobility services from the start of the 2021-2022 school year, through January 27, 2022. This was a material deviation from what Student should have received under the May 28, 2021 IEP, and resulted in a denial of FAPE.

In total, the evidence showed Bellflower failed to implement 1,030 minutes of orientation and mobility services from February 11, 2020, through January 27, 2022. Accordingly, Bellflower materially failed to implement Student's orientation and mobility services from February 11, 2020, through January 27, 2022, and therefore, denied Student a FAPE.

BELLFLOWER MATERIALLY FAILED TO IMPLEMENT STUDENT'S ASSISTIVE TECHNOLOGY

Student proved Bellflower materially failed to implement Student's assistive technology by not ensuring Student had a working BrailleNote. From February 11, 2020, through January 27, 2022, Student had repeated technical issues with the BrailleNote, which resulted in Student not having access to the BrailleNote for extended periods of time. Without a working BrailleNote, Student could not access academic materials in braille.

When distance learning began at the end of March 2020, Student could not access the online classroom because Student's BrailleNote was not working properly. Parent purchased Student a laptop so that Student could access the online classroom. At Student's September 28, 2020 IEP, Parent reported the BrailleNote

echoed during online instruction, which distracted Student and the teacher. Parent took the device to a technician multiple times to fix the problem. Then, in March 2021, one of the braille dots got stuck, and Parent took the device back to the technician. Student did not get the BrailleNote back until the beginning of the 2021-2022 school year, which impeded Student's ability to read and write braille for several months. Finally, at Student's December 1, 2021 IEP, Parent requested additional support to teach Student how to effectively use the BrailleNote and troubleshoot technical issues.

While Student had access to other devices when the BrailleNote was not working, no other device had the functionality of the BrailleNote. Dr. Biggs persuasively opined that the BrailleNote had everything Student needed to be an independent learner, and thus, it was a crucial component of Student's educational program. Dr. Biggs also persuasively testified that Student required a BrailleNote to receive a FAPE. Student needed the BrailleNote to read, write, and complete assignments; to store books and academic materials in braille; and for organization.

It was Bellflower's, and not Parent's responsibility, to ensure the BrailleNote worked properly. Bellflower's failure to ensure Student had a working BrailleNote or a replacement device that allowed Student to access academic materials and complete assignments in braille, was a material failure to implement Student's June 14, 2019, and May 28, 2021 IEPs, and resulted in a denial of FAPE.

Bellflower's material failure to implement Student's specialized academic instruction and orientation and mobility services, and to ensure Student had a working BrailleNote resulted in a denial of FAPE. Student prevailed on Issue 2.

CONCLUSIONS AND PREVAILING PARTY

Pursuant to California Education Code section 56507, subdivision (d), the hearing decision must indicate the extent to which each party has prevailed on each issue heard and decided. The parties prevailed on the issues as follows:

ON ISSUE 1A:

Bellflower did not deny Student a FAPE, from October 4, 2019, through the date Student's amended complaint was deemed filed on January 27, 2022, by failing to consider Student's needs as a blind pupil.

Bellflower prevailed on Issue 1a.

ON ISSUE 1B:

Bellflower denied Student a FAPE from October 4, 2019, through the date Student's amended complaint was deemed filed on January 27, 2022, by failing to address Student's needs as a blind pupil.

Student prevailed on Issue 1b.

ON ISSUE 2:

Bellflower denied Student a FAPE, from February 11, 2020, through the date Student's amended complaint was deemed filed on January 27, 2022, by failing to implement Student's IEP.

Student prevailed on Issue 2.

REMEDIES

Student prevailed on Issues 1b and 2 and is entitled to a remedy for Bellflower's denial of FAPE. Student requested residential placement at the Perkins School for the Blind for three years, as compensatory education. Perkins is a private school in Massachusetts that specializes in educating children and young adults who are visually impaired. If OAH does not award Student placement at Perkins, Student requested 393.5 hours of specialized academic instruction by a teacher credentialed to teach core academic subjects to students with visual impairments and 53.85 hours of orientation and mobility services, as compensatory education.

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

In remedying a FAPE denial, the student is entitled to relief that is appropriate in light of the purposes of the IDEA. (20 U.S.C. § 1415(i)(2)(C)(iii); 34 C.F.R. § 300.516(c)(3).) Appropriate relief means relief designed to ensure that the student is appropriately educated within the meaning of the IDEA. (*Student W. v. Puyallup School Dist.* (9th Cir. 1994) 31 F.3d 1489, 1497.) The award must be fact-

specific and be reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place. (*Reid ex rel. Reid v. District of Columbia* (D.C. Cir. 2005) 401 F.3d 516, 524.)

Bellflower denied Student a FAPE by failing to offer appropriate specialized academic instruction, specialized vision services, one-to-one aide support, braille transcription services, and a daily living skills goal. Bellflower also denied Student a FAPE by materially failing to implement Student's specialized academic instruction, specialized vision services, orientation and mobility services, and assistive technology.

As a result of Bellflower's FAPE denials under Issues 1b and 2, Student received insufficient and inadequate special education, related services, and supports during the 2019-2020, 2020-2021, and 2021-2022 school years. Specifically, Bellflower failed to implement approximately 795 combined hours of specialized academic instruction and orientation and mobility services. Student's academic and braille skills remained regressed as a result of Bellflower's denial of FAPE. By the time Dail started working with Student again in September 2021, Student had regressed in all academic areas and in braille skills because of inconsistent and inappropriate specialized academic instruction, specialized vision services, orientation and mobility services, one-to-one aide support, and assistive technology throughout the 2019-2020, 2020-2021, 2021-2022 school years.

Student is scheduled to receive a certificate of complete at the end of the 2021-2022 school year and transition out of the high school program. However,

Student does not have the academic or braille skills to transition to post-secondary life because of Bellflower's denials of FAPE. While Student is entitled to continue to receive special education services until age 22, at the time of the hearing, Bellflower and Parent had not yet determined what Student's placement and services would be after the 2021-2022 school year.

SCHOOL PLACEMENT AS COMPENSATORY EDUCATION

Parents may be entitled to reimbursement for the costs of placement or services they have procured for their child when the school district has failed to provide a FAPE, and the private placement or services were appropriate under the IDEA and replaced services that the school district failed to provide. (20 U.S.C. § 1412(a)(10)(C); *Burlington, supra*, 471 U.S. at p. 370; *Puyallup, supra*, 31 F.3d at p. 1496.) An ALJ has the authority to order placement in a non-certified private school as compensatory education. (*Ravenswood City School Dist. v. J. S.* (N.D.Cal. 2012) 870 F.Supp.2d 780, 787-788.)

Student proved that placement at Perkins, an out of state residential program, would be beneficial as compensation for Bellflower's denials of FAPE. Dr. Biggs persuasively testified that Perkins would be an excellent placement for Student because of its reputation of having the best immersive program for visually impaired students in the country. Further, Student already completed the admissions process and on November 29, 2021, Perkins admitted Student to its school.

Dr. Biggs persuasively opined that Student was significantly deficient in academic skills as Student functioned significantly below Student's academic grade level. Dr. Biggs also concluded Student's ability to function independently as a visually impaired student was significantly below Student's age level. Dr. Biggs attributed Student's deficient academic skills and lack of independence to insufficient and inconsistent specialized academic instruction, specialized vision services, and other supports Bellflower failed to offer.

Further, Dr. Biggs persuasively opined that Student required a program where Student could be immersed in braille instruction and technology designed for students with visual impairments. Dr. Biggs opined Student required an immersive program to successfully transition to post-secondary life. Dr. Biggs persuasively opined that Bellflower could not offer the level of service Student required to compensate Student for the instruction and services Bellflower failed to provide.

Student did not present evidence as to whether Perkins is a California certified non-public school. However, pursuant to *Ravenswood City School District v. J. S.*, OAH has the authority to award a non-certified private school as compensatory education. Accordingly, because of Bellflower's failure to offer Student a FAPE and implement Student's IEPs throughout the 2019-2020, 2020-2021, and 2021-2022 school years, Student is awarded placement at Perkins School for the Blind for two school years, including extended school years. Bellflower must directly fund Student's placement at Perkins, including the cost for specialized academic instruction, specialized vision services, vocational and transition services, orientation

and mobility services, braille transcription services, assistive technology services, and room and board. Student and one adult traveling companion are also awarded the cost of three round trips between Student's home and Perkins, each school year Student attends Perkins. The awarded cost of the trips includes airfare and ground transportation.

ORDER

1. Within 30 calendar days of the date of Order, Bellflower must establish a contract with Perkins School for the Blind, to directly fund Student's placement at Perkins School for the Blind during the 2022-2023, and 2023-2024 school years, including summer programs in 2023, and 2024.
2. Once Bellflower establishes a contract with Perkins School for the Blind, the educational rights holder must coordinate with Perkins School for the Blind to complete Student's enrollment process. Bellflower must provide all necessary documentation to Perkins School for the Blind to complete Student's enrollment process.
3. Bellflower must reimburse Parent or Student for three round trips for Student and one adult travel companion, between Student's home in California and Perkins School for the Blind, each school year Student attends Perkins, for a total not to exceed six round trips. Bellflower must reimburse the cost of airfare and ground transportation.
4. All other relief requested by Student is denied.

RIGHT TO APPEAL THIS DECISION

This is a final administrative decision, and all parties are bound by it. Pursuant to Education Code section 56506, subdivision (k), any party may appeal this Decision to a court of competent jurisdiction within 90 days of receipt.

Tara Doss

Administrative Law Judge

Office of Administrative Hearings