

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

CASE NO. 2022020241

PARENT ON BEHALF OF STUDENT,

v.

ENTERPRISE ELEMENTARY SCHOOL DISTRICT.

DECISION

July 22, 2022

On February 7, 2022, the Office of Administrative Hearings, called OAH, received a due process hearing request from Parent on behalf of Student, naming Enterprise Elementary School District. On March 21, 2022, OAH granted Student's request for continuance. Administrative Law Judge Marlo Nisperos heard this matter by videoconference on May 24, 25, 26, and 31, and June 1 and 2, 2022.

Tania Whiteleather, Attorney at Law, represented Student. Parent attended all hearing days. Janate Valenzuela, Attorney at Law, assisted counsel at hearing on behalf of Student. Rodney Ford, paralegal, and Patty Schiffner, administrative assistant, attended several days of hearing on Student's behalf.

Kyle Raney, Attorney at Law, represented Enterprise. Stephanie Holtz, Attorney at Law, observed two days of hearing on Enterprise's behalf. Annie Payne, Director of Special Education and Health Services, attended all hearing days on behalf of Enterprise.

At the parties' request the matter was continued to June 27, 2022, for closing briefs. The record was closed, and the matter was submitted on June 27, 2022.

ISSUES

Before the hearing, Student made an oral motion to correct a ministerial error in Issue 1(d), to change the date from May 19, 2021, to May 20, 2021. Enterprise did not object. Student's request to correct the date was granted.

1. Did Enterprise deny Student a free appropriate public education, called FAPE, from February 7, 2020, through the end of the 2020-2021 school year, by:
 - a. failing to timely review the assistive technology assessment report;
 - b. failing to develop an accurate assistive technology assessment report;

- c. failing to amend the assistive technology report;
 - d. failing to make an individualized education program, referred to as IEP, offer beginning May 20, 2021;
 - e. failing to offer in-person services per the opinion and findings of the assistive technology assessor; and
 - f. failing to offer licensed vocational nurse services?
2. Did Enterprise deny Student a FAPE during the 2021-2022 school year through February 7, 2022, by:
- a. failing to timely review the assistive technology assessment report through November 1, 2021;
 - b. failing to develop an accurate assistive technology assessment report;
 - c. failing to amend the assistive technology report;
 - d. failing to make an IEP offer;
 - e. failing to offer in-person services per the opinion and findings of the assistive technology assessor; and
 - f. failing to offer licensed vocational nurse services?

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 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 free appropriate public education 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).) Here, Student filed the complaint and had the burden of proof on all issues. The factual statements in this Decision constitute the written findings of fact required by the IDEA and state law. (20 U.S.C. § 1415(h)(4); Ed. Code, § 56505, subd. (e)(5).)

Student was five years old and eligible to attend preschool pursuant to an IEP. Student had not begun attending preschool or receiving IEP services at the time of hearing. Student resided within Enterprise's geographic boundaries at all relevant times. Student was eligible for special education under the primary category of intellectual disability and secondary category of orthopedic impairment.

ISSUE 1(d) AND 2(d): DID ENTERPRISE DENY STUDENT A FAPE FROM MAY 20, 2021, THROUGH FEBRUARY 7, 2022, BY FAILING TO MAKE AN IEP OFFER?

Student alleged that Enterprise denied him a FAPE by failing to make an IEP offer from May 20, 2021, through February 7, 2022, the date the complaint was filed. Enterprise claimed that it attempted to timely convene IEP team meetings, but the process was delayed because Parent canceled, rescheduled, or refused to attend meetings. Enterprise argued it did not deny Student a FAPE during this timeframe because it did not refuse to convene IEP team meetings.

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); 34 C.F.R. §§ 300.320, 300.321 (2007), and 300.501 (2006); and see Ed. Code, §§ 56031, 56032, 56341, 56345, subd. (a), and 56363, subd. (a).)

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 the 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].)

A district must review a student's IEP not less than annually, to determine whether the child's annual goals are being achieved, and revise the IEP as appropriate. (20 U.S.C. § 1414(d)(4)(A); 34 C.F.R. § 300.324(b) (2017); Ed. Code, §§ 56043, subd. (d), 56341.1, subd. (d).)

Student and Enterprise participated in a due process hearing involving a consolidated matter, in OAH cases 2021040393 and 2021020664. OAH issued a Decision in the consolidated matter on January 31, 2022. The administrative law judge found that Student's IEP team convened its first meeting on February 24, 2020, and made an initial IEP offer on May 21, 2020. The administrative law judge found the May 21, 2020 IEP denied Student a FAPE because it offered teleservices but Student required in-person assistance to access his education.

The IDEA specifically allows parties to file separate due process hearing requests for separate issues. (20 U.S.C. § 1415(o); 34 C.F.R. § 300.513(c) (2006); Ed. Code, § 56509.) For this reason, there is no requirement in special education law, as there is in civil cases, that parties must bring all claims at the same time in one filing. State and federal special education laws allow Student to raise issues in this hearing beginning on February 7, 2020, despite having adjudicated claims in the prior matter that arose during the 2019-2020 school year. In the present matter, Student raised different claims than were litigated in the prior due process hearing.

Student alleged a denial of FAPE based upon Enterprise's failure to make an IEP offer beginning May 20, 2021, one day less than one year after Enterprise made its initial offer. A finding is not made in this Decision whether Enterprise owed Student an IEP offer on Student's fourth birthday, December 10, 2020, or by February 2021, one year after the IEP process began. Analyzing whether a denial of FAPE began in May 2021 gives Enterprise the ultimate benefit of the doubt because it was required to review Student's IEP within one year. (20 U.S.C. § 1414(d)(4)(A); 34 C.F.R. § 300.324(b) (2017); Ed. Code, §§ 56043, subd. (d), 56341.1, subd. (d).) Student was entitled to an IEP offer by May 21, 2021, one year after the initial offer was made.

Enterprise scheduled an IEP team meeting for February 23, 2021 and provided a meeting notice to Parent. Parent asked to postpone the meeting so she could consult with an attorney. On March 2, 2021, the attorney sent correspondence to Enterprise addressing Parent's concerns and recommended for Enterprise to convene an IEP team meeting to further consider Student's educational needs. The IEP team held five meetings to develop Student's annual IEP offer. The IEP team meetings were convened on the following dates: April 20, June 2, November 1, 2021, and February 28, and May 10, 2022.

At the April 2021 IEP team meeting, the parties attempted to discuss Student's progress on goals from the February 2020 IEP. The IEP had not been implemented and Student had not begun receiving services. As a result, no service providers were available to describe Student's present levels of performance. The IEP team spent the bulk of the time at the April and June 2021 IEP team meetings quarreling about what information Enterprise needed to address Student's health needs. Student's pediatrician, Dr. Kelly D. Carter, M.D., attended the June 2021 IEP team meeting and answered health-related questions. In the following months, the parties exchanged

correspondence to try to resolve their disagreement regarding medical information. As a result of their dispute, the parties did not make appreciable progress developing Student's IEP at the first two meetings.

Geoffrey Barley completed Student's assistive technology assessment in May 2021. At the November 1, 2021 IEP team meeting, the team began discussing the assistive technology assessment report. The prior OAH Decision was issued on January 31, 2022, and this matter was filed on February 7, 2022. The parties convened an IEP team meeting on February 28, but Parent and Student's counsel terminated the meeting shortly after it began. They refused to participate in an IEP team meeting because the discussions from the previous three meetings had not been memorialized in writing and provided to them. On April 4, Enterprise provided the meeting notes requested by Parent and Student's counsel. Parent agreed to schedule another IEP team meeting after receiving the notes. The IEP team completed its review of the assistive technology report and finalized Student's IEP offer on May 10, 2022, nearly two years after Student's initial May 21, 2020, IEP offer.

This Decision makes no findings regarding what the IEP team discussed at meetings held after February 7, 2022. During the hearing, the undersigned excluded evidence regarding information discussed by the IEP team after the complaint was filed in this matter, on February 7. The evidence of the IEP team meetings held after February 7, was admitted for the limited purpose of establishing a timeline and to demonstrate that no IEP offer was made on or prior to February 7. Enterprise's failure to make an IEP offer between May 21, 2021, and February 7, 2022, was a procedural violation because it failed to complete the review of Student's IEP within one year of the offer made on May 21, 2020.

A procedural violation results in a denial of a FAPE only if the violation impeded the child's right to a FAPE; significantly impeded the parent's opportunity to participate in the decision-making process; or caused a deprivation of educational benefits. (20 U.S.C. § 1415(f)(3)(E)(ii); 34 C.F.R. § 300.513(a)(2) (2006); Ed. Code, § 56505, subds. (f)(2) & (j); *W.G. v. Board of Trustees of Target Range School Dist. No. 23* (9th Cir. 1992) 960 F.2d 1479, 1484, superseded in part on other grounds by 20 U.S.C. § 1414(d)(1)(B); *L.M. v. Capistrano Unified School Dist.* (9th Cir. 2009) 556 F.3d 900, 910.) The Ninth Circuit has held that a procedural error that causes a loss of an educational opportunity denies a student a FAPE. (*Doug. C. v. Hawaii Depart. of Education* (9th Cir. 2013) 720 F.3d 1038,1047.)

Enterprise's failure to make an IEP offer by May 21, 2021, was a procedural violation that significantly impeded Parents' opportunity to participate in the decision-making process because no offer was made. As determined in the prior Decision and discussed in Issues 1(e) and 2(e), Student needed in-person services so he could access his education. Enterprise's failure to make an IEP offer by May 21, caused a deprivation of educational benefits to Student because he needed in-person services and was not receiving them. Student proved by a preponderance of the evidence that Enterprise denied him a FAPE by failing to make an IEP offer from May 21, 2021, through February 7, 2022.

ISSUE 1(a) AND 2(a): DID ENTERPRISE DENY STUDENT A FAPE FROM FEBRUARY 7, 2020, THROUGH FEBRUARY 7, 2022, BY FAILING TO TIMELY REVIEW THE ASSISTIVE TECHNOLOGY ASSESSMENT REPORT?

Student alleged that Enterprise denied him a FAPE by failing to timely review the assistive technology report after Parent consented to the assessment plan. Enterprise

claimed that the IEP team reviewed the report on November 1, 2021, because that was the first date that the entire IEP team was available to meet after the report was completed. Enterprise asserted that it was excused from reviewing the report within 60-days because Parent delayed completion of the assessment until after the report was due to be reviewed by the IEP team.

The IDEA provides for periodic reassessments to be conducted not more frequently than once a year unless the parent and school district agree otherwise, but at least once every three years unless the parent and school district agree that a reevaluation is not necessary. (20 U.S.C. § 1414(a)(2)(B); 34 C.F.R. § 300.303(b) (2006); Ed. Code, § 56381, subd. (a)(2).) An evaluation under federal law is the same as an assessment under California law. (Ed. Code, § 56302.5.)

To obtain parental consent for assessment, the school district must provide proper notice to the parent. (20 U.S.C. § 1414(b)(1); 34 C.F.R. § 300.300(c) (2008); Ed. Code, §§ 56321, subd. (a), 56329.) Within 15 calendar days of referral, subject to certain exceptions, the school district must give the parent a written notice. (Ed. Code, §§ 56043, subd. (a); 56321, subd. (b).) The notice consists of a proposed written assessment plan describing any evaluation procedures the district proposes to utilize and a copy of the procedural safeguards under the IDEA and state law. (20 U.S.C. § 1414(b)(1); 34 C.F.R. § 300.304(a) (2006); Ed. Code, § 56321, subd. (a).) The school district must give the parents 15 days to review, sign and return the proposed assessment plan. (Ed. Code, § 56321, subd. (a).)

The assessment plan must be in a language easily understood by the public and the native language of the parent, explain the type of assessments being proposed, and notify the parent that no IEP will result from the assessment without consent of the

parent. (Ed. Code, § 56321, subd. (b)(1)-(4).) The reassessment must be completed and an IEP team meeting held within 60 days of receiving consent, exclusive of school vacations in excess of five school days, unless the parent consents in writing to an extension. (20 U.S.C. § 1414(a)(1)(C); 34 C.F.R. § 300.301(c) (2007); Ed. Code, §§ 56043, subd. (f)(1), 56302.1, subd. (a), and 56344, subd. (a).)

At the May 11, 2020, IEP team meeting, Student asked Enterprise to conduct an assistive technology assessment to determine Student's need for a communication device and services. On May 20, 2020, Enterprise sent Student an assessment plan and procedural safeguards. The assessment plan stated that the assessor would conduct an assessment for language and speech communication development. It described that the tests would measure Student's ability to understand and use language and speak clearly and appropriately. The prior OAH decision held that the assessment plan failed to state that no IEP will result from the assessment without the consent of Parent. As a result, the assessment plan was incompliant with procedural requirements. (Ed. Code, § 56321, subd. (b)(4).)

The incompliant assessment plan did not prevent Student from asserting that the assistive technology assessment included in the plan was untimely reviewed. Once Parent consented to the assessment plan, it triggered Enterprise's duty to conduct the assessment and review it with the IEP team within 60 days. Although the assessment plan was deemed legally incompliant, Student may allege that Enterprise failed to timely review the assistive technology report.

Parent consented to the assistive technology assessment on March 1, 2021. Typically, an IEP team must complete the assessment and review the report within 60 days of receiving parental consent. Here, the sixtieth day was April 30, 2021.

Enterprise was on spring recess for six school days, from April 5, through April 12, 2021, which extended the deadline by eight days. As a result, Student's IEP team was required to review the assessment report by May 9, 2021.

Enterprise contracted with Connecting to Care to conduct the assistive technology assessment. On March 25, 2021, the agency sent Parent an intake packet that was necessary to begin the assessment. Parent returned the completed packet on April 19, 2021. The assessor determined two sessions were necessary to conduct the assessment, and they were held on April 28, and May 14. The assessor completed the report on May 26, 2021, and sent it to Enterprise the same day. The IEP team convened a meeting on June 2, 2021, but the assessor was not available to attend the meeting. As a result, the assistive technology assessment was not discussed until the next IEP team meeting in November.

On June 28, 2021, Enterprise sent Student the three versions of the assistive technology report. The IEP team began reviewing the report at the November 1, 2021, IEP team meeting and finished discussing it at the May 2022 meeting. The IEP team's review of the assistive technology report that began eight months after, and concluded 15 months after, Parent provided consent to the assessment plan was a procedural violation of its duty to review the assessment report within 60 days of receiving a signed assessment plan.

Enterprise's argument that it reviewed the report as soon as the report was completed, and the entire IEP team was available to meet, was disingenuous. Before scheduling an IEP team meeting to review the assessment report, Enterprise asked the assessor to make two minor revisions. Enterprise determined the assistive technology report was completed once it received the revised version in June 2021.

Enterprise was able to schedule a meeting when the report was completed in May 2021. Enterprise delayed scheduling an IEP team meeting until the next school year because Enterprise wanted to edit the assistive technology report before a meeting was convened to discuss it.

In its closing brief, Enterprise asserted that it was not required to review the assistive technology report within 60 days. Enterprise relied on Education Code section 56302.1, subdivision (b)(2), which states the 60-day time period does not apply if the parent of a child repeatedly fails or refuses to produce the child for the assessment. Enterprise argued that when Parent returned the intake packet to the assessor, it was only 20 days before the May 9, 2021, deadline. Enterprise also alleged that Parent did not make Student available for the second assessment session until May 14, several days after the due date had passed. Enterprise's arguments are not persuasive.

Although Parent returned the intake packet 25 days after it was sent to her and scheduled the second assessment after the report should have been reviewed, this does not constitute repeatedly failing or refusing to produce the Student. In addition, Enterprise provided no explanation why it sent the intake packet 24 days after Parent consented to the assessment plan. As a result, Enterprise is not excused from the statutory deadline, that was greater than 60 days based on Enterprise's spring recess, to hold an IEP team meeting to review the assistive technology assessment. Additionally, Enterprise offered no persuasive authority excusing the IEP team from beginning the review eight months after, and completing the review 15 months after parent provided consent. That kind of delay cannot be justified by reference to a 25-day delay by a parent.

Enterprise's failure to timely review the assistive technology assessment significantly interfered with Parent's opportunity to participate in the decision-making process of Student's IEP by depriving her of information she needed to participate in developing Student's program. Parent should have had this information by May 9, 2021, when the assessment was due to be reviewed according to the statutory timelines. Timely review of assessments is an important element of the reevaluation process. As discussed in Issues 1(e) and 2(e), the assessor's presentation of the report provided the IEP team with critical information regarding Student's ability to use assistive technology independently. Enterprise's failure to complete the review of the assistive technology report until May 2022 was a denial of FAPE. Student proved by a preponderance of the evidence that Enterprise denied him a FAPE from May 9, 2021, through February 7, 2022, by failing to timely review the assistive technology assessment.

ISSUES 1(b), 1(c), 2(b), AND 2(c): DID ENTERPRISE DENY STUDENT A FAPE BY FAILING TO DEVELOP AN ACCURATE ASSISTIVE TECHNOLOGY REPORT OR FAILING TO AMEND THE ASSISTIVE TECHNOLOGY REPORT?

Student claimed Enterprise denied him a FAPE based upon failing to develop an accurate assistive technology report as required by federal and state statutes governing assessments. Student asserted the report was inaccurate because it failed to include a statement that Student was unable to independently operate assistive technology. Student also alleged a denial of FAPE based upon Enterprise's failure to amend the report to include the omitted statement. Enterprise contended the assistive technology report was accurate and did not require amendment.

The allegations in Issues 1(b), 1(c), 2(b), and 2(c), are based on statements the assessor made at the November 1, 2021, IEP team meeting. The assessor's opinions

and findings disclosed at the IEP team meeting involved Student's inability to use assistive technology independently. As discussed above in Issues 1(a) and 2(a), Student established that Enterprise denied him a FAPE from May 9, 2021, through February 7, 2022, based upon failing to timely review the assistive technology report. Because Student prevailed on the substantive claim regarding the assistive technology assessment report and established a FAPE denial, it is not necessary to determine if Student was denied a FAPE on alternate substantive grounds, such as whether the report was accurate or whether it should have been amended.

ISSUES 1(e) AND 2(e): DID ENTERPRISE DENY STUDENT A FAPE BY FAILING TO OFFER IN-PERSON SERVICES PER THE OPINION AND FINDINGS OF THE ASSISTIVE TECHNOLOGY ASSESSOR FROM FEBRUARY 7, 2020, THROUGH FEBRUARY 7, 2022?

Student alleged Enterprise denied him a FAPE by failing at the November 1, 2021, IEP team meeting, to offer in-person services to support his use of teleservices. Student argued that the assistive technology assessor's opinion and observations discussed at that meeting established Student's need for in-person services. Enterprise contended that if it had offered in-person services prior to finalizing the IEP in May 2022, it would have violated federal or state special education laws including predetermination of services. Enterprise claimed that it did not deny Student a FAPE because it offered in-person services at the appropriate time in the IEP development process.

In resolving the question of whether a school district has offered a FAPE, the focus is on the adequacy of the school district's proposed program. (*Gregory K. v. Longview School Dist.* (9th Cir. 1987) 811 F.2d 1307, 1314.) For a school district's offer

of special education services to a disabled pupil to constitute a FAPE under the IDEA, a school district's offer must be designed to meet the student's unique needs, and be reasonably calculated to provide the student with some educational benefit in the least restrictive environment. (*Ibid.*) Whether a student was offered or denied a FAPE is determined by looking to what was reasonable at the time the IEP was developed, not in hindsight. (*Adams v. State of Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149, citing *Fuhrmann v. East Hanover Bd. of Education* (3rd Cir. 1993) 993 F.2d 1031, 1041.)

Student's allegation was tied to the opinion the assistive technology assessor expressed at the November 1, 2021, IEP team meeting. The assessor's opinion that Student required in-person support was not included in the written report. The assessor reported his observation for the first time at the meeting. As pled, the analysis of Enterprise's failure to offer in-person services begins on that date. This Decision makes no findings regarding a denial of FAPE based upon failing to offer in-person services prior to November 2021.

The prior Decision found that Student was denied FAPE through May 19, 2021, based on Enterprise's failure to offer in-person services. This Decision holds in Issues 1(d) and 2(d), that Enterprise denied Student a FAPE by failing to make an IEP offer from May 21, 2021, through February 7, 2022. Enterprise's failure to make an IEP offer included failing to offer in-person services. Typically, when a global FAPE denial is established for a specific time period, as here, it is unnecessary to determine if Student was denied a FAPE based on alternate substantive grounds within the same time period. However, Student claimed that he required in-person services beginning in November 2021, to meet his assistive technology needs, as recommended by the assistive technology assessor. Therefore, it is necessary to reach this issue, not to determine if Student was denied a FAPE, as that was already established. Rather, it is

necessary to determine if Student met his burden of proof to establish that he had a newly identified need for in-person services related to assistive technology from November 2021, through February 2022.

Geoffrey Barley was the Assistive Technology Manager at Connecting to Care since 2010. Barley earned a master's degree in Multimedia Production and Design in 2005 and an Advanced Assistive Technology Certified Professional certificate in 2018. Barley conducted more than 800 assistive technology assessments. Barley's testimony was accurate, thorough, and corroborated by other witnesses. Barley's opinions and observations were given significant weight.

Barley completed the assistive technology report after conducting two days of in-person assessments. Barley established that Student was unable to access the assistive technology device independently, Student required in-person support to use it. Barley noted that Student needed help sitting upright, due to physical limitations, to access the device. Barley observed Student display physical weakness and mobility deficits with his wrist and index finger that required hand-over-hand assistance to activate the device. Barley established that Student needed adult assistance because he tired easily and required encouragement to use the device. Barley credibly testified that if there was a problem with the device or if the software was not functioning correctly, Student would require in-person support to troubleshoot these issues. Based on the assessments performed and trial of several devices, Barley also deduced that Student could not use a laptop computer independently to access teleservices.

Student's service providers also established that he needed in-person support to access teleservices. Hannah Ostrowski, Student's Registered Behavior Technician, since August 2019, observed that Student could not use the alternative communication device

independently. Ostrowski explained that Student required in-person support because he was a hands-on learner and sometimes needed hand over hand assistance. Jenna Ryan, Board Certified Behavior Analyst, worked with Student since 2020 and was familiar with Student's learning style and behaviors. Ryan established that Student could not independently turn on or use a laptop computer. Cynthia Kirchner was a licensed vocational nurse for 31 years and worked with Student from March 2020 through March 11, 2022. Kirchner explained that if Student was given access to a computer, he could pay attention for a short time, but he could not set up or use the computer independently. Kirchner established that based on Student's varied attention span, in-person support was required to help him access teleservices.

Student proved that he required in-person support to engage in teleservices based on his service providers' observations and the assistive technology assessor's opinions and findings expressed at the November 2021, IEP team meeting. The written assistive technology report did not include Barley's opinion that Student was unable to access an assistive technology device or a use a computer independently. Barley's observation and findings regarding Student's inability to independently use a device or independently participate in teleservices was uncontroverted and supported by the evidence. Student proved by a preponderance of the evidence that he needed in-person support to access assistive technology and teleservices beginning November 1, 2021.

Similar to the analysis of Issues 1 (b), 1(c), 2(b), and 2(c), a separate determination of whether Student was denied a FAPE based upon Enterprise failing to offer in-person services is not necessary. Student already established in Issues 1(d) and 2(d) that Enterprise denied him a FAPE from May 21, 2021, through February 7, 2022, by failing to make an IEP offer. However, Student did establish that he had a newly identified need

for in-person services to meet his assistive technology needs from November 1, 2021, through February 7, 2022. This Decision does not reach whether Student was denied a FAPE based upon Enterprise's failure to offer in-person services from November 1, 2021, through February 7, 2022, because Student already established such for the same time period.

ISSUES 1(f) AND 2(f): DID ENTERPRISE DENY STUDENT A FAPE BY FAILING TO OFFER LICENSED VOCATIONAL NURSE SERVICES FROM FEBRUARY 7, 2020, THROUGH FEBRUARY 7, 2022?

Student claimed Enterprise's failure to offer licensed vocational nurse services denied him a FAPE. Student asserted that various assessments and records supported his need for a licensed vocational nurse. Enterprise argued that it did not have access to sufficient medical information to determine if Student required the services of a licensed vocational nurse. Enterprise contended that it determined a licensed vocational nurse was not required to provide Student a FAPE when it received information necessary to complete standardized medical protocols.

In California, related services include health and nursing services. (34 C.F.R. § 300.34(a), (c)(13) (2006); Ed. Code, § 56363, subd. (b)(12).) Health and nursing related services include providing services by qualified personnel. (Cal. Code Regs., tit. 5, § 3051.12, subd. (a)(1).) A qualified school nurse may provide training for qualified personnel. (Cal. Code Regs., tit. 5, § 3051.12, subd. (b)(2)(B)(1).)

Qualified school personnel possess a current valid Cardio-Pulmonary Resuscitation certificate from an approved program, current knowledge of community emergency medical resources, and skill in the use of equipment and performance of techniques

necessary to provide specialized physical health care services for individuals with exceptional needs. (Cal. Code Regs., tit. 5, § 3051.12, subd. (b)(1)(C) & (b)(1)(E).) Qualified school personnel are trained in the procedures to a level of competence and safety which meets the objective of the training as provided by the school nurse. (Cal. Code Regs., tit. 5, § 3051.12, subd. (b)(1)(C)(2).)

A school nurse or other designated school employee may administer medication to a student during the school day if the medication is prescribed by a physician. (Ed. Code, § 49423, subd. (a) & (b); *Bueno v. Bass Lake Joint Union Elementary School District* (E.D. Ca., November 30, 2021, No. 1:21-CV-0436 AWI HBK) 2021 WL 5601504.) Qualified designated school personnel trained in the administration of specialized physical health care may assist a student during the regular school day under the supervision of a credentialed school nurse. (Ed. Code, § 49423.5, subd. (a)(2).) Specialized physical health care includes gastric tube feeding. (Ed. Code, § 49423.5, subd. (d).) Supervision means review, observation, and/or instruction of a designated school person's provision of physical health care services, but does not necessarily require the immediate presence of the supervisor at all times. Indirect supervision means the supervision shall be available to the qualified designated school person either in person or through electronic means to provide necessary instruction, consultation, and referral to appropriate care and services as needed. (Cal. Code Regs., tit. 5, § 3051.12, subd. (b)(1)(D).)

Student was diagnosed with Wolf-Hirschhorn Syndrome, which includes

- global developmental delays,
- impaired immune function,
- epilepsy,
- cleft palate,

- microencephaly,
- heart abnormalities,
- food intolerances, and
- gastroesophageal reflux disease.

Student was non-verbal and required a gastronomy tube, also referred to as gastric tube or g-tube, for feeding and to administer medications.

A transdisciplinary preschool assessment was completed to develop Student's initial IEP. It recommended a needs assessment be conducted to determine whether Student required one-to-one adult support for his health needs. The evidence established that a health needs assessment was not performed pursuant to the recommendation. At the May 2020 IEP team meeting, Enterprise asked why Student had not provided specialized health protocols it requested. Student's attorney informed the IEP team that the protocols were not provided because none of the IEP service providers would be responsible for Student's health needs. Student's counsel advised Enterprise that service providers would never be left alone with Student. During the development of Student's initial IEP, no member of the IEP team expressed concern that Student needed licensed vocational nurse services.

Student's pediatrician, Dr. Carter, wrote a letter dated July 29, 2020, in response to Enterprise's request for information to develop a medical protocol. Dr. Carter informed Enterprise that no additional support, besides that being provided by the home health agency, was needed for Student's medical needs. Dr. Carter explained the

home health agency assisted Student with services that were listed on Enterprise's request for information to create a medical protocol, including

- nutrition,
- gastronomy tube feeding,
- administration of emergency medications,
- toileting,
- physical movement, and
- a seizure action plan.

Dr. Carter told Enterprise that school personnel and IEP service providers had no responsibility for providing medical services to Student.

In the letter, Dr. Carter informed Enterprise that if the conditions changed and Student required assistance through his IEP, he would notify them. Enterprise was never informed by Dr. Carter or Student's other medical providers, that conditions had changed or that Student required assistance from a licensed vocational nurse. At the next IEP team meeting, on April 20, 2021, Student's attorney informed the IEP team that Enterprise did not need to worry about taking care of Student's health needs because the family had a licensed vocational nurse serving him.

Parent testified that Student's need for a licensed vocational nurse arose when Kirchner left her employment in March 2022. Since that time, Student had not had licensed vocational nurse care. The services provided by Kirchner included

- making sure Student's airways were clear,
- administering medication during a seizure,
- administering daily medications,
- feeding via the gastronomy tube and bottle feeding,

- checking vital signs and temperature,
- monitoring reflux,
- toileting,
- mobility, and
- assisting with activities of daily living.

At the time of hearing, Student remained eligible for 40 hours of licensed vocational nurse services from the home health agency, but the agency was unable to staff the position. As a result, at hearing, Student requested 40 hours of licensed vocational nurse services be provided by Enterprise in his IEP.

Kelly Pagan, worked as a registered nurse in the neonatal intensive care unit for 15 years at several hospitals including the University of California, Los Angeles, the University of California, Davis, and Mercy Medical Center. Pagan was employed as a credentialed school nurse since 2015 and was the school nurse for Enterprise since 2020. Pagan opined that based on the May 2022 health assessment, Student required health assistance from a trained district employee, not a licensed vocational nurse.

Pagan was a qualified school nurse who was aware of Student's health needs. Pagan was qualified to train a district employee to address Student's needs related to gastric tube feeding, administration of daily and emergency medication, toileting, mobility, and his seizure action plan. Pagan established that Student did not require licensed vocational nurse services to access his education. Enterprise established that a district employee could be trained to provide health-related services under Pagan's supervision.

Student failed to prove that he needed a licensed vocational nurse to receive a FAPE. Student described the services and support he received from his licensed

vocational nurse. But Student failed to establish that only licensed vocational nurses were qualified to perform these duties. Enterprise demonstrated that Pagan could train a school employee to provide health services to meet Student's health needs, a licensed vocational nurse was not necessary to provide a FAPE.

Assuming that Student proved he required the services of a licensed vocational nurse, which he did not, Student's need for such services began in March 2022, after the time period at issue. Parent testified that Student's need for a licensed vocational nurse resulted from losing services from the home health agency. At all times prior to filing the complaint in this matter, Parent, Student's counsel, and Student's pediatrician informed Enterprise that it did not need to provide support to meet Student's medical needs. Accordingly, Student failed to prove by a preponderance of the evidence that he required licensed vocational nurse services to receive a FAPE from February 7, 2020, through February 7, 2022.

CONCLUSIONS AND PREVAILING PARTY

As required by California Education Code section 56507, subdivision (d), the hearing decision must indicate the extent to which each party has prevailed on each issue heard and decided.

ISSUE 1(A):

Enterprise denied Student a FAPE from May 9, 2021, through the end of the 2020-2021 school year, by failing to timely review the assistive technology assessment report.

Student prevailed on issue 1(a).

ISSUE 1(B):

Because Student prevailed on Issue 1(a), it was deemed not necessary to determine the issue of whether Enterprise also denied Student a FAPE from February 7, 2020, through the end of the 2020-2021 school year, by failing to develop an accurate assistive technology report.

ISSUE 1(C):

Because Student prevailed on Issue 1(a), it was deemed not necessary to determine the issue of whether Enterprise also denied Student a FAPE from February 7, 2020, through the end of the 2020-2021 school year, by failing to amend the assistive technology report.

ISSUE 1(D):

Enterprise denied Student a FAPE from May 21, 2021, through the end of the 2020-2021 school year by failing to make an IEP offer.

Student prevailed on Issue 1(d).

ISSUE 1(E):

Because Student prevailed on Issue 1(d), it was deemed not necessary to determine the issue of whether Enterprise also denied Student a FAPE from November 1, 2021, through the end of the 2020-2021 school year, by failing to offer in-person services per the opinion and findings of the assistive technology assessor.

ISSUE 1(F):

Enterprise did not deny Student a FAPE from February 7, 2020, through the end of the 2020-2021 school year by failing to offer licensed vocational nurse services.

Enterprise prevailed on Issue 1(f).

ISSUE 2(A):

Enterprise denied student a FAPE during the 2021-2022 school year, through February 7, 2022, by failing to timely review the assistive technology assessment report.

Student prevailed on Issue 2(a).

ISSUE 2(B):

Because Student prevailed on Issue 2(a), it was deemed not necessary to determine the issue of whether Enterprise denied Student a FAPE during the 2021-2022 school year, through February 7, 2022, by failing to develop an accurate assistive technology report.

ISSUE 2(C):

Because Student prevailed on Issue 2(a), it was deemed not necessary to determine the issue of whether Enterprise denied Student a FAPE during the 2021-2022 school year, through February 7, 2022, by failing to amend the assistive technology report.

ISSUE 2(D):

Enterprise denied Student a FAPE during the 2021-2022 school year, through February 7, 2022, by failing to make an IEP offer.

Student prevailed on Issue 2(d).

ISSUE 2(E):

Because Student prevailed on Issue 2(d), it was deemed not necessary to determine the issue of whether Enterprise also denied Student a FAPE during the 2021-2022 school year, through February 7, 2022, by failing to offer in-person services per the opinion and findings of the assistive technology assessor.

ISSUE 2(F):

Enterprise did not deny Student a FAPE during the 2021-2022 school year, through February 7, 2022, by failing to offer licensed vocational nurse services.

Enterprise prevailed on Issue 2(f).

REMEDIES

Student prevailed on Issues 1(a), 1(d), 2(a), and 2(d). As remedies, Student requested that the assistive technology report be amended to include a statement that Student is unable to access assistive technology independently, and compensatory education in the areas of assistive technology, specialized academic instruction, language and speech, occupational therapy, and physical therapy.

ALJ's 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]; *Parents of Student W. v. Puyallup Sch. Dist., No. 3* (9th Cir. 1994) 31 F.3d 1489, 1496.) In remedying a FAPE denial, the student is entitled to relief that is "appropriate" in light of the purposes of the IDEA. (20 U.S.C. § 1415(i)(2)(C)(iii); 34 C.F.R. § 300.516(c)(3) (2006).)

The authority a district court has to order relief extends to hearing officers. (*Forest Grove Sch. Dist. v. T.A.* (2009) 557 U.S. 230, 243-244, fn. 11 [129 S.Ct. 2484; 174 L.Ed.2d 168].) 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.*)

School districts may be ordered to provide compensatory education or additional services to a student who has been denied a FAPE. (*Student W. v. Puyallup School Dist.* (9th Cir. 1994) 31 F.3d 1489, 1496.) These are equitable remedies that courts may employ to craft "appropriate relief" for a party. An award of compensatory education need not provide a "day-for-day compensation." (*Ibid* at pp. 1496-1497.) The conduct of both parties must be reviewed and considered to determine whether equitable relief is appropriate. (*Ibid* at p. 1496.) Compensatory education is a prospective award of educational services designed to catch the student up to where he should have been absent the denial of FAPE. (*Brennan v. Regional Sch. Dist. No. 1* (D. Conn. 2008) 531 F.Supp.2d 245, 265.)

As to Issues 1(a) and 2(a), Student was denied a FAPE from May 9, 2021, through February 7, 2022, including 2021 extended school year, based upon Enterprise's failure

to timely review the assistive technology report. The evidence established that Student did not receive assistive technology services or the device recommended by the assessor during that time period. Student was without assistive technology services for approximately 29 weeks or seven months, including four weeks for the 2021 extended school year. (Cal. Code. Regs., tit. 5, § 3043, subd. (d).) Student did not receive IEP services from May 2021, through February 2022, as a result, although day for day compensation is not required, it is appropriate based on the evidence. Student had not received IEP services since he became eligible to receive them based upon Enterprise's failure to offer in-person services. The compensatory education will help catch Student up to where he should have been absent the denial of FAPE.

The assistive technology assessor was credible and thorough. The undersigned therefore adopted the assessor's recommendation for services contained in the May 2022 IEP and the device and accessories listed in his report. The IEP offered 60 minutes per month of individual services and training for Student and personnel supporting him 12 hours for the first three months, then one hour per month thereafter. Enterprise is ordered to provide Student 420 minutes of individual direct assistive technology services and 960 minutes of consultation, training and collaboration for teachers, school staff, Student's family, and other personnel that support Student. This is compensatory and is in addition to any services Student requires to receive a FAPE.

Enterprise is ordered to provide Student a laptop, computer, or tablet for Student and his family to access teleservices ordered in this Decision. Enterprise is ordered to provide Student with an

- iPad with WIFI, 8th generation,
- Snap Core First Symbol-based AAC with Speech application,
- speech case for iPad 8th generation,

- speech case keyguard, and
- a Zagg InvisibleShield Glass+ tempered screen protector.

As a remedy for Enterprise's failure to timely review the assistive technology report, Enterprise is ordered to fund an assistive technology independent educational evaluation. Student asserted that he was not seeking an independent educational evaluation as a remedy for the deficiencies related to the assistive technology report. Instead, Student requested for the report to be amended to add a statement that Student was unable to use assistive technology independently. Student provided no legal authority to demonstrate that an administrative law judge can amend or should amend an assessment report.

An independent educational evaluation was not the remedy that Student requested but an administrative law judge has broad equitable powers to remedy a failure of a school district to provide FAPE. Based upon the evidence at hearing, a mock teleservice session should be conducted to determine Student's current abilities to participate in teleservices independently. The mock teleservices session will simulate a provider delivering teleservices and the assessor will evaluate how Student engages with the provider. In addition to typical assistive technology assessments, the independent educational evaluation shall examine whether Student can use a laptop, computer, or tablet independently to access teleservices. Since the May 2021 report is more than one year old and was based on assessments from February 2020, an updated report that reflects Student's current abilities would benefit Student as he transitions to kindergarten for the 2022-2023 school year. An assistive technology independent educational evaluation is the appropriate remedy given the facts presented at hearing.

Student also prevailed on Issues 1(d) and 2(d), based upon Enterprise's failure to make an IEP offer. The May 2022 IEP offered teleservices with an in-person aide at Student's home to facilitate the lesson. Student is entitled to compensatory education for services that he should have received, from May 21, 2021, through February 7, 2022, including 2021 extended school year. Student was without services for 35 weeks based on this denial of FAPE. Parent testified that she was unable to find a non-public agency that provided compensatory education services in-person, they only offered teleservices.

Student's IEP's offered two 30-minute sessions weekly of specialized academic instruction. The evidence established that 60 minutes of weekly specialized academic instruction is appropriate based on Student's unique needs. Considering the 35 weeks Student was denied a FAPE, Enterprise is ordered to provide 2,100 minutes of direct specialized academic instruction as compensatory education.

The remedy for missed speech and language, occupational therapy, and physical therapy services is based on the amounts specified in the May 2020 and 2022 IEP's. The evidence established that the services, in the duration and frequency offered, met Student's needs. The IEP's recommended 60 minutes per week of language and speech, 30 minutes per week of occupational therapy, and 30 minutes eight times per year of physical therapy services. Enterprise is ordered to provide compensatory education in the amount of 2,100 minutes of language and speech, 1,050 minutes of occupational therapy, and 240 minutes of physical therapy services.

The evidence established that Student cannot access teleservices without the assistance of an in-person aide. In its closing brief, Enterprise stated that it offered in-person aide services in the May 2022 IEP because Student demonstrated he needed it. Enterprise is ordered to fund 4,260 minutes of in-person aide services to facilitate the

direct services awarded as compensatory education in this Decision. All direct services in this Decision will be delivered in-person by the service provider or delivered via teleservices with an in-person aide to help Student access teleservices. The assistive technology consultation services for school personnel and Student's family may be delivered by teleservices. Parent may choose the service providers from a non-public agency. Student will receive all services from his home.

ORDER

1. Enterprise must fund the following direct, individual, in-home services to Student within 30 days of Parent notifying it of the service provider. The services shall be provided by a certified non-public agency of Parent's choice. Parent may elect to have services delivered in-person or by teleservices. If Parent chooses teleservices, Enterprise must fund in-person aide services provided by a non-public agency to facilitate the delivery of teleservices to Student. Enterprise must establish a mechanism for direct payment to any certified non-public agency selected by Parent. All service hours will be available to be used until July 31, 2025, and will thereafter be deemed forfeited.
 - a. Assistive technology:
 - i. 420 minutes of service to Student. If Parent chooses delivery via teleservice, 420 minutes of in-person aide services; and
 - ii. 960 minutes of team consultation, training and collaboration for teachers, other school staff, Student's family, and other personnel that support Student. The consultation, training and collaboration services may be delivered by teleservices.

- b. Specialized academic instruction for 2,100 minutes. If Parent chooses delivery via teleservices, 2,100 minutes of in-person aide services.
 - c. Language and speech for 2,100 minutes. If Parent chooses delivery via teleservices, 2,100 minutes of in-person aide services.
 - d. Occupational therapy for 1,050 minutes. If Parent chooses delivery via teleservices, 1,050 minutes of in-person aide services.
 - e. Physical therapy for 240 minutes. If Parent chooses delivery via teleservices, 240 minutes of in-person aide services.
2. Within 15 days of the date of this Decision, Enterprise must provide Student a laptop, computer, or tablet for Student and his family to access educationally related services via teleservices ordered by this Decision. Enterprise shall provide the laptop, computer, or tablet, until July 31, 2025, or so long as Student is receiving teleservices pursuant to this Decision.
3. Within 30 days of this Decision, Enterprise must provide Student an
 - iPad 8th generation with WIFI,
 - Snap Core First Symbol-based AAC with Speech application,
 - speech case for iPad 8th generation,
 - speech case keyguard, and a
 - Zagg InvisibleShield Glass+ tempered screen protector.Enterprise shall provide the iPad, accessories, and application through July 31, 2025, or so long as Student is receiving assistive technology services pursuant to this Decision.
4. Student is entitled to obtain an independent educational evaluation, in the area of assistive technology, for the purpose of assessing whether Student requires alternative communication other than natural speech. The

evaluation shall assess if Student can use a laptop, computer, or tablet independently to access teleservices.

- a. The assistive technology independent educational evaluation must be conducted by an assessor of Parent's choice, who meets Enterprise's qualification and location requirements.
- b. Enterprise must fund the independent assistive technology evaluation of Student including the selected assessor's time to conduct the evaluation, review records, conduct observations and interviews of school staff, service providers, Parent, and Student, at the assessor's usual hourly rate, as long as such rate does not exceed the typical hourly rate for such assessments in the local professional community, not to exceed \$5,000.
- c. Enterprise must fund up to two hours for the assessor to prepare for and attend, in-person or virtually, an IEP team meeting to present the evaluation findings, including mileage reimbursement at the federal internal revenue service business reimbursement rate.
- d. If Parent decides to obtain the independent educational evaluation, Parent must choose an assessor and give notice to Enterprise within 30 days of this Decision. Enterprise must contact the selected assessor within 15 days of receiving notice of Parent's selection.
- e. Enterprise must convene an IEP team meeting within 15 days of receipt of the independent educational evaluation report, to consider the results of the report, unless Enterprise and Parent agree to a different timeline.

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/

Marlo Nisperos

Administrative Law Judge

Office of Administrative Hearings