

BEFORE THE  
OFFICE OF ADMINISTRATIVE HEARINGS  
STATE OF CALIFORNIA

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CASE NO. 2021100727

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PARENT ON BEHALF OF STUDENT,

v.

CENTRALIA ELEMENTARY SCHOOL DISTRICT.

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DECISION

MAY 20, 2022

On October 25, 2022, the Office of Administrative Hearings, called OAH, received a due process hearing request from Student naming Centralia Elementary School District as respondent. The case was continued on December 7, 2022, for good cause. Administrative Law Judge Penelope Pahl heard this matter via videoconference on March 29 and 30, and April 5, 6, 7, 11 and 12, 2022.

Attorneys Meldie Moore and Sarina Yared represented Parent and Student. Parent attended all hearing days on Student's behalf. Attorney Courtney Brady represented Centralia. Dr. Arvin Garcia attended all hearing days on Centralia's behalf.

At the parties' request the matter was continued to May 3, 2022, for written closing briefs. The record was closed, and the matter was submitted on May 3, 2022.

## ISSUES

Following the conclusion of the testimony, Student's counsel withdrew Issue 3, as stated in the Prehearing Conference Order. The issues were renumbered accordingly. The issues remaining are:

1. Did Centralia Elementary School District deny Student a free appropriate public education, or FAPE, from October 25, 2019, through the date Student's complaint was filed on October 25, 2021 by failing to:
  - a. Develop measurable goals;
  - b. Offer appropriate services in the areas of reading intervention, behavior, counseling, and aide support; and
  - c. Offer appropriate placement?
2. Did Centralia deny Student a FAPE, from March 2020 through April 2021, by failing to implement Student's IEP during distance learning and by failing to offer compensatory education as a result of distance learning?

3. Did Centralia deny Student a FAPE, from December 2020 through May 2021, by failing to conduct a new functional behavior assessment and updating Student's behavior intervention plan?

## 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 et seq. (2006) [All references herein to the Code of Federal Regulations are to the 2006 version unless otherwise indicated.]; Ed. Code, § 56000 et seq.; Cal. Code Regs., tit. 5, § 3000 et seq.) The main purposes of the Individuals with Disabilities Education Act, referred to as the IDEA, are to ensure:

- all children with disabilities have available to them a free appropriate public education 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. The party requesting the hearing has the burden of proof by a

preponderance of the evidence. (20 U.S.C. § 1415(f)(3)(B); Ed. Code, § 56502, subd. (i); *Schaffer v. Weast* (2005) 546 U.S. 49, 57-58, 62 [126 S.Ct. 528, 163 L.Ed.2d 387]; and see 20 U.S.C. § 1415(i)(2)(C)(iii).) In this case, Student had the burden of proof. The factual statements in this Decision constitute the written findings of fact required by the IDEA and state law. (20 U.S.C. § 1415(h)(4); Ed. Code, § 56505, subd. (e)(5).)

Student was nine years old and in third grade at the time of hearing. Student resided within the Centralia Elementary School District geographic boundaries at all relevant times. Beginning December 3, 2019, Student was eligible for special education under the categories of Other Health Impairment and Specific Learning Disability.

## LEGAL FRAMEWORK

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 (2007), 300.321, and 300.501.)

In general, a child eligible for special education must be provided access to specialized instruction and related services which are individually designed to provide educational benefit through an IEP reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances. (*Board of Education*

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

## ISSUE 1A: DID CENTRALIA ELEMENTARY SCHOOL DISTRICT DENY STUDENT FAPE FROM DECEMBER 3, 2019, TO OCTOBER 25, 2021, BY FAILING TO DEVELOP MEASURABLE GOALS?

### ISSUE 1 TIMEFRAME

Student alleges an October 25, 2019 start date in Issue 1. However, Student was first found eligible for special education and related services on December 3, 2019. Student did not allege that he should have been made eligible for special education before December 3, 2019. Although the issue asserted begins prior to special education eligibility, districts are not obligated to provide a FAPE as defined by the IDEA and state special education laws, to a child who is not eligible for special education. (*R.B. v. Napa Valley Unified School Dist.* (9th Cir. 2007) 496 F.3d 932, 942.) Therefore, issues 1A, 1B and 1C will be limited to the time from of December 3, 2019, through October 25, 2021.

### GOAL MEASURABILITY

Student contends that the goals offered in Student's IEPs were not measurable, because the baselines were expressed with measurements that did not match the measurement methods in the goals themselves. Student asserts that

without baselines that express Student's current abilities in a way that can be compared mathematically to the measurement in the baseline, progress cannot be tracked, and thus the goal cannot be measurable.

Centralia argues that whether the baselines were measurable was not at issue in the case; and, furthermore, baselines are not required to be measurable pursuant to state or federal law.

A statement of annual goals must include a description of the manner in which the pupil's progress toward meeting annual goals will be measured. (20. U.S.C. § 1414 (d)(1)(A)(i)(III); Ed Code § 56345, subd. (a)(3).)

Student failed to establish that goals offered during the relevant timeframe were not measurable. Centralia conducted Student's initial IEP over two sessions, on December 3 and 13, 2019. Although Centralia designated the latter IEP as an "amendment," the December 13, 2019 IEP meeting completed the IEP team's discussion of assessments, at which point the discussion turned to goals, services, accommodations, and placement. Thus, the goals offered to Student were those stated in the December 13, 2019 IEP.

Similarly, the December 15, 2020 IEP goals offered were those revised during the February 12, 2021 IEP team meeting. There is no issue pled in this case asserting that the goals in other drafts of the December 3, 2019, or December 15, 2020 IEPs were incomplete. Nor did Student plead that the goals were unclear. The issue here is whether the goals offered in the December 3, 2019, and December 15, 2020 IEPs were measurable.

Each of the goals offered in the 2019 and 2020 IEPs detailed the means by which Student's progress would be measured. Each goal stated a mathematical means of determining success, either percent accuracy or by amount of time; the number of trials or tasks to be used to determine success; and the means of determining Student's abilities, i.e., teacher observation, data collection, assessments given, or student work samples. No specific form of measurement is required by statute or caselaw. In evaluating whether goals were measurable, the Ninth Circuit Court of Appeals has stated that "goals could be measured based on teacher subjective observations; ordinarily, e.g., no improvement, some improvement, significant improvement; or in any other way." (*Capistrano Unified School Dist. v. B.W.*, (9th Cir. 2021) 21 F. 4th 1125, 1133-1135.) Thus, goals that offer a specific form or measurement, as each of the goals in the December 3, 2019, and December 15, 2020 IEPs do, meet the requirements of state and federal law.

Student argues that the information describing Student's "baseline" in relation to the goal should have mirrored the measurement method expressed in the goal itself. For example, in Annual Goal Number 1, Student asserted that expressing Student's baseline by use of Student's Wechsler Individual Achievement Test Reading Comprehension subtest standard score and percentile rate would not allow Student's progress to be determined when compared to the goal requiring him to answer comprehension questions with 80 percent accuracy in three of five trials when given a short passage at the first-grade level. In support, Student's closing argument proffered goal standards from sources that were not in evidence and were not explained by any witness. Further, the goal writing standards were not derived from

any statute or regulation. Thus, these were given no weight. Student also offered no legal authority requiring goals to include baselines expressing Student's current abilities in a manner directly aligned to the goal measurement method in the goal itself; or, in fact, that baselines be measurable at all. California does not require additional information be included in an IEP, beyond that explicitly required by the IDEA and California state statute. (Cal. Educ. Code § 56345(i).) Thus, Student's argument fails.

Student also argues that the data collection over the course of the year following creation of the IEP was not consistent, rendering the goal inadequate. However, the issue is whether the offered goals were measurable. In evaluating an IEP, it is not appropriate to critique it with the benefit of hindsight. Rather, the IEP must be evaluated to determine whether the goals and methods proposed were reasonably calculated to ensure that the child would receive educational benefit at the time of implementation. An IEP is "a snapshot, not a retrospective." (*Anchorage School Dist. v. M.P.* (9th Cir. 2012) 689 F. 3d 1047, 1057; citing, *Adams v. State of Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149.) Alleged failures to properly collect data following the date the goals are offered are irrelevant to whether the offered goal itself was measurable. Accordingly, Student failed to prove that the goals offered in either the December 3, 2019, or December 15, 2020 IEP, were not measurable.



## ISSUE 1B: DID CENTRALIA DENY STUDENT A FAPE FROM DECEMBER 3, 2019, THROUGH OCTOBER 25, 2021, BY FAILING TO OFFER APPROPRIATE SERVICES IN THE AREAS OF READING INTERVENTION, BEHAVIOR, COUNSELING, AND AIDE SUPPORT?

Student asserts that Centralia failed to offer appropriate services in the areas of reading intervention, behavior, counseling, and aide support. Centralia argues that the IEPs offered a FAPE.

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 to meet its substantive obligations, a district must provide an IEP that is "reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances." *Endrew F. supra*, 580 U.S. \_\_\_\_; 137 S. Ct. at 1001.

### DECEMBER 3, 2019 IEP OFFER

#### READING INTERVENTION

Student failed to show that Centralia offered inadequate reading intervention services in Student's initial IEP. During Student's initial IEP on December 3, 2019, Student's reading deficits and the need for reading intervention were discussed. At that time, the IEP team members knew Student had needs in phonics, fluency, sight words, and reading comprehension, and offered specialized academic instruction in the amount of 40 minutes, three times per week.

Student failed to establish the reading intervention approach offered did not meet his reading and literacy needs; nor did he establish it was not reasonably calculated to provide educational benefit. The IEP team discussed different reading intervention programs for Student. Parent's advocate recommended an Orton Gillingham program called Rainbow Structured Literacy. Parent asked about the Lindamood Bell program. The special education teacher, Marguerite Vu, stated her intention to use Reading Mastery, which focused on sounds and phonemic awareness. The intent to use Reading Mastery was also noted in the IEP notes.

"The IDEA accords educators discretion to select from various methods for meeting the individualized needs of a student, provided those practices are reasonably calculated to provide him with educational benefit." (C.P. v. Prescott Unified School Dist. (9th Cir. 2011) 631 F.3d 1117, 1122.) The methodologies to address Student's needs do not have to be specified in the IEP. (Ibid.)

Student presented neither evidence nor testimony establishing that Reading Mastery did not meet Student's needs at the time it was offered on December 13, 2019. The sole complaint was that it was not Parent's preferred the Orton Gillingham or Lindamood Bell program. A district is not required to use the methodology a parent prefers when providing special education services for a child. School districts are entitled to deference in deciding what programming is appropriate as a matter of educational policy. (Crofts v. Issaquah School District No. 411 (9th Cir. 2022) 22 F.4th 1048, 1056 1057.)

Student's Advocate, Paul Eisenberg, asserted that only an Orton Gillingham program would meet Student's needs. However, in evaluating whether an IEP offered FAPE, the focus is on the District's offer, not on the alternative that the family

preferred. (*Gregory K. v. Longview School Dist., supra*, 811 F.2d at p.131.) Nor does Eisenberg qualify as an expert on the subject. He is not a credentialed teacher, and the evidence did not establish he possessed other training in choosing reading intervention curriculum or determining Student's educational needs. Furthermore, Eisenberg had only superficially reviewed the proposed Reading Mastery program by looking briefly at information about it on the internet. He offered no specific evidence establishing that Reading Mastery would not meet Student's needs. Eisenberg's opinion regarding the offer of Reading Mastery was given no weight.

Similarly, Dr. Jeanette Morgan, Student's expert witness, only had a passing familiarity with Reading Mastery and little knowledge of Student. She had not met Student directly. Parent hired Dr. Morgan to review records, conduct observations, and make recommendations regarding appropriate placement and services. To make these determinations, Dr. Morgan had reviewed some of Student's educational records but could not identify which ones. Dr. Morgan observed Student in his current non-public school placement and had also observed a third-grade general education class and a resource class at Student's former school in the Centralia district. However, she did not observe Student in a Centralia classroom. Dr. Morgan admitted during hearing that she was not familiar enough with Reading Mastery to say whether or not it was appropriate. Given her lack of information regarding the Reading Mastery program, Dr. Morgan's opinion in this area was given no weight.

Student argued that Eisenberg and Dr. Morgan testified that Reading Mastery is not evidence-based. However, neither of them so testified. As previously stated, neither of them had more than a passing familiarity with the program. Accordingly, Student failed to establish that Centralia's choice of reading intervention programs, Reading Mastery, denied Student a FAPE.

Student also failed to demonstrate that the type and amount of specialized academic instruction services offered denied Student a FAPE. Dr. Morgan did not testify the offered specialized academic instruction was inadequate. The December 3, 2019 IEP offered three, 40-minute sessions per week of focused reading intervention from Vu using Reading Mastery. Dr Morgan's testimony evaded the question of whether implementation of the program three times a week for 40 minutes as offered in the IEP met the program's protocols or would have been adequate. Dr. Morgan offered a vague recommendation that Student needed "intensive reading intervention four-to-five times per week in a program that was repetitive and used a method known to be systematic and evidence-based." Dr. Morgan did not define the time necessary for a program to be "intensive." Dr. Morgan also acknowledged that a program that was offered three days per week might be adequate so long as the chosen method was implemented with fidelity and used protocols the program recommended. Dr. Morgan's lack of knowledge of Student's needs as evidenced by the vague opinion regarding the type of reading intervention Student required, rendered her opinions in this area unreliable.

Student also argued that his lack of progress in reading was evidence that the offer was inadequate, and that data was not properly collected to track Student's progress. However, offers are not evaluated in hindsight. (*Anchorage School District v. M.P.*, supra, 689 F. 3d at p. 1057.) Allegations of data collection failures, or lack of adequate progress after an IEP offer is made, are irrelevant to the evaluation of whether the IEP offered was reasonably calculated to provide FAPE. Student failed to prove the reading intervention program offered in the December 3, 2020 IEP did not meet Student's needs.

## BEHAVIOR, COUNSELING AND AIDE SUPPORT

Student also failed to establish that Centralia's December 3, 2019 behavior, counseling, and aide support offers were inappropriate. Student's December 3, 2019 IEP offered a behavior intervention plan and behavior instruction provided by a full-time behavior aide working one-to-one with Student each day. The IEP also offered four hours per month of assistance with behavior plan implementation by a Board-Certified Behavior Analyst from the Special Education Local Plan Area, or SELPA to which Centralia belonged. The behavior analyst, Caitlin Cabiles, who trained the behavior aide, Perla Vazquez, modeled the provision of behavior services for Vazquez, and analyzed the data collected by Vazquez and other staff members. Cabiles also consulted with teachers and the school psychologist regarding behavior plan implementation, offering specific instruction for executing the behavior plan in their programs.

The IEP also offered direct counseling services to Student for 30 minutes weekly, to teach self-regulation skills, personal space, accepting consequences, and friendship skills. The IEP provided for 60 minutes per month of psychological services consultation and instruction for Student's behavior aide, and other IEP team members, to learn social-emotional behavioral intervention approaches for Student.

Student offered no testimony or documentary evidence establishing that this offer was inadequate when made on December 13, 2019. Instead, he offered multiple records from different systems tracking Student's behavior. Student argued

that the numbers of recorded incidents indicated the IEP offers were inadequate. The closing arguments failed to consider the duplication of records related to some incidents of behavior among the various systems recording Student's conduct. Student's argument also failed to acknowledge Student's behavioral progress.

The evidence established that there were no clear criteria governing when conduct was reported as a "Serious Behavior Emergency," versus a "Student Conference Record" versus an "Assertive Discipline Record." Consequently, the same incident of this Student's maladaptive conduct was frequently reported in multiple databases. Behavior was also recorded in data collection for his behavior plan, and in data collection for his goals, as well as in the daily communication logs that began being sent to his Parents in March of 2021. A careful comparison of all the reported data showed duplication within the different recording systems as well as across data recordation systems. This duplication was not accounted for in Student's arguments regarding the evidence in his closing brief. Nor did Student acknowledge any of the qualitative differences in Student's behavior when comparing recorded behaviors in the fall of 2019 with those noted at the end of the 2020-2021 school year. This resulted in descriptions of the evidence that were inaccurate. More importantly, however, the arguments regarding Student's levels of conduct did not support Student's assertion that the offers made were not adequate to meet Student's needs.

Student argued that incidents of uncontrolled behavior recorded in the fall of 2019, before being made eligible for special education, were evidence that the behavior plan offered in 2019 did not meet Student's needs. However, Student

offered no evidence establishing how the offer was deficient based on those incidents. Centralia considered the severity of Student's behaviors during its assessments. Student's IEP team also considered this information in developing the IEP.

Student also argued that the December 2019 IEP failed to offer any more services than Student was receiving prior to the IEP implementation. This is inaccurate. Student had been assigned a one-to-one aide at the beginning of his first-grade year, prior to being found eligible for special education and related services. The December 2019 IEP offered a behavior plan, implemented by a one-to-one behavior aide, trained and supervised by a SELPA behavior analyst, with weekly counseling sessions to teach behavior management. Student did not establish Centralia failed to consider the severity of Student's behaviors in making its IEP offer, nor did Student established that the offer failed to offer sufficient behavior services.

Student also argued that evidence of continued behavior challenges over the year following the 2019 IEP offer were proof the behavior services offered in the 2019 IEP were inadequate. However, as stated, an offer is not evaluated in hindsight. (*Anchorage School District v. M.P.*, supra, 689 F. 3d at p. 1057.) Student failed to prove that the combination of behavior intervention plan, behavior aide, behavior analyst and psychological services offered in the December 19, 2019 IEP were not designed to meet Student's needs and were not reasonably calculated to provide educational benefit. Thus, Student failed to prove that Centralia denied Student a FAPE by failing to offer adequate behavior, counseling, or aide support services in the December 3, 2019 IEP.

## IEP OFFERS DURING THE 2020-2021 SCHOOL YEAR, THROUGH OCTOBER 25, 2021

Student's first annual IEP convened on December 15, 2020, with two additional sessions in January of 2021 and on February 12, 2021. The exact date of the January 2021 IEP session was not established. The IEP offer was made on February 12, 2021. An amended IEP offer was tendered on June 4, 2021.

### READING INTERVENTION

Student failed to establish that the 2020-2021 reading intervention service offers through October 25, 2021, were inappropriate. The December 15, 2020 IEP offered four, 30-minute sessions of specialized academic instruction each week, for a total of 120 minutes. Vu recommended the adjustment due to the need to maintain Student's focus via Zoom during distance learning. The IEP team considered the recommendation, and it was adopted.

Student offered no credible testimony or evidence that the reading intervention offered in the December 15, 2020 IEP was inadequate. Parents and their advocate asked Centralia to consider RAVE-O or Lindamood Bell for reading. After researching the suggestions, Centralia informed parent during the February 12, 2021 IEP team meeting that it would use Rave-O as Student's primary reading program. Although Eisenberg stated Student needed sessions longer than 30 minutes, he offered no basis for his opinion. As previously discussed, he was not a qualified teacher or reading specialist.

Dr. Morgan offered only a vague opinion regarding an appropriate reading program without defining what she meant by an "intensive" program or identifying



why Centralia's offer did not meet her recommendation for an intensive reading intervention program offered four to five times per week. Instead, she discussed other programs that she admired, such as Orton Gillingham. As previously noted, in evaluating whether there has been an offer of FAPE, the focus is on the adequacy of the school district's proposed program. (*Gregory K., supra*, 811 F.2d at p. 1314.) Student failed to prove the reading intervention offered in the December 15, 2020 IEP was inadequate.

On June 4, 2021, following receipt of Student's May 24, 2021 decision not to consent to the December 15, 2020 IEP, and notice Student would be placed by Parents in non-public school, Centralia offered to increase Student's specialized academic instruction to 60 minutes per day, four times per week. Student failed to offer any evidence that the offered additional specialized academic instruction did not meet Student's needs. Nor does the increase in specialized academic instruction reflect on the adequacy of the prior offer. "The fact that a subsequent IEP offered more services than its earlier counterpart is not per se evidence that the earlier IEP was inadequate." (*Z. B. v. District of Columbia* (D.C. Cir. 2018) 888 F.3d 515, 526.) Student failed to prove the reading intervention offered in the June 4, 2021 IEP amendment was inadequate. No further IEP offers were made to Student following the June 4, 2021 IEP amendment.

## BEHAVIOR AND AIDE SUPPORT

The 2020-2021 school year began with full-time distance learning from August 13, 2020, to October 2, 2020. Student was provided no behavior aide support for those 35 school days. Mother worked nights and father worked days. During synchronous distance learning, when Student worked directly with his

teacher, he required help with logging on at the correct time, maintaining attention, and being redirected in class. Mother struggled to offer continuous support after working all night. Student's adult sister attempted to fill in but was attending school online herself and could not afford to miss her own classes to support Student. Centralia had knowledge of Student's struggles with distance learning. School Psychologist, Pamela Marks-Hollander, received emails from Parent in September of 2021 describing the struggle to maintain Student's participation in distance learning. In addition, Student's second grade teacher, Melissa Paonessa, observed student playing with toys or wandering around during Zoom sessions instead of doing his lessons.

Beginning October 2, 2020, Student returned to the classroom two days per week as part of a hybrid class. His behavior aide began supporting him in the classroom and online during synchronous work. Student was not provided with aide support on Wednesdays which were "asynchronous learning" days.

Online behavior aide support proved to be inadequate to meet Student's needs during Zoom instruction. During the January 2021 IEP team meeting, Paonessa reported that Student's behaviors on Zoom were challenging, as Student could be argumentative. She also noted that Student had become less actively engaged. At this meeting, Parent requested an in-home aide due to her difficulties keeping Student focused. Principal, Dr. Estela Salas, believed she could not provide an at-home aide due to COVID-19 related restrictions, although no evidence to that effect was presented at hearing. (Centralia had the burden of proof to establish its own affirmative defenses. (Evid. Code § 500. [Except as otherwise provided by law, a party has the burden of proof as to each fact the existence or nonexistence of which is essential to the claim for relief or defense that he is asserting.].) Instead, Dr. Salas

offered to have Student on the school-site four days per week beginning on January 19, 2021. Student would be in his classroom for his two classroom instruction days and would work with his behavior aide in a separate room while participating in Zoom classes two days per week. Student was unable to participate in classroom instruction four days per week because Centralia was not permitted to mix student cohorts which were established when hybrid instruction commenced to minimize COVID-19 exposures and infections.

Despite knowing that online aide support was inadequate to meet Student's needs and that in-person support had been increased to four days per week, the December 15, 2020 IEP offered on February 12, 2021, only included "student intensive individual services," that is, behavior aide minutes, of 630 minutes per week. This amounted to 126 minutes or approximately two hours per day. Centralia witnesses explained that this constituted full-time aide services for the two days per week Student was attending classroom instruction during the hybrid class schedule which was in effect at the time the IEP was drafted in December. However, this explanation failed to address the fact that by February 13, 2021, Student's behavior aide services had been changed in recognition of his need for more in-person support. Nor did it explain why the same, limited aide hours were offered in the June 4, 2021 Amendment IEP, when all students had returned to full-time classroom instruction on April 12, 2021.

All IEP team members agreed Student continued to need a full-time behavior aide. While Student's behaviors were improving, he still required the guidance of a full-time behavior aide to ensure he participated in the positive reinforcement system underpinning his behavior plan and to make sure Student's attention remained focused on schoolwork as much as possible while he continued to learn to

manage his impulsive behaviors. Additionally, the behavior intervention plan required that the aide collect data daily to evaluate Student's progress and continuing behavior service needs. Despite having opportunities at each IEP team meeting, and at the time the June 4, 2021 amendment was offered, to correct what all staff acknowledged was an error, the December 15, 2020 IEP never offered full-time aide services. Furthermore, the evidence established that Centralia's intention was to provide full-time aide services in the IEP. Without an offer of full-time aide services stated in the IEP, the December 15, 2020 IEP could not have met his needs and been reasonably calculated to provide Student educational benefit.

Behavior analyst services were continued at 240 minutes per month to support the behavior intervention plan. There was no dispute that this was adequate to meet Student's needs. However, Student proved the failure to offer full-time, in-person behavior aide services in the December 15, 2020 IEP denied Student a FAPE.

## COUNSELING

Student also proved that Centralia's December 15, 2020 counseling services offer was inadequate. The December 15, 2020 IEP offered psychological services of 60 minutes per month, which included "at least one individual session/interaction" with Student per month. The rest of the monthly hour was to be used for consultation with the behavior analyst, general education teacher or other IEP team members.

The evidence established that Student had benefitted from the weekly 30-minute counseling sessions with Marks-Hollander offered in his December 3, 2019 IEP. His prior IEP also supplemented his direct counseling services with 60 minutes

per month of consultation services for IEP team members and the behavior aide for social-emotional intervention. The behavior, counseling, psychological consultation, and aide support worked symbiotically to produce the improvements that were starting to be seen in Student's behavior.

Student learned self-regulation skills, personal space, accepting consequences, and friendship skills in his counseling sessions and reinforced the behavior plan. Cabiles, the SELPA behavior analyst, provided Marks-Hollander with Student's preferred reinforcement toys and games so the behavior plan was consistently applied across the Student's learning environments, including counseling sessions. Student could earn points for engaging in his sessions with Marks-Hollander and demonstrating the positive behaviors his behavior plan was working to improve. An accumulation of enough points resulted in access to extra breaks to play with toys and games that he enjoyed. Additionally, Student liked Marks-Hollander. On some distance learning days, when Student refused to engage in online class sessions, he would still log on to participate in his sessions with Marks-Hollander. Student valued his relationship with her and her good opinion of him. This was evidenced by Student making a point of coming to Marks-Hollander, when he discovered he would be changing schools, to reassure her that he would return. Student was receptive to her instruction and his improved behavior was, in part, the result of her sessions on self-control, appropriate peer interactions, coping skills, and accepting consequences. Student proved that the regular counseling sessions were important elements of his IEP and behavior plan.

Marks-Hollander testified that she recommended the reduced psychological services in the 2020 IEP due to Student's behavior improvements. She wanted to encourage Student to ask for help when he needed it, as opposed to relying on the

regularly scheduled sessions. This explanation for the reduction in services lacked credibility; however, as Marks-Hollander also said, the reduction was due to Student's reduced presence on campus in December of 2020, and the fact that Student was receiving private counseling services outside school. Neither of these justified a reduction in counseling. Student was entitled to receive the counseling he needed to access his education, regardless of where Centralia provide the educational services. (34 C.F.R. § 300.34.) Centralia was not allowed to rely on the family's private psychological services to offset the services Student needed to access his education. A free, appropriate public education and all necessary related services must be provided at public expense, under public supervision and direction and without charge. (34 C.F.R. §§ 300.17 (b).)

Although Student's outbursts, aggression, and refusals to follow directions had noticeably diminished since the initial implementation of Student's IEP services, it was undisputed that Student still required a full-time behavior aide. The character of the episodes had changed from extended outbursts that required evacuating the classroom or Student's extended removal to an alternate location, to shorter more specific outbursts that could usually be managed with redirection or a short break. Student's conduct was still impulsive and sometimes resulted in aggressive acts towards others, and there were still times that Student struggled to accept the consequences of his actions. While he showed more insight into his actions, he had not mastered the lessons in self-control, appropriate peer interactions, coping skills, and accepting consequences that Marks-Hollander offered. Centralia's reliance on his outside counseling indicated they knew he required more counseling than was

offered in the December 15, 2020 IEP to access his education. The minimal, ad hoc counseling sessions offered in the December 15, 2020 IEP were not reasonably calculated to enable Student to receive educational benefit.

To meet its substantive obligation under the IDEA, a school must offer an IEP reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances." (*Endrew F. ex rel. Joseph F. v. Douglas Cty. School. Dist.* RE-1, — U.S. —, 137 S.Ct. 988, 999, 197 L.Ed.2d 335 (2017).) Student's IEP team was aware of Student's continued behavior support needs through both a full-time behavior aide and consistent counseling. Thus, Centralia's failure to offer full-time behavior aide services and adequate psychological services to meet Student's needs in the December 15, 2020 IEP was not reasonably calculated to receive educational benefit and enable him to make appropriate progress in light of his circumstances and denied Student a FAPE.

#### ISSUE 1C: DID CENTRALIA DENY STUDENT A FAPE FROM DECEMBER 3, 2019, THROUGH OCTOBER 25, 2021, BY FAILING TO OFFER APPROPRIATE PLACEMENT?

Student asserts that placement in the general education classroom did not provide the small group and individual setting his expert said would be the best place for him to learn. Student also contends his placement in the general education classroom without sufficient services denied Student a FAPE. Student asserts the inadequacy of the placement is shown by his continued maladaptive behaviors after nearly two years of behavior plan implementation. Student further argues that Centralia should have seen that Student needed special education and related

services before Parent requested an assessment. Allegations regarding special education eligibility timing will not be addressed in this Decision as Student did not allege this issue.

Centralia argues that Student's IEP team considered a special day class, which would have offered Student a smaller class size, but had the potential to expose him to behaviors that would have been detrimental for him to adopt. Centralia maintains that the general education classroom with the one-to-one behavior aide, behavior analyst support, counseling, psychological services consultation, and resource assistance to focus on his reading and writing deficits was the best compromise, offering Student one-to-one attention and support throughout the day while allowing Student to engage with general education peers.

A school district must ensure that a child with a disability is educated in the least restrictive environment. (34 C.F.R. § 300.116.) To provide the least restrictive environment, school districts must ensure, to the maximum extent appropriate, that (1) children with disabilities are educated with non-disabled peers; and (2) special classes or separate schooling occur only if the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily. (20 U.S.C. § 1412(a)(5)(A); Ed. Code, § 56031; 34 C.F.R. 300.114 (a).) To determine whether a special education student could be satisfactorily educated in a regular education environment, the Ninth Circuit Court of Appeals instructs that the following factors be balanced:

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



- (4) the costs of mainstreaming the student. (*Sacramento City Unified School Dist. v. Rachel H.* (9th Cir. 1994) 14 F.3d 1398, 1404.)

A specific educational placement means that unique combination of facilities, personnel, location, or equipment necessary to provide instructional services to an individual with exceptional needs, as specified in the student's IEP, in any one, or a combination of public, private, home and hospital, or residential settings. (Cal. Code Regs., tit. 5, § 3042.)

Student presented no evidence that the December 3, 2019 general education placement with supports was inappropriate when offered. Student was offered placement in the general education classroom with a full-time one-to-one behavior aide in the December 3, 2019 IEP. Placement in a special day class for students with mild to moderate disabilities was also considered. However, Student is bright and impulsive. The team decided that he would be better served in a general education classroom with appropriate supports, where he would have more positive role models, as opposed to a special day class where he could be exposed to students with maladaptive behaviors Student might adopt.

Student's general education placement included a behavior intervention plan. His placement was supported by the behavior analyst from the SELPA who trained his behavior aide and provided support to Student, the behavior aide, and other IEP teams members as needed to help implement and refine the behavior plan. The placement also included psychological services, and instruction with the resource specialist for reading, spelling, and writing intervention.

Centralia was legally obligated to ensure Student was educated with typically developing peers unless the IEP team knew Student could not be educated

satisfactorily in the general education classroom with supportive services. (20 U.S.C. § 1412(a)(5)(A); Ed. Code, § 56031; 34 C.F.R. 300.114 (a).) Student did not prove that Centralia knew Student would be unable to reap educational or non-educational benefit in a general education classroom with all of the offered supports. Student further failed to prove that Centralia knew his impact on the teacher and his first-grade classmates would be such that he should not have been placed in the general education classroom. Student presented no evidence that placement in the general education classroom was cost prohibitive. Student failed to prove the placement offered in the December 3, 2019 IEP was not reasonably calculated to meet Student's needs in the least restrictive environment.

Student was also offered placement in a general education classroom with supports in the December 15, 2020 IEP. Student's argument that his continued behaviors after two years in the general education classroom showed the placement was inadequate, was unpersuasive, as offers are not evaluated in hindsight. (*Anchorage School District v. M.P.*, supra, 689 F. 3d at p. 1057.) Nor did Student prove the December 15, 2020 IEP placement offer failed because he needed a smaller class size. Student offered no evidence establishing the benefits a smaller class would have offered Student. Nor was there evidence that Student would have done better in either first or second grade had he been placed in a smaller class. It is notable that Student regressed when placed in a non-public school that offered him a smaller class size.

Student's experts opined that Student needed a small class size to access his education; but those opinions lacked supporting evidence. For example, after stating that Student functioned better when he returned to the public-school class that was smaller due to fewer students returning to in-person learning after COVID-19

restrictions were lifted, Dr. Morgan's report stated, "he lacks the skills and can't keep up with the pace or self-regulate in a larger group setting." However, no evidence other than Student's continued behavior challenges was offered to support the theory that it was the class size that was the impediment. Furthermore, Dr. Morgan failed to acknowledge the improvements in Student's conduct in the general education classroom or that Student received reading intervention in a one-to-one setting.

Student did, however, establish that the December 15, 2020 IEP failed to offer sufficient supports to meet Student's needs in the general education environment. Both Student's behavior and his academic performance had improved over the prior year in the general education placement with the supports in place in the December 3, 2019 IEP. As discussed previously, Student still required a full-time behavior aide and regular counseling, which were not offered. These flaws were not corrected in the proposed June 4, 2021 amendment. Student proved that the December 15, 2021 IEP offer of placement in the general education classroom with insufficient supports denied him a FAPE.

## ISSUE 2: DID CENTRALIA DENY STUDENT A FAPE, FROM MARCH 2020 THROUGH APRIL 2021, BY FAILING TO IMPLEMENT STUDENT'S IEP DURING DISTANCE LEARNING AND BY FAILING TO OFFER COMPENSATORY EDUCATION AS A RESULT OF DISTANCE LEARNING?

Student alleged generally that Centralia failed to implement his IEP during distance learning, but in closing argued only a failure to implement behavior aide services. Centralia argues that Student's IEP was "materially implemented via

distance learning from March 2020 to the end of the 2019-2020 school year and from August 2020 to January 19, 2021, via a combination of distance learning and in-person instruction. Centralia asserts that beginning January 19, 2021, through the end of the 2020-2021 school year, Student's IEP was implemented via in-person instruction in the classroom and by accessing distance learning on campus with his behavior aide assistance.

## STATE AND FEDERAL GUIDANCE REGARDING CENTRALIA'S OBLIGATION TO PROVIDE FAPE DURING DISTANCE LEARNING

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

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

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

*and Secondary Schools While Serving Children with Disabilities* (March 21, 2020, Office of Civil Rights and OSEP) at p. 2.) It stated that a FAPE may include, as appropriate, services provided through distance instruction, provided virtually, online, or telephonically. (*Id.*, at pp. 1-2.) The US DOE emphasized that the IDEA allowed for flexibility in determining how to meet the individual needs of students with disabilities. (*Id.*, at p. 2.)

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

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

On March 20, 2020, the CDE issued guidance that stated, when providing instruction through a distance learning model, local educational agencies must

create access to the instruction for students with disabilities, including planning for appropriate modifications or accommodations based on the individualized needs of each student and the differences created by the change in modality. (Cal. Dept. of Educ., Special Education Guidance for COVID-19, COVID-19 School Closures and Services to Students with Disabilities (March 20, 2020).)

## IMPLEMENTATION OF STUDENT'S IEP DURING DISTANCE LEARNING

Following the statewide COVID-19 related shelter-in-place orders, Centralia closed its school sites and offered students distance learning. Distance learning began on March 16, 2020, and continued until May 21, 2020, when the 2019-2020 school year ended. Centralia began the 2020-2021 school year on August 13, 2020. From August 13, 2020, to October 2, 2020, Centralia continued providing education via distance learning five days per week.

Beginning October 5, 2020, and continuing through December 18, 2020, Student participated in hybrid learning. He attended school in person two days a week, and had distance learning three days per week. Following the winter break, the school returned to full-time distance learning from January 4, 2021, to January 29, 2021, due to a spike in COVID-19 related illness. However, starting on January 19, 2021, due to a special arrangement made with Principal Salas, Student was allowed to attend school, on the school site, four days per week.

COVID-19 restrictions limited Centralia's flexibility to allow Student to attend school in his classroom with a different cohort. However, Student was allowed to attend school four days per week with two days per week in the classroom with his assigned cohort and two days per week with his behavior aide supporting him in a separate classroom while he accessed his Zoom classes. Student continued to work

at home on Wednesdays when he was expected to do asynchronous work. On those days Student's checked in with the teacher at the beginning of the day and completed work independently. This was the day the school conducted deep cleaning and all Students and staff were required to be off campus. The four-day per week attendance arrangement continued until April 12, 2021, when all students returned to full-time in-person instruction. Student did not participate in distance learning after April 9, 2021.

Student generally contended that his IEP was not implemented during distance learning. The evidence showed some lapses in implementation during the time Student was accessing distance learning at home. However, a closer review of the evidence established only a single area of material failure to implement the IEP. Although there were some deviations from the IEP specifications, the material failure to implement established was Centralia's failure to provide a behavior aide to support Student in person while he was accessing distance learning instruction in his home. This may explain why Student's closing brief focused solely on the failure to implement the behavior aide.

Student's December 13, 2019 IEP offered intensive individual services which were provided by Student's behavior aide, full-time for the school day, and behavior intervention support by the behavior analyst 60 minutes, four times monthly. Parents did not consent to the December 15, 2020 IEP offer. Therefore, the IEP services required for Student did not change during the time he received distance learning instruction.

A district's material failure to implement the child's IEP may violate the IDEA. A material failure occurs when there is more than a minor discrepancy between the services provided to a disabled child and those required by the IEP. (*Van Duyn ex rel. Van Duyn v. Baker School Dist. 5J*, (9th Cir. 2007) 502 F.3d 811, 815.)

Student was not provided with a one-to-one aide from March 16, 2020, to May 21, 2020, a total of 44 school days; or from August 13, 2020, to October 2, 2020, an additional 35 school days. Student lost all of the behavior training and reinforcement he was supposed to have received daily from his behavior aide. He also lost the benefit of the data collection regarding his behaviors that was supposed to be provided under his IEP. Without the data, there was no ability to track the results of the behavior plan implementation. The evidence established that no data was collected between March 16, 2020, and May 21, 2020; or from August 13, 2020, to October 2, 2020. Most importantly, Student lost the benefit of the behavior plan implementation that motivated him and supported his ability to access his education. This was a material variance in his IEP and constituted a FAPE denial.

When Student began participating in the hybrid class on October 5, 2020, Student's behavior aide, Vazquez, returned to support Student. Two days per week, Vazquez worked with Student in person when he was in the classroom. Two days per week, Vazquez logged onto Zoom to support Student when he was participating in distance learning. At times, Vazquez would work with Student in a separate Zoom room the teacher would open.



When Student returned to full-time distance learning, following the winter break, Student continued to receive the services of the behavior aide online four days per week. Student did not receive any aide support on asynchronous learning days. As discussed, Centralia was on notice that online aide support was inadequate to meet Student's needs.

Student returned to campus four days per week beginning January 19, 2021. He had in-person aide support during his classroom instruction and on two additional days, in a separate classroom he received one-to-one behavior aide support during his Zoom instruction. He received no aide support on asynchronous learning days although he was expected to complete and turn in schoolwork.

Centralia was allowed to use alternative methods of providing FAPE, including offering services online during distance learning so long as they provided FAPE. (*Supplemental Fact Sheet Addressing the Risk of COVID-19 in Preschool, Elementary and Secondary Schools While Serving Children with Disabilities* (March 21, 2020, Office of Civil Rights and OSEP) at p. 2.; *Special Education Guidance for COVID-19* (CA Dept. of Education, 3-31-2020) p. 1, § 2.) However, for all of the reasons previously discussed, implementing Student's behavior aide services online did not meet Student's needs. Student was denied a FAPE during the 2020-2021 school year by being denied full-time, in-person, behavior aide services.

### ISSUE 3: DID CENTRALIA DENY STUDENT A FAPE, FROM DECEMBER 2020 THROUGH MAY 2021, BY FAILING TO CONDUCT A NEW FUNCTIONAL BEHAVIOR ASSESSMENT AND UPDATING STUDENT'S BEHAVIOR INTERVENTION PLAN?

Student asserts that Centralia was obligated to update Student's functional behavior assessment before updating his behavior intervention plan. Student further argues that an updated behavior plan should have been created after Student started showing a spike in behaviors in February 2021. Centralia argues that an updated assessment was not required, and the behavior plan was adequately updated.

All students receiving special education and related services are reevaluated at least every three years to examine their continuing eligibility and, if eligible, their current educational needs, unless both the district and the parents agree reevaluation is unnecessary. (20 U.S.C. § 1414 (c)(5)(A); Ed. Code § 56381, subd. (a)(2).) A reevaluation may be done following proper notice to the parents and receipt of consent. (20 U.S.C. § 1414 (b)(1) and §1415 (b)(3), (b)(4) and (c); Ed. Code 56381, subd. (f).)

A school district must ensure that reevaluations of a child's needs are conducted if the district determines that the educational or related services needs of a child with special needs, including improved academic achievement and functional performance, warrant a reevaluation; or if the parent or teacher request a reevaluation. Reevaluations must be conducted in accordance with the procedural requirements of the IDEA. (20 U.S.C. 1414 (a)(2)(A).) Reevaluations must be

conducted at least every three years, and may not be performed more frequently than once a year unless both the district and the parents agree. (20 U.S.C. §1414 (a)(2)(B).)

Student failed to meet his burden of proving that a second functional behavior assessment was required between December 2020 and May 28, 2021, which was the end of the 2020-2021 school year. Student's initial functional behavior assessment was completed in November of 2019 and updated in December of 2019. This assessment analyzed the antecedents, functions, and consequences of Student's behaviors to determine what triggered his maladaptive behaviors, why he was inclined to behave in a certain way (e.g., escaping something or someone he preferred to avoid, needing attention) and what consequences occurred when the student behaved inappropriately. Based on the behavior assessment, a behavior intervention plan was developed that identified the behaviors most in need of modification: a positive behavior intervention system that offered Student the opportunity to work towards extra breaks in which he could engage in preferred activities only available when he behaved appropriately.

Student presented no evidence that Parent or a teacher requested a second functional behavior assessment. Nor did Student establish that Centralia had information warranting the necessity of a new functional behavior assessment.

Student offered no testimony or evidence establishing that a second functional behavior assessment was warranted to evaluate Student's behaviors, other than "spikes" in Student's behaviors at various times. Student had a relatively smooth return to the classroom when hybrid instruction began in October of 2020. Parent expressed concern about a spike in behaviors after Thanksgiving. After the

Christmas holidays he was required to return to full time distance learning for a time. He then started the four day per week routine on campus. Student argues that he exhibited a spike in behaviors beginning in February of 2021. In March, he started taking medications in an attempt to manage his attention deficit and tried more than one. This also resulted in behavior spikes. However, Student does not account for the many reasons changes in his behavior should have been expected, including the many changes in Student's routine resulting from the COVID-19 impacts on the school's schedules, and the mediation trials.

Despite what Parents saw as an increase in the frequency of the behaviors, Student's continued behaviors did not necessarily result in a need for a new behavior assessment. Student did not prove that there was a change in the behaviors that demonstrated Centralia's lack of understanding as to the antecedents or functions of the behaviors. Marks and Cabiles established the fundamental nature of Student's behaviors had not changed. This is supported by the fact that reports from The Children's School continued to identify the same essential behaviors and causes Centralia staff had identified.

Student also failed to prove that his behavior plan was not updated. Student continued to have a behavior intervention plan that was discussed and adjusted by the IEP team during the IEP team meetings in the 2020-2021 school year. The behavior plan's efficacy was demonstrated by the fact that Student's behavior was improving. The argument that Student's behavior plan should have been updated in February ignores the fact that an updated behavior plan was waiting for Parent's consent after being offered on February 12, 2021. Parents did not act on the IEP offer until May 24, 2021. The school year ended on May 28, 2021.

Even had Student established that a second functional behavior assessment should have been completed, which he did not; he failed to prove a FAPE denial. The failure to assess is a procedural violation. Solely technical defects do not rise to the level of a denial of FAPE. (*Amanda J. v. Clark County. School Dist.*, (9th Cir. 2001) 267 F.3d 877, 892.; 34 C.F.R. § 300.510(a)(2).) A FAPE denial resulting from a procedural violation exists only if it is established that the procedural violation resulted in a denial of educational benefit or a failure to provide parents a meaningful opportunity to participate in the development of Student's IEP. (*Doug C. v. Hawaii Dept. of Educ.*, (9th Cir. 2013) 720 F. 3d. 1038, 1046.)

Student presented no evidence that a failure to conduct a second functional behavior assessment resulted in either a denial of meaningful parental participation in the IEP development process, or that it resulted in a denial of educational benefit for Student. Parents actively participated in the December 15 2020 IEP sessions during which the behavior intervention plan was updated. Student's behavior was improving during the period from February 2021 to May 28, 2021. Student did not prove that Centralia denied him a FAPE by failing to conduct a new functional behavior assessment. Nor did Student prove Centralia failed to update Student's behavior intervention plan.

## 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 did not allege that Centralia failed to assess him or failed to make him eligible for services before the date Student was found eligible, that is December 3, 2019. Therefore, Student's issues alleging a FAPE denial began December 3, 2019.

#### ISSUE 1A:

Centralia did not deny Student a FAPE from December 3, 2019, through October 25, 2021, by failing to develop measurable goals.

Centralia prevailed on Issue 1A.

#### ISSUE 1B:

Centralia did not deny Student a FAPE from December 3, 2019, to December 14, 2020, by failing to offer appropriate reading intervention, counseling, behavior, or aide services. However, Centralia did deny Student a FAPE by failing to offer adequate aide support and psychological counseling from December 15, 2020, to October 25, 2021.

Student partially prevailed on Issue 1B, and Centralia partially prevailed on issue 1B.

#### ISSUE 1C:

Centralia did not deny Student a FAPE from December 3, 2019, to December 14, 2020, by failing to offer appropriate placement. Centralia did deny Student a FAPE from December 15, 2020, through October 25, 2021.

Centralia failed to offer appropriate placement during this time frame by failing to offer a general education placement with sufficient supportive services to allow Student to access his education.

Student partially prevailed on Issue 1C, and Centralia partially prevailed on issue 1C.

## ISSUE 2:

Centralia denied Student a FAPE for failing to implement Student's behavior aide services in his IEP. Student did not prove a material failure to implement any other IEP service during distance learning. From March 16, 2020, through May 21, 2020, and from August 13, 2020, to October 1, 2020, Centralia denied Student a FAPE by failing to implement any of Student's behavior aide services as required by his December 3, 2019 IEP. Centralia denied Student a FAPE from October 5, 2020, to January 18, 2021, by failing to implement aide support in person, three days per week; and from January 19, 2021, to April 11, 2021, by failing to implement behavior aide services in-person one day per week.

Student partially prevailed on Issue 2 and Centralia partially prevailed on Issue 2.

### ISSUE 3:

Centralia did not deny Student a FAPE from December 2020 through May 2021 by failing to conduct a new functional behavior assessment and failing to update Student's assessment plan.

Centralia prevailed on Issue 3.

### REMEDIES

Administrative Law Judges have broad latitude to fashion appropriate equitable remedies for the denial of a FAPE. (*School Comm. of Burlington v. Department of Educ.* (1985) 471 U.S. 359, 370 [105 S. Ct. 1996, 85 L. Ed. 2d 385 (*Burlington*)]; *Parents of Student W. v. Puyallup School Dist., No. 3* (9th Cir. 1994) 31 F.3d 1489, 1496 (*Puyallup*.) In remedying a FAPE denial, the student is entitled to relief that is "appropriate" in light of the purposes of the IDEA, which are, providing Student with a FAPE which emphasizes special education and related services to meet Student's unique needs. (20 U.S.C. § 1415(i)(2)(C)(iii); 34 C.F.R. § 300.516(c)(3); *Burlington, supra*, 471 U.S. at p. 374.)

### STUDENT'S ENTITLEMENT TO REMEDIES

Student is entitled to remedies for Centralia's denials of FAPE. These include the failure to offer adequate IEP services in the December 15, 2020 IEP; the failure to offer adequate placement in the December 15, 2020 IEP, and the failure to implement Student's behavior aide services during distance learning.



## STUDENT'S FAILURE TO PROVE REMEDIES

Student did not demonstrate the degree to which his educational access was limited due to not receiving aide services. For example, no evidence established how often he failed to log into distance learning, or how often he logged out early. No evidence was presented regarding how much work he did not turn in or how much work was not fully completed. However, Student did prove the lack of an in-person behavior aide resulted in Student receiving no behavior instruction, no assistance with maintaining focus on his academics, and no day-to-day behavior plan implementation that provided motivation for the positive behaviors resulting in Student completing academic work. Student was also denied the behavior aide's daily data collection that helped the IEP team understand and adjust Student's behavior training. The deprivation of Student's behavior aide services was material, denying Student a FAPE.

In his closing brief, Student requested compensatory education in the areas of "academic instruction, reading intervention, behavioral services, aide services, and counseling." Student did not present evidence establishing the amount of compensatory education necessary to make up for Centralia's failure to implement the behavior aide services. Student also did not offer evidence establishing an appropriate remedy for Centralia's failure to offer adequate behavior aide or counseling services in the December 15, 2020 IEP.

In addition to compensatory education, Student also requested reimbursement for Parent's expenses for the 2021-2022 school year, including tuition, fees, and mileage; as well as continued placement at The Children's School. However, Student's case ended on October 25, 2021, so remedies beyond that date

are not considered here. Normally, reimbursement for Student's non-public school expenses could be considered as an option for compensatory education, or as a remedy for the failure to offer an IEP constituting FAPE. (*Florence County School Dist. Four v. Carter by and Through Carter* (1993) 510 U.S. 7, 14; 114 S. Ct. 361; 126 L. Ed. 2d, 284.) However, here, the evidence did not establish that The Children's School was an appropriate placement warranting reimbursement.

## FAILURE TO PROVE THE CHILDREN'S SCHOOL IS APPROPRIATE

Student is entitled to reimbursement for a unilateral private school placement only if he proves both that (1) that the public school failed to offer FAPE, and (2) the private school placement was appropriate. The school is not required to meet all state standards to be deemed an appropriate program. (*Florence County School Dist., supra*, 510 U.S. at p. 14.) Parents need not show that a private placement furnishes every special service necessary to maximize their child's potential. However, Parents are required to demonstrate that the placement provides Student with educational instruction specially designed to meet the unique needs of the disabled child, supported by such services as are necessary to permit the child to benefit from instruction. (*S.L. ex rel. Loof v. Upland Unified School Dist.* (9th Cir. 2014) 747 F.3d 1155, 1159.) Here, the evidence did not establish that The Children's School offered Student educational instruction and supportive services that provided educational benefit.

The Children's School is a California certified non-public school that serves children with attention deficits or behavior issues that impede their ability to access their education. The Children's School uses a positive behavior intervention system that places students in different color zones depending on their conduct and

compliance with school rules and classroom directions. The positive behavior interventions and supports system employed by The Children's School uses an analysis of the antecedents, functions, and consequences of a student's behaviors to determine the triggers of their maladaptive behaviors, why they were inclined to behave in a certain way, and the consequences of their maladaptive behaviors. This information is used to teach the students coping and self-management skills by use of a token economy.

In The Children's School's positive behavior reinforcement system, Students earn points and move between different color categories, with green being the goal. If a student is in the green category, that student gets extra privileges. Data is collected to allocate points. Every 30 minutes, 20 points are available. If a student earns 90 percent of the available points, the student earns green for that period. 80 to 90 percent earns orange and below 80 percent earns purple. Points are averaged for the day and then for the week. If a student earns green for the week, they are able to participate in Fun Day Friday when students have a shorter workday and fun time. Similarly, if students earn green for the day, they can "cash out" at the end of the day. They can use their points for the kinds of prizes children get at birthday parties or for treats; or to play with games and toys only available for this purpose. No evidence was offered as to how data was collected for Student individually, what categories data was collected on, or the definitions of maladaptive or compliant behavior used by data collectors to track incidents throughout the day. Nor was it explained how two behavior aides tracked data accurately for 14 children every 30 minutes.

The Children's School's positive behavior reinforcement system was nearly identical to that used at the Centralia middle school Student attended, with the

exception that, at the public school, Student had a full-time behavior aide who had worked with him for two years and tracked data exclusively for him throughout the day.

The evidence established that Student regressed in all areas as a result of attending The Children's School. Student began attending on July 15, 2021, and was assigned to a class of 15 with a teacher and two behavior aides. However, Student's behavior was so extreme that for the first six weeks, he was not able to attend classes. Instead, he met with his teacher for math and English language arts remediation sessions. The evidence did not establish how long these sessions lasted or how frequently they occurred.

After the first six weeks and a two-week school holiday, Student was expected to attend math and English language arts classes and one-half of science or history class which were offered in alternate semesters. Modifications were put in place for Student such that he was not expected to participate actively or produce work. Student had always been expected to attend the one-hour daily social skills class. However, Student was not required to meet all the classroom requirements until January of 2022.

The Children's School offered two reports of Student's behavior improvements spanning the period from July 2021 to February 2022. The first report, dated October 15, 2021, was created by Patricia Ramsey, a licensed marriage family therapist employed at The Children's School. The report was prepared at Parent's request to show a snapshot of Student's progress as of October 15, 2021. Ramsey prepared the report but was only directly involved with Student's behavior instruction from July 15, 2020, to September of 2020 when the school took a two-

week break. Ramsey did not explain how the data in her report, that supported the significant reduction in Student's behaviors, was collected. She did not personally collect the data and was unable to verify the information. According to Ramsey, The Children's School collects data and records it in an Excel database, but no evidence of what categories of data were collected, or how incidents recorded were defined, was offered into evidence. According to Ramsey, the data was discussed in staff meetings, but was not shared outside the school or with Parents. Nor was there any evidence of other types of reporting regarding Student's conduct, such as emergency reports, despite general descriptions of Student being aggressive towards other students and destroying other's property.

The second report, prepared by Erica Nguyen, a staff social worker for The Children's School, updated the first report as of February 2022. Most of the report was an exact duplicate of the one prepared in October of 2021. The only differences were Nguyen's entries for Student's behavior progress as of February 2022, and short updates to conclusions. Again, no information regarding the underlying data supporting the reported diminishment of Student's behaviors was described or discussed in the report, or offered into evidence. Nguyen did not testify at hearing. Nor was any evidence offered of who collected data or the data collection methods employed. According to Ramsey, the behavior report offered was created at Parent's request for use in this hearing.

The information in both reports lacked credibility, given the self-serving nature of the conclusions and the lack of any evidence explaining how the conclusions were derived. Nguyen's lack of testimony regarding her descriptions of Student's reported progress was also considered and her contributions to the document dismissed as unreliable hearsay. Findings of fact in a special education hearing may not be based

solely on hearsay evidence. (Cal. Code Regs., tit. 5, § 3082 subd. (b).) As a result, the progress reports were given little weight. Even seen in their best light, they demonstrated a dramatic regression in Student's conduct and an inability to participate in classwork for several weeks.

The Children's School's academic reports showed Student also regressed in both reading and math. While neither witness from The Children's School was able to thoroughly explain the AimsWeb standardized test reports, the scores reported indicate that Student's reading went from being in the low-average range in the fall of 2021 to the below-average range in the winter of 2022. Lindsay McKee, Student's third grade teacher, focused on the whole score increase from 346 to 353; but was evasive as to why Student went from performance at the 26th percentile in the fall to the 18th percentile in the winter.

Furthermore, contrary to Student's argument, Student did not receive reading instruction using the Lindamood Bell system at The Children's School. McKee had received only a single course of instruction regarding use of the Lindamood Bell reading system. McKee stated she "pulls from the Lindamood Bell system in her lower-level reading classes regarding letter identification." However, Student's reading instruction is not a Lindamood Bell based course. Rather, it is based on a general education reading curriculum called Wonders. Student received 30 minutes of general education reading instruction in a small group daily. Some of that instruction was focused on reading comprehension, for which, McKee reads to the group. McKee estimated Student actually read approximately five to six minutes per day and only recently began doing that. Every witness who testified about Student's reading instruction at The Children's School, including Parent, McKee, and

Dr. Morgan, acknowledged that it did not meet Student's needs. Each of them stated that Student would require additional reading instruction which would cost an additional \$75 per hour and would only be offered after school.

Similarly in math, which has always been one of Student's strengths, AimsWeb scores showed that Student went from performance at the 60th percentile nationally in the fall term, to the 34th percentile in the winter term. McKee could not explain all of the indicators on the report. However, Student's math performance had clearly declined. McKee's explanation was that the winter tests were more difficult and assessed Student on more third-grade content such as multiplication and division and that he struggles to understand the word problems. However, no data supporting that explanation was presented into evidence. No work samples were offered, and no description of the impact on Student's academic progress of the minimal schoolwork requirements from July of 2021 to January of 2022 was offered.

The report cards submitted were so vague that they included comments such as "is bright, motivated, and hardworking and can be proud of his/her accomplishments;" and "enjoys participating in-class lessons and his/her background knowledge adds a great deal to our discussions." Student's third grade report card does not specifically describe Student's academic work. Instead, the report card describes the types of lessons being presented. Furthermore, the report card information pertaining to Student's work habits in the class do not align with the behavior progress report. For instance, Student's report card says he "remains on task with little or no prompting" in English language arts and science. However, the progress report item regarding "works independently" is marked "no." None of this information was supported by data or work samples demonstrating Student's

abilities at The Children's School and there was no testimony from anyone who took data. His teacher was able to provide only superficial comments regarding his work and behavior.

McKee testified she was unable to provide any detail regarding Student's behavior in her class because she did not have the data in front of her. McKee noted in testimony that the behavior aides took data and managed the behaviors of the 15 students so she could focus on teaching. She did confirm that he was unable to be in the classroom when he first arrived because he was aggressive and destroyed property. McKee stated that he was currently struggling with being off task and not following directions. However, no data was offered from The Children's School to confirm any details of his conduct.

Student established Centralia denied him a FAPE. The evidence, however, established that despite the significant IEP defects, during his time at the public school, his maladaptive behaviors lessened, and he was learning new coping skills and replacement behaviors. This progress stopped, and he regressed behaviorally, when he attended The Children's School. The evidence further established that his academic skills in reading and math also regressed once enrolled at The Children's School. Student did not prove he received any educational benefit from The Children's School. Student failed to establish that The Children's School provided an educational program that met Student's needs. While Parents did not have to prove that all IDEA requirements were provided, significant educational benefit is expected for reimbursement to be supported. (*C.B. ex rel. Baquerizo v. Garden Grove Unified School Dist.*, (9th Cir. 2011) 635 F. 3d 1156, 1159.) The evidence did not establish The



Children's School offered even meagre educational benefit. Thus, Student failed to demonstrate that The Children's school was an appropriate placement and his request for non-public school tuition reimbursement is denied.

### ALTERNATIVE REMEDY AWARD

Student failed to prove that The Children's School is an appropriate placement and offered no alternative remedy recommendation. However, Student is entitled to a remedy for Centralia's failure to implement the behavior aide services provided in his December 3, 2019 IEP. Additionally, Student is owed a remedy for Centralia's failure to offer him services that met his needs and were reasonably calculated to provide educational benefit in the December 15, 2020 IEP, which rendered the general education placement offer inadequate as well.

School districts were not relieved of their responsibility to provide Student a FAPE during the distance learning implemented during the COVID-19 school closures. They were allowed to provide alternative instructional methods. However, those methods still had to provide FAPE. Here, Centralia knew Student was unable to access his education online without in-person, one-to-one assistance. Centralia did not provide that assistance during all times Student was expected to access his education online. Therefore, Student is entitled to compensatory education for the failure to provide behavior aide services five days per week, on days school was in session, from March 16, 2020, to May 21, 2020, and from August 13, 2020, to October 2, 2020. Student is also entitled to compensatory education for Centralia's failure to provide in-person aide services when school was in session, three days per

week, from October 5, 2020, to January 15, 2021; and one day-per week on Wednesdays, from January 19, 2021, to April 8, 2021. These total 131 school days without the aide support required by Student's IEP.

Centralia's failure to implement the IEP required aide services during distance learning denied Student the behavior instruction and data collection required to implement his behavior plan. The evidence did not establish the number of days or hours of instruction missed due to the lack of behavior aide services. However, when implementing the behavior plan, Student's aide was necessary to allow Student to access his academic instruction.

While Student also claims compensatory education is due for the failure to provide behavior aide services during Student's resource class, Student failed to prove the loss of aide services was material. Student offered no proof of how many minutes of aide services Student was denied during his in-person resource sessions between December 3, 2019, and May 28, 2021, the last day of the 2020-2021 school year. Nor did Student establish that Vazquez' absence for part of the in-person resource periods resulted in Student's inability to access his education or receive behavior training.

Student had in-person reading intervention sessions, one-to-one with Vu, three times per week from January 6, 2020, to March 13, 2020. The evidence was not clear regarding when Student received reading intervention sessions beginning October 5, 2020. The evidence did not establish whether the reading intervention sessions were done online, in person, or a combination of the two. On the days Student received reading intervention in person, the behavior aide came into the

resource room and settled Student so he could begin his instruction with Vu, then left for a lunch break. If Student was having a difficult day, Vazquez stayed longer to settle Student.

Vu was also trained by the behavior analyst in implementing Student's behavior plan. Cabiles consulted with Vu specifically regarding methods of managing Student's behaviors and redirecting him during the one-to-one reading intervention sessions in the Resource Room. Cabiles also gave Vu reinforcement prizes to give Student for his attention and positive behaviors during reading intervention. Vu kept notes of Student's conduct and shared those with the behavior aide when she returned so the data collection for that period could be complete. A failure to implement an IEP must be material. Minor failures in implementing an IEP are not automatically treated as violations of the IDEA. (*Van Duyn, supra*, 502 F. 3d 811, 821.) A material failure occurs when there is more than a minor discrepancy between services a school provides, and the services required by the child's IEP. (*Van Duyn, supra*, 502 F. 3d 811, 822.) Here, student did not prove a material failure to implement the IEP occurred due to the behavior aide's absence during Student's one-to-one instruction with Vu.

An award of compensatory education need not provide day-for-day or hour for hour compensation. (*Puyallup, supra*, 31 F. 3d at p.1497.) An award to compensate for past violations must rely on an individualized assessment, just as an IEP focuses on the individual student's needs. (*Reid v. District of Columbia* (D.C. Cir. 2005) 401 F.3d 516, 524.) The award must be fact specific. (*Ibid.*)

The lack of quantifiable evidence regarding the impediment to Student's access to education resulting from the behavior aide's services being provided

online, and the lack of evidence regarding an appropriate remedy for the failure to implement behavior aide services and to offer adequate services and placement in the IEP, results in the need for an equitable remedy to be devised to compensate Student for the lost educational access and lost behavior training. School districts may be ordered to provide compensatory education or additional services to a student who has been denied a FAPE. (*Puyallup, supra*, 31 F.3d at pg. 1496.) The authority to order such relief extends to administrative law judges. (*Forest Grove Sch. Dist. v. T.A.* (2009) 557 U.S. 230, 243-244, fn. 11 [129 S.Ct. 2484].) These are equitable remedies that courts and administrative law judges may employ to craft "appropriate relief" for a party. (*Puyallup Sch. supra*, 31 F.3d at p. 1496.)

Following consideration of the totality of the evidence and testimony, as an equitable remedy for failing to provide a behavior aide, Student shall be awarded 262 hours of one-to-one academic tutoring. Normally, the remedy for the failure to provide an aide would be the provision of an aide. However, Student was provided a full-time aide when he returned to the classroom. As no quantifiable loss of education was demonstrated, an equitable remedy of two hours per day for the 131 days of aide services lost totaling 262 hours of compensatory education, has been awarded for the loss of support with academic instruction. These hours shall be used by June 30, 2025.

Student's compensatory education shall be provided by Centralia staff. Student sought reimbursement for a program that was inadequate to meet Student's needs. The evidence established that when Student's IEP was implemented by Centralia, he showed growth and improvement. It was not until Student was placed in the certified non-public school that he showed regression. Student's

compensatory education shall be provided by teachers with special education certifications and reading specialist training. All tutoring must be provided on a one-to-one basis and must be provided outside regular school hours.

No alternate remedy to reimbursement of expenses for The Children's School was proven for the failure to offer an IEP that met Student's needs from December 15, 2020, to October 25, 2021. The evidence established that Student was provided with services pursuant to the December 3, 2020 IEP while Centralia awaited Parent's consent to the December 15, 2020 IEP. These services have been determined to have offered Student a FAPE. As an equitable remedy, Centralia shall be required to arrange for a three-hour training for all Raymond Temple staff involved in the creation of IEPs. The training shall be in the following areas:

- 1) developing an IEP that meets all of Students need with adequate documentation to establish why the offered services were chosen;
- 2) the requirements necessary for a complete, clearly stated, and accurate IEP, and approaches to ensuring IEP documents meet all California state and IDEA requirements; and
- 3) identifying the need for one-to-one support and Centralia's obligation to implement needed supports when a student must be provided instruction in an alternate format or location.

## ORDER

1. Centralia shall immediately locate district staff with a special education certification and reading specialist training to provide the academic tutoring awarded. Centralia shall notify Parents within 30 days of the

date of this decision with information regarding how to initiate the awarded academic tutoring. Tutoring shall be made available after school and during summer holidays at Parent's election. Parents shall have the right to access these hours through June 30, 2025.

2. Centralia shall complete the required three-hour training detailed in the remedies section of this Decision. This training shall not be provided by Centralia staff. The training must be completed by March 31, 2023.
3. All other remedy requests are denied.

## RIGHT TO APPEAL THIS DECISION

This is a final administrative decision, and all parties are bound by it. Pursuant to Education Code section 56505, subdivision (k), any party may appeal this Decision to a court of competent jurisdiction within 90 days of receipt.

/s/

Penelope S. Pahl

Administrative Law Judge

Office of Administrative Hearings