

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

CASE NO. 2021090721

PARENT ON BEHALF OF STUDENT,

v.

CHULA VISTA ELEMENTARY SCHOOL DISTRICT.

DECISION

JULY 8, 2022

On September 22, 2021, the Office of Administrative Hearings, called OAH, received a due process hearing request from Student, naming Chula Vista Elementary School District. OAH granted a continuance for good cause on November 8, 2021, and January 10, 2022.

Administrative Law Judge Tiffany Gilmartin heard this matter via videoconferencing using Microsoft Teams application, on May 24, 25, 26, 31, and June 1, 2022. Attorneys Robert Burgermeister, Lynda Williams, and Sheila Bayne represented

Student. Parent attended all hearing days. Attorney Pamela Townsend represented Chula Vista. Sharon Casey, Executive Director of Special Education attended on Chula Vista's behalf.

At the parties' request, the matter was continued to June 24, 2022, for written closing briefs. The record was closed, and the matter was submitted on June 24, 2022.

ISSUES

1. Did Chula Vista deny Student a free appropriate public education, called FAPE, by assigning Student to distance learning from March 2020 until the end of the 2019-2020 school year without continuing to provide in-person services in-person in the areas of:
 - a. Specialized academic instruction
 - b. Adapted physical education
 - c. Occupational therapy
 - d. Intensive individual service of a one-to-one aide; and
 - e. Language and speech?
2. Did Chula Vista deny Student a FAPE by assigning Student to distance learning from March 2020 until the end of the 2019-2020 school year without evaluating Student in the areas of:
 - a. Specialized academic instruction
 - b. Adapted physical education
 - c. Occupational therapy
 - d. Intensive individual service of a one-to-one aide; and
 - e. Language and speech?

3. Did Chula Vista deny Student a FAPE by assigning Student to distance learning from March 2020 until the end of the 2019-2020 school year without implementing Student's individual education program, called an IEP, accommodations to ensure Student could obtain a FAPE through distance learning?
4. Did Chula Vista deny Student a FAPE for the 2019-2020 school year and extended school year 2020 by failing to develop an IEP that was reasonably calculated to enable Student to receive educational benefit by failing to provide adequate goals to be implemented during distance learning?
5. Did Chula Vista deny Student a FAPE by failing to address the regression Student allegedly suffered as a result of being assigned to distance learning from March 2020 through extended school year 2020?

JURISDICTION

This hearing was held under the Individuals with Disabilities Education Act, its regulations, and California statutes and regulations. (20 U.S.C. § 1400 et. seq.; 34 C.F.R. § 300.1 (2006) et seq.; Ed. Code, § 56000 et seq.; Cal. Code Regs., tit. 5, § 3000 et seq.) The main purposes of the Individuals with Disabilities Education Act, referred to as the IDEA, are to ensure:

- all children with disabilities have available to them a FAPE that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment and independent living, and

- the rights of children with disabilities and their parents are protected. (20 U.S.C. § 1400(d)(1); See Ed. Code, § 56000, subd. (a).)

The IDEA affords parents and local educational agencies the procedural protection of an impartial due process hearing with respect to any matter relating to the identification, assessment, or educational placement of the child, or the provision of a FAPE, to the child. (20 U.S.C. § 1415(b)(6) & (f); 34 C.F.R. § 300.511 (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, 57-58, 62 [126 S.Ct. 528, 163 L.Ed.2d 387]; and see 20 U.S.C. § 1415(i)(2)(C)(iii).) Student carried 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 14 years old and in eighth grade at the time of hearing. Student resided within the Chula Vista's geographic boundaries at all relevant times. At the time of hearing, Student had enrolled in another school district. Student was eligible for special education under intellectual disability and a secondary eligibility category of speech and language impairment. Student has cognitive, speech, and motor delays.

ISSUE 1(A), (B), (C), (D), and (E): DID CHULA VISTA DENY STUDENT A FAPE BY ASSIGNING STUDENT TO DISTANCE LEARNING FROM MARCH 2020 UNTIL THE END OF THE 2019-2020 SCHOOL YEAR WITHOUT PROVIDING IN-PERSON SERVICES?

Student asserts that Chula Vista failed to implement Student's IEP services from March 2020 to June 3, 2020. Specifically, Student asserts Chula Vista failed to provide in-person services and the requisite number of specialized academic instruction, occupational therapy, and speech and language minutes.

Chula Vista maintains it implemented Student's IEP "to the greatest extent possible" in accordance with the applicable state and federal guidance of that time.

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(2006).) Parents and school personnel develop an IEP, for an eligible student based upon state law and the IDEA. (20 U.S.C. §§ 1401(14), 1414(d)(1); and see Ed. Code, §§ 56031, 56032, 56341, 56345, subd. (a) and 56363 subd. (a); 34 C.F.R. §§ 300.320 (2007), 300.321(2006), and 300.501(2006).)

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].)

DISTRICT-WIDE INSTRUCTION INTERRUPTION MARCH 16, 2020, TO APRIL 12, 2020

Student failed to meet his burden that Chula Vista was required to provide services to Student from March 16, through April 12, 2020. Chula Vista was on spring break from March 23, through April 6, 2020. Following spring break, Chula Vista remained closed and provided no instruction to students through April 12, 2020, due to the shelter-in-place order issued by Governor Gavin Newsom in response to the COVID-19 pandemic. Governor Newsom declared a State of Emergency because of the COVID-19 pandemic on March 4, 2020. (Executive Order N-26-20.) He then issued a statewide “shelter-in-place” order, effective March 19, 2020, under the California State Public Health orders as confirmed by Executive Order N-33-20. Governor Newsom’s order required all non-essential personnel to stay at home and avoid public gatherings.

On March 12, 2020, the U.S. Department of Education, called the US DOE, outlined the States’ responsibility under the IDEA to children with disabilities during the COVID-19 outbreak. (*Questions and Answers on Providing Services to Children with Disabilities During the Coronavirus Disease 2019 Outbreak* (U.S. Dept. of Educ., March 2020).) That document stated,

“If an LEA, that is a local educational agency, closes its schools to slow or stop the spread of COVID-19, and does not provide any educational services to the general student population, then an LEA would not be required to provide services to students with disabilities during that same period of time.”

The US DOE is the agency responsible for developing regulations for and enforcement of the IDEA. When an agency interprets its own regulations, a heightened deference applies, and such an interpretation is controlling unless plainly erroneous or inconsistent with the regulation. (*Federal Express Corp. v. Holowecki* (2008) 552 U.S. 389, 397.)

As a result of the guidance provided by the US DOE, Chula Vista was not required to provide Student a FAPE while Chula Vista's schools were closed to all students to prevent the spread of COVID. Chula Vista closed all its schools to attempt to stop the spread of a contagious virus. The closures were done to protect the health and welfare of staff, students, and the larger Chula Vista community.

Student failed to meet his burden to establish he was denied a FAPE from March 2020 until April 12, 2020. This includes all allegations raised in Issue 1, specifically, failing to implement specialized academic instruction, adapted physical education, occupational therapy, intensive services of a one-to-one aide, and language and speech.

DISTANCE LEARNING INSTRUCTION FROM APRIL 13, 2020, TO JUNE 3, 2020

Chula Vista resumed educational services to all students on April 13, 2020. Chula Vista provided education through the distance learning modality. On March 20, 2020, California Department of Education, called CDE, issued guidance urging LEAs 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 LEAs 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.

Also, in March 2020, CDE defined "distance learning" as instruction in which the student and instructor are in different locations, which could include

- delivering instruction and check-in time with the teacher,
- video or audio instruction,
- instructional television,
- telecourses, or
- other instruction that relies on computer or communications technology.

(Cal. Dept. of Educ., *Distance Learning Considerations* (March 18, 2020).) Distance learning could also include the use of print materials incorporating assignments that are the subject of written or oral feedback. (*Ibid.*)

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 [the LEA] 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 [LEA] 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 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.)

From April 13, 2020, until June 3, 2020, Chula Vista provided educational services through a distance learning format to students for the remainder of the 2019-2020 school year. Accordingly, Chula Vista was required to provide Student a FAPE from April 13, 2020, to June 3, 2020.

Student has Down Syndrome, global delays in cognition, academic, communication, and adaptive skills. He is a friendly child. His visual learning and working memory are strengths. He possesses visual learning strengths. However, he also presents with speech and language delays and works best in an environment where he receives consistent visual and verbal cues. He can sustain attention on tasks for

about 15-20 minutes. He struggles with changes to his routine and will become agitated if he is not provided help right away rather than trying an activity on his own first.

STUDENT PROVED CHULA VISTA FAILED TO IMPLEMENT STUDENT'S IEP SERVICES FROM APRIL 13, 2020, TO JUNE 3, 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 School. 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 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 FAPE denials. (*Id.* at p. 821.)

On April 13, 2020, Chula Vista gave Student a prior written notice that described its distance learning program. It addressed how Student would access the curriculum, how instruction and related services would be provided online or via telephone, and that access to accommodations or modifications were available. For Student, Chula Vista's distance learning service included daily meetings with his moderate-severe special education teacher, distributed work packets, and service provider office hours. All interactions between Student and Chula Vista were offered through a computer.

Student's operative IEP included 1,505 minutes weekly of specialized academic instruction, 30 minutes weekly of adapted physical education in a group setting, 30 minutes weekly of occupational therapy, with 15 minutes being devoted to individual services and 15 minutes in a group setting, 1,795 minutes weekly of special circumstances instructional assistance to support behavior, 75 minutes weekly of language and speech in both a group and individual. All services were offered in person, in a regular classroom in a public-school setting. Accordingly, the shift from all in person to all virtual was a failure to implement Student's IEP.

CHULA VISTA FAILED TO MATERIALLY IMPLEMENT STUDENT'S SPECIALIZED ACADEMIC INSTRUCTION

Student's primary special education teacher, Kristin Zavala, died before the hearing, and was unable to testify. Evidence showed Zavala provided families with seven weekly parent newsletters with suggested schedules, curriculum and enrichment resources, service provider tips, along with a class website. These newsletters were distributed to the entire class, not Student in particular. Zavala spoke with Parent twice in April, first before distance learning started, to confirm access to a computer and for a distance learning overview. The second time was to assist Parent in accessing one of the supportive applications Zavala used in class.

Student was present on Zavala's MS Teams class meeting for all sessions except for two. Zavala's logs also demonstrated that Student's service providers including his adaptative physical education teacher, Matt Lopez, occupational therapist, Lexi Shapiro, speech language pathologist, Jordan Harris, and school psychologist Kristalyn Obtera

also participated during class time. While participating in the MS Teams class meeting, Zavala conducted lessons, provided feedback, and engaged her students during an uncharted period.

Zavala's weekly newsletters were comprehensive. Parent was provided a chart of educational websites and Chula Vista provided logins for Unique Curriculum, Boom learning, Starfall, and Raz-Kids. Parent raised no issues with the daily MS Teams meetings. Parent was in contact with Zavala and the evidence points to Zavala's responsiveness.

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).) The IDEA defines "specially designed instruction" as "adapting, as appropriate to the needs of an eligible child ... the content, methodology, or delivery of instruction" to meet the child's unique needs. (34 C.F.R. § 300.39(b)(3) (2006).)

Chula Vista's program however well-designed did not meet Student's needs. His resistance to schedule changes required Parent to sit with him during Zavala's morning MS Teams meetings. He required redirection and supervision to type and use a computer. His communication deficits were compounded by the distance learning modality. His behavior, which pre-distance learning impacted his ability to learn, deteriorated. He refused to get out of bed in the mornings for school. He refused to

remain seated in front of the computer. This was not unforeseeable as Student's IEP provided 1795 minutes weekly of individual aide support to address these challenges. That necessary support was eliminated during distance learning.

Distance learning as a delivery of instruction failed to work for him. Student lost the opportunity to interact with his general education and mild-moderate peers as the distance learning platform did not provide this opportunity. Thomas Perezchica, a Chula Vista special education teacher, worked with Student since January 2020 as Student's mild-moderate teacher. Before distance learning as part of his specialized academic instruction, Student integrated into Perezchica's classroom 45 minutes to one hour three-to-four days per week. However, once the transition to distance learning occurred, Perezchica did not instruct Student again until extended school year in the summer of 2020. Student interactions with his general education peers was a delight for him. Distance learning deprived him of the benefit of appropriate peer modeling through game play and being a class helper.

Chula Vista went to great lengths to design and implement its distance learning program during the challenging circumstances of a global pandemic. However, Student suffered tangible losses because his needs were not met through the delivery of instruction Chula Vista constructed. This loss is tangible and specific to Student's individual situation. As a result, Chula Vista failed to materially implement his IEP. Accordingly, Student showed Chula Vista denied Student a FAPE by failing to implement Student's specialized academic instruction from April 13, 2020, until June 3, 2020.

CHULA VISTA FAILED TO MATERIALLY IMPLEMENT STUDENT'S ADAPTIVE PHYSICAL EDUCATION

Student's IEP adaptive physical education offer consisted of 30 minutes per week in a group setting. Matt Lopez, Student's adaptive physical education teacher immediately reached out to Student's family at the outset of distance learning. He provided parents with do-it-yourself activities to work on skill mechanics. Lopez participated in two of Student's daily MS Teams classes on April 23, 2020, and May 4, 2020. Every email signed off with an offer for Parents to reach out if they had questions or concerns.

However, like Student's specialized academic instruction, adaptive physical education via distance learning did not work for Student. Student had no direct contact with Lopez during distance learning. Chula Vista's program as implemented deprived Student of interacting with his peers, working on his gross motor skills goals, and managing his behavior. Thus, Chula Vista materially failed to implement Student's IEP between April 13, 2020, until June 3, 2020, in adaptive physical education.

CHULA VISTA FAILED TO MATERIALLY IMPLEMENT STUDENT'S OCCUPATIONAL THERAPY

Student's IEP provided him 30 minutes weekly of occupational therapy, with fifteen minutes each of group and individual services. Like other teachers, Student's occupational therapist, Alexandra Shapiro, provided all parents in Student's classroom with weekly emails that included updates and activities families could work on with their child at home.

Student's fine motor strength was impacted. This interfered with his ability to manipulate clothing fasteners, and open packages and containers during snack time. Before distance learning, Shapiro worked with Student on a clothes board to manipulate various clothing buttons, zippers, and snaps. Shapiro did not send home a clothes board during distance learning as she reasoned Student could utilize clothing within his home.

When Parent emailed her requesting assistance, Shapiro responded promptly, scheduled a meeting, and followed through. However, beyond one meeting, Shapiro had no direct contact with Student during distance learning. As a result, during distance learning, Shapiro did not observe if Student's fine motor skills were remaining consistent, improving, or regressing as she did not observe him working on his occupational therapy goals.

The consultative method of weekly emails of proposed activities and activities and office hours did not meet this Student's needs. This was a material failure to implement Student's IEP. Accordingly, Student demonstrated that Chula Vista failed to materially implement occupational therapy services from April 13, 2020, to June 3, 2020.

CHULA VISTA FAILED TO MATERIALLY IMPLEMENT STUDENT'S INTENSIVE INDIVIDUAL SERVICE OF A ONE-TO-ONE AIDE

Even before distance learning, Student required intensive individual behavior support during the school day. Student's IEP showed he required 1795 minutes weekly of special circumstances instructional assistance to support behavior. This support was intended to provide Student one-to-one supports during snack breaks, class transitions, and integrating into his mild/moderate class. The support was also intended to be faded within the classroom and when Student was working at with a teacher and student at a one-to-four ratio.

Student required assistance with his fine motor skills, required behavior prompting to keep him on task and to manage his own physicality with other students, and ensure compliance during activity transfers. Student was unable to individually access his education before distance learning. The evidence established that Student required the same individual assistance during distance learning. Student did not receive benefit of his intensive individual services during the distance learning period from April 13, 2020, until June 3, 2020. This was a material failure to implement Student's aide services.

CHULA VISTA FAILED TO MATERIALLY IMPLEMENT STUDENT'S SPEECH AND LANGUAGE

Student had two speech and language therapists over the course of distance learning between April 13, 2020, until June 3, 2020. Student's first therapist Jordan Harris did not testify at this hearing. Harris was covering for Student's other therapist, Amanda Lopez, while she was on leave. Lopez returned to Chula Vista on May 18, 2020. Lopez testified credibly at the hearing. Lopez immediately got in contact with Parent, responding to her email on a Saturday. She further arranged two meetings with Student on MS Teams for the following week and answered Parent's questions on how to join meetings and what to expect.

Student's IEP provided for 75 minutes weekly of speech and language services. He received two 30-minute group and one 15-minute individual session per week. Like Student's other service providers, Harris provided weekly speech and language support activities, but failed to provide any direct speech and language services other than with

Lopez on May 26 and May 27. Lopez followed up the meeting on May 27, 2020, with additional material to support Student's articulation needs, but no further direct speech and language services.

Student's receptive and expressive vocabulary skills are consistent with a five-year-old child. Student's articulation skills are extremely impaired, and he struggled with "l", "th", and "r" sounds. He required reminders to regulate his speech pacing. The Boom learning read-aloud exercises and exercises that required Parent's participation to ensure comprehension did not meet Student's needs. Chula Vista effectively handed over its speech and language services to Parent to implement.

The evidence established that Chula Vista failed to materially implement Student's IEP services during the distance learning period from April 13, 2020, until June 3, 2020. Accordingly, Chula Vista failed to materially implement Student's speech and language services, denying Student a FAPE.

It is not necessary to determine whether Chula Vista was required to deliver in-person services in-person as Student prevailed on Issue 1 (a), (b), (c), (d), and (e) by establishing Chula Vista denied him a FAPE, by failing to materially implement all of Student's IEP services during this time period through distance learning.

ISSUE 2(A), (B), (C), (D), and (E): DID CHULA VISTA DENY STUDENT TO A FAPE, BY ASSIGNING STUDENT TO DISTANCE LEARNING FROM MARCH 2020 UNTIL THE END OF THE 2019-2020 SCHOOL YEAR WITHOUT EVALUATING STUDENT?

Student alleges Chula Vista failed to assess Student before transitioning the distance learning because of the global pandemic. Chula Vista asserts it was not required to assess Student at the time because it had no notice that he needed reassessment to make educational progress. Student failed to meet his burden on this issue.

The distance learning program for the 2019-2020 school year began on April 13, 2020 and ran until June 3, 2020. Student failed to demonstrate additional assessments were necessary or requested during this period. After a child's initial assessments to establish special education eligibility, the school district has an ongoing duty to assess the student's needs, and continuing eligibility for special education. The school district must reassess a student eligible for special education at least once every three years; but not more than once a year unless Parents agree. (20 U.S.C. § 1414(a)(2)(B); Ed. Code, § 56381(a)(2).) Student's triennial evaluation was completed in August 2019. It included a psychoeducational evaluation, speech and language evaluation, adapted physical education evaluation, and a special circumstances independence assistance evaluation.

The school district must assess or reassess the educational needs of a child with a disability if requested by Parent, or a teacher; or if the district "determines that the educational or related service needs, including improved academic achievement and functional performance of the child, warrant a reevaluation." (Ed. Code, § 56381(a).) The

evidence showed neither Parent nor Chula Vista personnel requested reevaluation during the time at issue. Nor did Student demonstrate that there was a triggering event or additional need that would have put Chula Vista on notice that re-assessment was necessary.

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) (2007).) 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 did not establish by a preponderance of the evidence that he required further assessments before the initiation of distance learning. Student did not show Chula Vista was on notice that Student's educational needs warranted a reevaluation during the period from April 13, 2020, until June 3, 2020, the last day of the 2019-2020 school year. Student argued that Chula Vista had a legal obligation to assess Student before shifting his placement or instruction method from in-person to distance learning. Student's reliance on Senate Bill 98 and Education Code Section 43503 which outlines distance learning requirements for the school year 2020-2021 is misplaced as it fails to address the time in question. Further, a change in instruction method or placement does not necessarily warrant reassessment solely on that basis without evidence of a demonstrating need.

Student presented no evidence of requests for assessments made at any time between March 16, 2020, and June 3, 2020, or that Student had difficulties with distance learning given rise to additional suspected disabilities warranting reassessment. While most students required some parental assistance to log onto the computer and get situated with online school as was undoubtedly the case here, that does not require reassessment.

However, even if Student could establish that required reassessment at that time, Student failed to present any evidence that he was denied educational benefit or Parents were denied a meaningful opportunity to participate in the IEP development process, due to a failure to assess Student's needs before the initiation of distance learning on April 13, 2020, through June 3, 2020. Student failed to meet his burden that Chula Vista denied him a FAPE by failing to assess prior to the initiation of distance learning.

ISSUE 3(A), (B), (C), (D), AND (E): DID CHULA VISTA DENY STUDENT A FAPE, BY ASSIGNING STUDENT TO DISTANCE LEARNING FROM MARCH 2020 UNTIL THE END OF THE 2019-2020 SCHOOL YEAR WITHOUT IMPLEMENTING STUDENT'S IEP, ACCOMODATIONS?

Student asserted Chula Vista failed to implement his accommodations during distance learning to allow him to access his education. Chula Vista argued it provided all accommodations to Student that it could to facilitate through distance learning.

An IEP must contain a statement of the program modifications or supports that will be provided for the student to advance appropriately toward attaining his annual goals, and to be involved in and make progress in the regular education curriculum. The IEP must also include a statement of any individual accommodations that are necessary to measure the student's academic achievement and functional performance. (20 U.S.C. § 1414(d)(1)(A)(i)(IV), and (VI)(aa); Ed. Code, § 56345, subds. (a)(4), (6)(A).)

On March 20, 2020, CDE issued guidance that stated, when providing instruction through a distance learning model, LEAs 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).)

As found previously, Student established that he was denied a FAPE from April 13, 2020, until June 3, 2020, because Chula Vista failed to implement his IEP. Student's IEP accommodations included visual cues for reading aloud, graphic organizer, visual organizers for his math tool, and frequent breaks. Absent these accommodations, Student struggled with his behavior, speech pacing, and progress towards goals. Some of these accommodations could be implemented in a virtual environment such as visual cues and frequent breaks. Thus, Student established that Chula Vista failed to materially implement Student's accommodations from April 13, 2020, through June 3, 2020, which denied him a FAPE.

ISSUE 4: DID CHULA VISTA DENY STUDENT A FAPE FOR THE 2019-2020 SCHOOL YEAR AND EXTENDED SCHOOL YEAR 2020 BY FAILING TO DEVELOP AN IEP THAT WAS REASONABLY CALCULATED TO PROVIDE ADEQUATE GOALS TO BE IMPLEMENTED DURING DISTANCE LEARNING?

Student asserted Chula Vista failed to assess and reevaluate Student's nine IEP goals in March 16, 2020, until the end of extended school year 2020 to determine if they were appropriate for distance learning. Chula Vista maintained Student failed to demonstrate Student's goals were inadequate or were unable to be implemented in a distance learning environment.

The purpose of annual goals is to permit the IEP team to determine whether the pupil is making progress in an area of need. (Ed. Code, § 56345, subd. (a).) For each area in which a special education student has an identified need, the IEP team must develop measurable annual goals that are based upon the child's present levels of academic achievement and functional performance, and which the child has a reasonable chance of attaining within a year. (Ed. Code, § 56345; *Letter to Butler* (OSERS 1988) 213 IDELR 118.)

Student's May 14, 2019, IEP as amended on September 13, 2019, offered him nine goals including reading accuracy and comprehension, fine motor, two in communication, adaptive physical education—object control, skip counting, typing, money, and writing. Student failed to prove Chula Vista was required to amend his IEP between March 16, 2020, and the end of extended school year because education

delivery shifted to a distance learning platform. The IEP that was in effect at the time of physical school closure remained in effect for students. (CDE, *Special Education Guidance for COVID-19, supra*, (April 9, 2020).) Student presented no evidence that Student's needs changed at this time or that Chula Vista was on notice of additional needs of Student that would require redrafting or additional goals.

Student failed to meet its burden that Chula Vista denied Student a FAPE by failing to develop adequate and appropriately written goals for a distance learning setting for the period between the March 2020 school closure and end of 2020 extended school year. Student provided no legal authority Chula Vista had an obligation to redraft Student's goals solely due to the switch to distance learning as the public's response to Covid-19 mitigation.

Student's closing brief raised for the first time that Chula Vista denied Student a FAPE based on an IEP offer of August 28, 2020. This matter exceeds the time at issue, no evidence was taken during the hearing, and it will not be addressed in this Decision. Further, Student's closing brief misstates the timeline in question and attempts to introduce concepts of SB 98 that were inapplicable for the time at issue here in the instant case. The timeline at issue was addressed with all parties on the first day of hearing and reaffirmed numerous times over the course of the hearing.

Accordingly, Student failed to prove Chula Vista denied Student a FAPE by failing to develop adequate goals for distance learning from March 2020 through the end of extended school year 2020.

ISSUE 5: DID CHULA VISTA DENY STUDENT A FAPE BY FAILING TO ADDRESS REGRESSION STUDENT ALLEGEDLY SUFFERED AS A RESULT OF BEING ASSIGNED TO DISTANCE LEARNING FROM MARCH 2020 THROUGH EXTENDED SCHOOL YEAR 2020?

Student contends he regressed academically, socially, and therapeutically during distance learning. Parent testified Student began stuttering shortly after distance learning began on April 13, 2020. Chula Vista argued Student failed to meet his burden that Student experienced regression or any regression concerns of Parent were unaddressed by Chula Vista.

On March 12, 2020, OSERS issued guidance that IEP teams would be required to make an individualized determination as to whether compensatory services were needed to make up for any skills that may have been lost during school closure due to the COVID-19 pandemic. (Office of Special Education and Rehabilitative Services, *Questions and Answers on Providing Services to Children with Disabilities During the Coronavirus Disease 2019 Outbreak, Answer to Questions A-1, A-2, and A-3* (March 12, 2020).) OSERS reiterated this in additional guidance on March 16, 2020. (Office of Special Education and Rehabilitative Services, *Fact Sheet Addressing the Risk of COVID-19 in Schools While Protecting the Civil Rights of Students* (March 16, 2020).)

On March 20, 2020, CDE issued guidance that stated: “[o]nce the regular school session resumes, LEAs should plan to make individualized determinations, in collaboration with the IEP team, regarding whether or not compensatory services may be needed for a student.” (Cal. Dept. of Educ., *Special Education Guidance for COVID-*

19, COVID-19 School Closures and Services to Students with Disabilities, Answer to Question 3 (March 20, 2020).) On March 21, 2020, OSERS issued further guidance that stated:

"[w]here, due to the global pandemic and resulting closures of schools, there has been an inevitable delay in providing services ... IEP teams ... must make an individualized determination whether and to what extent compensatory services may be needed when schools resume normal operations."

(Office of Special Education and Rehabilitative Services, *Supplemental Fact Sheet Addressing the Risk of COVID-19 in Preschool, Elementary and Secondary Schools While Serving Children with Disabilities*, pp. 2-3 (March 21, 2020).)

Student matriculated into another school district for school year 2020-2021. Education Code section 48200 determines the local education agency responsible for providing a special education program. At the conclusion of summer of 2020, Student was fully enrolled into another school district. This LEA was responsible for providing Student FAPE, not Chula Vista. Chula Vista did not resume normal operations during the time at issue.

A determination of regression requires the local education agency to make an individualized determination in collaboration with Student's IEP team. At the time Chula Vista resumed normal operations, Student was no longer enrolled. Student provided no evidence Chula Vista was entitled to convene a meeting or consult with Student's current IEP team when in-person education resumed. Student failed to prove Chula

Vista denied him a FAPE by failing to address regression related to his participation in distance learning from March 2020 through the end of extended school year 2020.

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.

ISSUES 1 (A), (B), (C), (D), AND (E):

Chula Vista denied Student a FAPE by failing to implement Student's IEP in specialized academic instruction, adaptive physical education, occupational therapy, individual intensive service, and speech and language from April 13, 2020, through June 3, 2020.

Student prevailed on Issues 1(a), (b), (c), (d), and (e).

ISSUES 2(A), (B), (C), (D), AND (E):

Chula Vista did not deny Student a FAPE by assigning Student to distance learning from March 2020 until the end of the 2019-2020 school year without evaluating Student.

Chula Vista prevailed on Issues 2 (a), (b), (c), (d), and (e).

ISSUE 3:

Chula Vista denied Student a FAPE by assigning Student to distance learning from April 13, 2020, through June 3, 2020, without implementing Student's IEP accommodations to ensure Student could obtain a FAPE through distance learning.

Student prevailed on Issue 3.

ISSUE 4:

Chula Vista did not deny Student a FAPE for the 2019-2020 school year and extended school year by failing to develop an IEP that was reasonably calculated to enable Student to receive education benefit by failing to provide adequate goals to be implemented during distance learning.

Chula Vista prevailed on Issue 4.

ISSUE 5:

Chula Vista did not deny Student a FAPE by failing to address the regression Student allegedly suffered as a result of being assigned to distance Learning from March 2020 through the extended school year 2020.

Chula Vista prevailed on Issue 5.

REMEDIES

Administrative Law Judges have broad latitude to fashion appropriate equitable remedies for the denial of a FAPE. (*School Comm. of Burlington v. Dept. 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, specifically 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. 359, 374.

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 hearing officers. (*Forest Grove School Dist. v. T.A.* (2009) 557 U.S. 230, 243-244, fn. 11 [129 S.Ct. 2484].) These are equitable remedies that courts and hearing officers may employ to craft “appropriate relief” for a party. (*Puyallup School supra*, 31 F.3d at pg. 1496.) An award of compensatory education need not provide “day-for-day compensation.” (*Id.* 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. Dist. of Columbia* (D.C. Cir. 2005) 401 F.3d 516, 524.) The award must be fact specific. (*Ibid.*)

The evidence established from April 13, 2020, until June 3, 2020, Chula Vista failed to implement Student’s IEP services and accommodations. That was 29 full days, not counting minimum days or school holidays, of instruction from April 13, 2020, until June 3, 2020. Student’s requested remedies include

- 12 hours of compensatory education for speech and language services;
- 4.8 hours of compensatory education for adaptive physical education services;
- 221.8 hours of compensatory education for specialized academic instruction services;

- 4.8 hours or occupational therapy services, and
- 1,436 hours or compensatory education for a one-to-one aide.

Student further requested round-trip transportation for all services, a full academic assessment by a non-public agency of Parent's choice, funding of all the assessor's recommendations, goal training to Chula Vista's staff in goal writing, fees, and any other relief deemed appropriate. Student is requesting a total of 1,679.40 compensatory education hours for a 29-day time period. This request is exorbitant. Student's evidence fails to support such an excessive compensatory education award.

Student's May 9, 2019, IEP as amended on September 13, 2019, offered

- 1,505 minutes per day of specialized academic instruction in a moderate-severe special day class;
- 30 minutes weekly of group adapted physical education;
- 30 minutes weekly of occupational therapy, with 15 group and 15 individual minutes;
- 1,795 minutes weekly of special circumstances instructional assistance to support behavior,
- 75 minutes weekly of group and individual language and speech.

Hour for hour compensatory education is not a required award. (*Puyallup School. supra*, 31 F.3d at pg. 1497.)

It was established over the 29 full school days from April 13, 2020, until June 3, 2020, Student received 150 minutes of specialized academic instruction per week during this time. As an equitable remedy, Student is awarded 30 hours of one-to-one

specialized academic instruction. This award considers Student's IEP intended his specialized academic instruction to be implemented in a group setting from April 13, 2020, until June 3, 2020, and the failure to provide accommodations.

Student is awarded one hour of individualized adaptive physical education to compensate for the loss of 30 minutes per week of group adaptive physical education Student did not receive from April 13, 2020, until June 3, 2020.

Student is awarded two hours of occupational therapy to compensate for the loss of 30 minutes weekly of occupational therapy, with 15 group and 15 individual minutes from April 13, 2020, until June 3, 2020.

Student is further awarded five hours of speech and language services to compensate for the loss of his two 30-minute group and one 15-minute individual session per week his IEP entitled him from April 13, 2020, until June 3, 2020.

As to a one-to-one aide, Student failed to present evidence how Student could be appropriately compensated for the lack of receiving a one-to-one aide during distance learning. The typical remedy in this situation is to order the district to provide a one-to-one aide; however, Student is no longer enrolled at Chula Vista. Further, should Student currently need a one-to-one aide, that would be the obligation of his current LEA. Student's aide was intended to provide him behavior support as he transitioned between activities at school and with fine motor skills during snack time to open his food packages. Any additional services to remediate this gap cannot be appropriately addressed outside the school day. This is not simply additional academic services that can be provided outside the school such as math or reading. As a result,

the only appropriate remedy considering these specific circumstances is for Chula Vista to require all members of Student's IEP team complete a two-hour training on drafting IEPs to ensure clear communications between school districts and parents.

ORDER

1. Chula Vista must fund 30 hours of direct, individual specialized academic instruction for Student by a certified nonpublic agency of Parent's choice. Chula Vista must establish direct payment to any certified nonpublic agency selected by Parent. All hours will be available until June 30, 2023, and will thereafter be deemed forfeited.
2. Chula Vista must fund one hour of direct, individual adaptive physical education services for Student by a certified nonpublic agency of Parent's choice. Chula Vista must establish direct payment to any certified nonpublic agency selected by Parent. The hour will be available until June 30, 2023, and will be thereafter deemed forfeited.
3. Chula Vista must fund two hours of direct, individual occupational therapy services for Student by a certified nonpublic agency of Parent's choice. Chula Vista must establish direct payment to any certified nonpublic agency selected by Parent. All hours will be available until June 30, 2023, and will be thereafter deemed forfeited.
4. Chula Vista must fund five hours of direct, individual speech and language services for Student by a certified nonpublic agency of Parent's choice. Chula Vista must establish direct payment to any certified nonpublic agency selected by Parent. All hours will be available until June 30, 2023, and will be thereafter deemed forfeited.

5. No later than December 2022, Chula Vista will require all members of Student's IEP team to participate in two hours of training lead by a qualified professional or professional group selected by Chula Vista, but not employed by Chula Vista to address drafting IEPs and ensuring clear communication between parents and Chula Vista.
6. All other requests for relief are denied.

RIGHT TO APPEAL THIS DECISION

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

/s/

TIFFANY GILMARTIN

Administrative Law Judge

Office of Administrative Hearings