

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

CASE NO. 2022030482
CASE NO. 2022030575

THE CONSOLIDATED MATTERS INVOLVING

PARENT ON BEHALF OF STUDENT, AND
ETIWANDA SCHOOL DISTRICT.

DECISION

July 14, 2022

On March 14, 2022, the Office of Administrative Hearings, called OAH, received a due process hearing request from Student, naming Etiwanda School District. On March 16, 2022, OAH received a due process hearing request from Etiwanda, naming Student. On April 4, 2022, OAH consolidated the cases and ordered that the timeline for issuing the decision in the consolidated cases would be based on the date of the filing of Student's case. Administrative Law Judge Laurie Gorsline heard this matter by videoconference on May 3, 4, 5, 10, 11, 12, 13, 17, and 24, 2022.

Sheila Bayne, Lynda Williams, Robert Burgermeister, and Constance Zarkowski represented Student. Parent attended parts of the hearing on Student's behalf. Sundee Johnson represented Etiwanda School District. Special Education Director Elizabeth Freer attended all hearing days on Etiwanda's behalf.

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

ISSUES

STUDENT'S ISSUES

1. Did Etiwanda deny Student a free appropriate public education, called a FAPE, in developing Student's December 2, 2021 individualized education program for Student, called an IEP, by failing to consider Parent's concerns regarding Student?
2. Did Etiwanda deny Student a FAPE in the December 2, 2021 IEP by:
 - A. Failing to offer Student sufficient programs and supports to enable Student to receive educational benefit in the area of academic instruction?
 - B. Failing to include adequate goals for Student?
 - C. Failing to offer Student sufficient speech and language services?
 - D. Failing to offer Student sufficient occupational therapy services?
 - E. Failing to offer Student sufficient intensive academic instruction to address Student's reading skills?

- F. Failing to offer Student placement with neuro-typically developing peers to the maximum extent possible for the 2021-2022 school year and extended school year?
- G. Failing to offer Student a one-to-one aide?
- H. Failing to offer Student appropriate behavior interventions and behavior goals for the 2021-2022 school year?
- I. Failing to offer Parents training to address Student's needs arising from intellectual disability and speech and language impairment?

Student's Issues 2A through 2I were reframed for clarity. The ALJ has authority to rephrase a party's issues, so long as no substantive changes are made. (*J.W. v. Fresno Unified School Dist.* (9th Cir. 2010) 626 F.3d 431, 442-443.)

ETIWANDA'S ISSUE

- 3. Did Etiwanda's December 2, 2021 IEP offer Student a FAPE in the least restrictive environment appropriate for Student, such that Etiwanda may implement the IEP without Parent's consent?

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, referred to as FAPE, to the child. (20 U.S.C. § 1415(b)(6) & (f); 34 C.F.R. § 300.511; Ed. Code, §§ 56501, 56502, and 56505; Cal. Code Regs., tit. 5, § 3082.) The party requesting the hearing is limited to the issues alleged in the complaint, unless the other party consents, and has the burden of proof by a preponderance of the evidence. (20 U.S.C. § 1415(f)(3)(B); Ed. Code, § 56502, subd. (i); *Schaffer v. Weast* (2005) 546 U.S. 49, 57-58, 62 [126 S.Ct. 528, 163 L.Ed.2d 387]; and see 20 U.S.C. § 1415(i)(2)(C)(iii).) Student has the burden of proof on Student's Issues and Etiwanda has the burden of proof on its Issue. 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 11 years old and in fifth grade at the time of hearing. Student resided with Parent within Etiwanda's geographic boundaries at all relevant times where she attended her home school, Etiwanda's John L. Golden Elementary School. Student was initially found eligible for special education and related services in 2014. At the time of the hearing, she was eligible for special education under the primary category of intellectual disability and the secondary category of speech and language impairment.

BACKGROUND

THE DISTANCE LEARNING AND HYBRID PERIOD

During the 2019-2020 school year, Student attended school full time at Golden Elementary, until March 13, 2020, the last day of in-person instruction due to school closures because of the COVID-19 pandemic. Her placement at that time was at least part of the day in a special day class setting. Between March 16, 2020, and March 2021, Etiwanda delivered instruction to students through distance learning. Student rarely participated in Etiwanda's distance learning opportunities between March 16, 2020 and March 2021. Parent claimed Student had access to a program she had at home called Easy Peasy, which had activities for Student to work on. However, there was no convincing evidence regarding how much educational instruction Student received while at home during the approximately one-year distance learning period. Parent's testimony on this issue lacked any details or other specificity, and therefore her testimony was not persuasive on this topic.

From March 2021 to the end of the 2020-2021 school year, Etiwanda implemented a hybrid program where students attended in-person instruction four days a week for three hours per day, which focused on English language arts and math. The weight of evidence established that on some days while learning in-person during the hybrid period, students at Golden Elementary received physical education. Students also received asynchronous instruction during the hybrid period. Asynchronous instruction meant students worked on assignments at home. Social studies and science were addressed through asynchronous instruction. Student attended in-person instruction during the hybrid period, but the weight of evidence established she did not regularly engage in asynchronous instruction.

During this hybrid period, Etiwanda operated under COVID-19 protocols, including placing students into cohorts that limited the ability of students to go into other classrooms and engage in recess. Student was with her special day class cohort group while in the classroom. She was with her general education peers during physical education, during which time students were asked to maintain an appropriate, safe distance and encouraged to continue to wear their masks.

Etiwanda returned to full-time, in-person instruction on campus for the 2021-2022 school year. Student attended school in-person during the 2021-2022 school year.

THE AUGUST 2020 IEP IN EFFECT AT THE TIME OF THE DECEMBER 2, 2021 IEP AND THE HEARING

In January 2021, Parent consented to the implementation of Student's annual August 4, 2020 IEP. The August 4, 2020 IEP continued to be implemented at the time of the hearing because Parent did not consent to the December 2, 2021 IEP. The August 2020 IEP provided for specialized academic instruction in a mild-moderate special day class for English language arts and math instruction, and for Student to be with general education peers for

- recess,
- lunch,
- physical education,
- library,
- social studies, and
- science.

It offered one 30-minute individual occupational therapy session per week, and a total of 1650 minutes per year of group speech and language therapy sessions at 30 minutes per session, along with extended school year services in the same areas. The offer of specialized academic instruction placement amounted to 70 percent of the time outside the regular class, extracurricular and nonacademic activities, and 30 percent of the time in the regular class, extracurricular and non-academic activities. Student did not participate in regular class for core academic subjects of English language arts and math because she required substantial supports to achieve gains in the grade-level/age-appropriate curriculum.

Student was also offered program modifications in the form of instructional strategies and materials with a primary focus on the Core Content Connectors, linked to grade-level Common Core State Standards and Next Generation Science Standards. California has both a set of common core standards upon which the general education curriculum is based and a modified set of standards that are called the Core Content Connectors. Core Content Connectors are the modified standards of the common core standards, which focus on the most important elements, or most basic or foundational skills related to topics in common core standards.

The IEP included a total of nine goals in the following areas:

- phonics,
- high-frequency words,
- rote counting,
- math,
- visual motor,
- requesting attention, and
- communication.

It also offered program accommodations such as visual aids and supports, frontloading of behavioral expectations, first-then contingencies, etc. The IEP included a behavior intervention plan because Student's behavior at that time impeded her learning or the learning of others. Maladaptive behavior was likely to occur when Student attempted to avoid a non-preferred task, such as language arts or math, and when she attempted to gain attention from staff. Student struggled with appropriately requesting attention. She shouted out when it was not her turn to talk, instead of raising her hand and waiting to be called on. She looked around the room to see which adults were working with which students and talked about things that were not related to the topic at hand. These behaviors impacted her and her peer's ability to focus on instruction and academic tasks.

ISSUE 1: DID ETIWANDA DENY STUDENT A FAPE IN DEVELOPING STUDENT'S DECEMBER 2, 2021 IEP BY FAILING TO CONSIDER PARENT'S CONCERNS REGARDING STUDENT?

On first day of hearing, Student contended she was denied a FAPE by failing to consider Parent's concerns regarding the topics in all the other enumerated Issues. At the conclusion of the evidence on the last day of hearing, Student contended Etiwanda denied Student a FAPE by disregarding and denying Parent's requests. In the closing brief, Student argues Etiwanda failed and refused to acknowledge or address Parent's concerns and Parent did not deserve to be handed a take-it-or-leave it IEP.

Etiwanda contends it requested Parent's input during the assessment process and the school district members of the IEP team listened to and considered Parent's concerns at the IEP team meetings where the December 2, 2021 IEP was developed.

Etiwanda contends it did not ultimately agree to Parent's specific requests because Etiwanda did not believe the requests were appropriate or necessary for Student to receive a FAPE or access and benefit from her educational program.

A FAPE means special education and related services that are available to an eligible child that meets state educational standards at no charge to the parent or guardian. (20 U.S.C. § 1401(9); 34 C.F.R. § 300.17.) Parents and school personnel develop an IEP for an eligible student based upon state law and the IDEA. (20 U.S.C. §§ 1401(14), 1414(d)(1); and see Ed. Code, §§ 56031, 56032, 56341, 56345, subd. (a), and 56363 subd. (a); 34 C.F.R. §§ 300.320, 300.321, and 300.501.)

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

Assessments are required to determine eligibility for special education, and what type, frequency, and duration of specialized instruction and related services are required. In evaluating a child for special education eligibility and prior to the development of an IEP, a district must assess in all areas related to a suspected disability. (20 U.S.C. § 1414(b)(3)(B); Ed. Code, § 56320, subd. (f).) The IDEA provides for periodic reevaluations to be conducted at least once every three years unless the parent and district agree that a reevaluation is not necessary. (20 U.S.C. § 1414(a)(2)(B); 34 C.F.R. § 300.303(b); Ed. Code, §§ 56043, subd. (k), 56381, subd. (a)(2).)

A denial of FAPE occurs if a school district significantly impedes the parents' opportunity to participate in the decisionmaking process regarding the provision of a FAPE to the parent's child. (20 U.S.C. § 1415(f)(3)(E)(ii); Ed. Code, § 56505, subd. (f)(2). The IDEA's procedural safeguards are intended to protect the informed involvement of parents in the development of an education for their child. (*Winkelman v. Parma City School Dist.* (2007) 550 U.S. 516, 524 [127 S. Ct. 1994].) "[T]he informed involvement of parents" is central to the IEP process. (*Ibid.*) Protection of parental participation is "[a]mong the most important procedural safeguards" in the IDEA. (*Amanda J. v. Clark County School Dist.* (9th Cir. 2001) 267 F.3d 877, 882 ("*Amanda J.*").) Parents not only represent the best interests of their child in the IEP development process, but also "provide information about the child critical to developing a comprehensive IEP and which only they are in a position to know." (*Ibid.*)

The parents of a child with a disability must be afforded an opportunity to participate in meetings with respect to the identification, evaluation, and educational placement of the child, and the provision of FAPE to the child. (20 U.S.C. § 1414(d)(1)(B)(i); 34 C.F.R. § 300.501(b) & (c); Ed. Code, §§ 56304, 56341, 56342.5.) Each public agency must take steps to ensure one or both of the parents of a child with a disability are present at each IEP team meeting or afforded the opportunity to participate. (34 C.F.R. § 300.322(a).)

A school district is required to conduct not just an IEP team meeting, but a meaningful IEP team meeting. (*W.G., et al. v. Board of Trustees of Target Range School Dist., etc.* (9th Cir. 1992) 960 F.2d 1479, 1485 ("*Target Range*"), *superseded in part by statute on other grounds.*) "Participation must be more than mere form; it must be meaningful." (*Deal v. Hamilton County Board of Education* (6th Cir. 2004) 392 F.3d 840, 858 [citations omitted] ("*Deal*").) The IEP team shall consider the concerns of the parent

for enhancing the student's education and information on the student's needs provided to or by the parent. (20 U.S.C. § 1414(d)(3)(A) & (d)(4)(A)(ii); 34 C.F.R. § 300.324(a)(1)(ii) & (b)(1)(ii)(C); Ed. Code, § 56341.1, subds. (a)(2), (d)(3) & (f). A school cannot independently develop an IEP without meaningful participation, and then present the IEP to the parent for ratification. (*Target Range, supra*, 960 F.2d at p. 1484.)

A school district that predetermines the child's program and does not consider parents' requests with an open mind has denied the parents' right to participate in the IEP process. (*Deal, supra*, 392 F.3d at p. 858; *Ms. S. ex rel. G. v. Vashon Island School Dist.* (9th Cir. 2003) 337 F.3d 1115, 1131 ("*Ms. S.*"), *superseded on other grounds by statute*.) For IEP team meetings, predetermination occurs when an educational agency has decided on its offer prior to the meeting and is unwilling to consider other alternatives. (*Deal, supra*, 392 F.3d at p. 857-858; *H.B. v. Las Virgenes Unified School Dist.* (July 3, 2007, No. 05-56486) (9th Cir. 2007) 239 Fed. Appx. 342, 344-345 [nonpub. opn.].) A district may not arrive at an IEP team meeting with a "take it or leave it" offer. (*JG v. Douglas County School Dist.* (9th Cir. 2008) 552 F.3d 786, fn.10.)

Although school district personnel may bring a draft of the IEP to the meeting, the parents are entitled to bring to an IEP team meeting their questions, concerns, and recommendations as part of a full discussion of a child's needs and the services to be provided to meet those needs before the IEP is finalized. (*Assistance to States for the Education of Children Disabilities* (March 12, 1999) 64 Fed. Reg. 12478-12479.) School officials may permissibly form opinions prior to IEP meetings. However, if the district goes beyond forming opinions and becomes "impermissibly and deeply wedded to a single course of action," this amounts to predetermination. (*P.C. v. Milford Exempted Village Schools* (S.D.Ohio, January 17, 2013, No. 1:11-CV-398) 2013 WL 209478, p. 7.)

A parent has meaningfully participated in the development of an IEP when parent has been informed of the child's problems, attends the IEP meeting, expresses disagreement regarding the IEP team's conclusions, and requests revisions in the IEP. (*N.L. v. Knox County Schools* (6th Cir. 2003) 315 F.3d 688, 693; *Fuhrmann v. East Hanover Board of Education* (3d Cir. 1993) 993 F.2d 1031, 1036 ("*Fuhrmann*") [parent who has an opportunity to discuss a proposed IEP and whose concerns are considered by the IEP team has participated in the IEP process in a meaningful way].)

An IEP need not conform to a parent's wishes to be sufficient or appropriate. (*Shaw v. District of Columbia* (D.D.C. 2002) 238 F. Supp. 2d 127, 139 [IDEA did not provide for an "education ... designed according to the parent's desires."].) A school district is not required to place a student in a program preferred by a parent, even if that program will result in greater educational benefit to the student. (*Ibid.*) A school district has the right to select the program offered, as long as the program is able to meet the student's needs, and the district is ultimately responsible for ensuring a FAPE is offered. (*Letter to Richards* (OSEP January 7, 2010).) The Ninth Circuit has held that while the school district must allow for meaningful parental participation, it has no obligation to grant the parent a veto over any individual IEP provision. (*Ms. S., supra*, 337 F.3d at p. 1131.)

Here, the preponderance of evidence established Etiwanda did not deny Student a FAPE in the development of Student's December 2, 2021 IEP by failing to consider Parent's concerns regarding Student.

PARENT INPUT FOR THE IEP WAS SOUGHT AND OBTAINED DURING THE ASSESSMENT PROCESS

On January 19, 2021, the parties entered into a written agreement regarding Student's triennial reassessment and three-year IEP review. The parties agreed that by signing the January 19, 2021 Agreement, Parent consented to the pending August 17, 2020 assessment plan, which Parent never signed. The parties agreed Etiwanda would convene an IEP team meeting on or before May 25, 2021, to review the results of the assessments and develop Student's triennial IEP to be implemented during the 2021-2022 regular school year. Parent specifically waived the statutory timeline for Student's triennial assessments and IEP meeting.

Pursuant to a written agreement between the parties in January 2021, in preparation for Student's triennial review, Etiwanda timely conducted assessments in March, April, and May 2021 in the areas of

- health,
- psychoeducation,
- academics,
- speech and language,
- functional behavior,
- occupational therapy and
- physical therapy.

There was no evidence presented that Etiwanda failed to assess in the areas covered by the August 17, 2020 assessment plan.

Etiwanda requested and received some input from Parent for the triennial assessments, but Parent failed to fully participate in the assessment process despite repeated opportunities to do so. In April 2021, Parent provided to Etiwanda a Health and Developmental form and a Parent Questionnaire she filled out. Etiwanda school nurse Rana Katrib unsuccessfully attempted to interview Parent for Student's health assessment. Katrib called Parent by telephone on April 6, 7, and 26, 2021, but Parent never answered the telephone, and Katrib was unable to leave a message. Katrib also emailed Parent on April 6, 14, and 28, 2021, to obtain information for the health assessment, find out Parent's concerns, and review the information Parent had provided. For the physical therapy assessment, physical therapist Barbara Heidelman not only reviewed the Health and Developmental form and Parent Questionnaire responses Parent provided, but she also interviewed Parent by telephone on April 13, 2021. For the occupational therapy assessment, Parent completed the Sensory Processing Measure – Home Form and occupational therapist Laura Passons reviewed the information Parent had already provided to Etiwanda. Passons also called Parent three different times, April 7, 9, and 12, 2021, to conduct a Parent interview, but got no response and was unable to leave a message because the voice mailbox was full. For the functional behavior assessment conducted by board certified behavior analyst Christina Teneriello, Parent filled out the Functional Analysis Screening Tool, which was presented to identify a hypothesis of a given target behavior, and returned the Open-Ended Functional Assessment Interview form in April 2021.

To the extent Parent's input was not obtained for the assessments, it was because Parent failed to provide that input despite Etiwanda's repeated requests. For example, as part of the psychoeducational assessment, on April 8, 2021, Etiwanda school psychologist Kimberly Tungate provided forms to Parent to fill out and return. Parent

never returned the Achenbach System of Empirically Based Assessment Child Behavior Checklist form and never responded to Tungate's efforts to interview Parent. Tungate sent the Child Behavior Checklist form to Parent again on April 26, 2021, at Parent's request, and on April 29, 2021, by email. Tungate also called Parent on April 21, 2021, to request Parent return the form and to conduct an interview with Parent regarding Student. Parent did not answer the call, but Tungate left a detailed voice message. Receiving no response, Tungate sent Parent an email on April 23 and 26, 2021, requesting a time for a phone interview. Tungate tried again to reach Parent by phone and left Parent detailed voicemail messages on April 27 and 29, 2021.

Moreover, as part of the speech and language assessment, on April 14, 2021 speech-language pathologist Marie Rodriguez provided Parent with forms to fill out to obtain Parent's input, including the Clinical Evaluation of Language Fundamentals 5 Pragmatics Profile, pages 1 and 2, and the Parent Input form. Because Parent did not respond, Rodriguez resent the forms to Parent by email on April 21 and 26, 2021. Rodriguez also called Parent on April 28, 2021 and obtained some Parent input. Parent asked for another copy of the forms, which were sent to Parent by email the same day. In fact, in the speech and language assessment report, Rodriguez documented eight different attempts between April 14 and May 18, 2021, to obtain parent input and parent survey forms, including phone calls, email, mail, and Student's communication folder sent home in Student's backpack. However, Parent never returned the forms.

As of May 6, 2021, Parent had still not returned the missing forms sent by Rodriguez and Tungate and had not responded to requests to schedule an interview with Tungate. On May 6, 2021, Etiwanda sent a letter to Parent by mail and email with a copy by email to lay advocate Jim Peters, who worked for Student's attorneys, asking Parent to return the missing forms and contact Tungate as soon as possible to get the

interview scheduled. Copies of the missing forms requested by Rodriguez and an online link and instructions for completing the Child Behavior Checklist-Achenbach form were provided with the letter. Etiwanda informed Parent it was critical for Parent to provide her input. Parent never responded to this letter.

On May 13, 2021, Etiwanda sent a letter to Parent by mail and email with a copy to Peters by email, reminding Parent that none of the missing forms referenced in the May 6, 2021 letter had been returned and that Tungate was still attempting to interview Parent. The letter enclosed another copy of the same forms, as well as the online link and instructions for completing the Child Behavior Checklist-Achenbach form. The letter asked Parent to return the forms, emphasizing the importance of Parent's input and asked Parent to contact Tungate for an interview. Etiwanda received no response to this letter.

On July 20, 2021, Etiwanda sent a letter to Parent by mail and email, with a copy to Peters by email, stating Etiwanda was attempting to obtain her input, and that none of the documents requested in the May 6 and 13, 2021 letters had yet been returned. Parent did not respond to this letter.

On July 28, 2021, Etiwanda sent Parent a letter by mail and email, with a copy to Peters by email, stating Etiwanda was attempting to obtain her input, and that none of the documents requested in the May 6 and 13, 2021, and July 20, 2021 letters had been returned. Etiwanda received no response to this letter.

On August 3, 2021, Etiwanda sent Parent a letter by mail and email, with a copy to Peters by email, stating Etiwanda was attempting to obtain her input, and that none

of the documents requested in the May 6 and 13, 2021, and July 20, 2021 letters had been returned. The letter also stated that Parent's input was important, and encouraged Parent to return the forms. Etiwanda received no response to this letter.

On August 12, 2021, Etiwanda sent Parent a letter by mail and email, with a copy to Peters by email, stating that Etiwanda was attempting to obtain her input, and that none of the documents requested in the May 6 and 13, 2021, July 20 and 27 [sic], 2021, and August 3, 2021 letters had been returned. The letter also stated that Parent's input was important and encouraged Parent to return the forms. Etiwanda received no response to this letter.

Although Parent testified that she returned all of the forms she was sent for the assessments, Parent's testimony was not believable. Parent's testimony was inconsistent, defensive, inadequate, and otherwise unconvincing. Parent repeatedly claimed she filled out and returned every document or questionnaire she received, but then inconsistently admitted she did not return every form. She later claimed she returned "mainly all of the forms," and at another point said "maybe" she sent them back a couple days later. With regard to the Clinical Evaluation of Language Fundamentals and Parent Input forms from the speech-language pathologist, Parent "believed" she returned the forms but did not know when she returned them.

In fact, Parent did not produce at hearing copies of any of her completed forms, was unable to provide any details as to when she allegedly returned the documents to Etiwanda, and otherwise failed to produce any convincing evidence that supported her hollow representations. Parent's vague assertions that she returned the documents in Student's backpack but could not recall the dates were unconvincing when weighed against Etiwanda's detailed, contemporaneous, written evidence documenting that

Parent had never returned the missing documents. Although Parent admitted to receiving Etiwanda's letters asking her to return the requested documents, Parent admitted she never followed up with Tungate or Rodriguez after she received Etiwanda's May 13, 2021 letter advising her Etiwanda had still not received the requested documents. Furthermore, Parent had no adequate explanation why she never returned Tungate's phone calls, documented in Etiwanda's letters and Tungate's assessment report.

Student's claim that Parent never reached out to Etiwanda because of the bad relationship between Parent and Etiwanda, thereby affecting Parent's ability to meaningfully participate in the process, was not persuasive. The preponderance of evidence established Parent was given multiple opportunities to provide input during the assessment process and could have provided her input on the missing forms without ever speaking to Etiwanda personnel. In addition, Parent was represented by counsel and could have had her counsel facilitate the return of the forms and the parent interviews Etiwanda personnel requested. Significantly, there was no contemporaneous evidence that Parent or her counsel ever responded to Etiwanda's letters explaining or otherwise documenting that Parent had returned the forms to Etiwanda, or that Parent was unwilling to be interviewed by Etiwanda personnel because of the allegedly bad relationship. It strains logic that Parent or her counsel would not have provided Etiwanda with such a response if Parent had actually returned the forms, or if there was a clear reason Parent never returned Tungate's phone calls.

The evidence established Etiwanda provided Parent a meaningful opportunity to participate in the assessment process as part of a meaningful opportunity to participate in the IEP process.

PARENT MEANINGFULLY PARTICIPATED DURING EACH OF THE IEP TEAM MEETINGS HELD TO DEVELOP THE DECEMBER 2, 2021 IEP

Etiwanda was unable to hold Student's triennial IEP by May 25, 2021, because Parent refused to respond to its multiple attempts to schedule the IEP team meeting. As more fully discussed in Issue 3 below, Etiwanda was unable to convene Student's triennial IEP meeting review until December 2, 2021, precisely because of Parent's failure to timely respond to its attempts to schedule the meeting. Significantly, prior to December 2, 2021, and in preparation for the IEP team meeting discussion, Etiwanda sent Parent a draft copy of Student's December 2, 2021 IEP along with the triennial assessment reports prepared in March, April, and May 2021. The December 2, 2021 IEP included Student's present levels of performance from the assessments along with more recent updates of Student's performance during the 2021-2022 school year.

Student's triennial IEP dated December 2, 2021, was developed over the course of three IEP team meetings held on December 2, 2021, January 6, 2022, and February 9, 2022. Parents were provided a copy of Parent's Rights and Procedural Safeguards prior to the meetings. Parent attended each one of those IEP team meetings, accompanied by at least one of her attorneys as well as lay advocate Peters. Specifically, on December 2, 2021, three of Student's attorneys and Peters attended the IEP team meeting, including Bayne, Burgermeister, and Danelle Harvey-Jacob. Attorney Harvey-Jacob and lay advocate Peters attended the January 6, 2022 IEP team meeting. Attorneys Bayne and Burgermeister and lay advocate Peters attended the February 9, 2022 IEP team meeting.

At the outset of the December 2, 2021 IEP team meeting, Parent's concerns were shared by Student's lay advocate Peters. Specifically, Peters stated Student could not

read, spell her name, or count past one hundred, and got confused. He asked the IEP team to consider Parent's request for an intensification of Student's program, placing her in general education 100 percent of her day, "continuation" of a one-to-one behavior aide, and an academic aide. Peters also stated he believed Student should have three hours of speech therapy per week, pull-out for group and individual services, with some push-in into the classroom. He recommended consultation between the speech-language pathologist and teachers, and also collaboration with Parent. Peters stated there was a massive amount of homework Student was unable to do and that there must be some way to put together an intensive program. Peters stated that Student's behavior intervention plan should have information updated from the functional behavior analysis evaluation, although he shared that Student's behaviors had continued to improve. Peters requested an iPad to ensure Student's access and communication with peers. He also recommended occupational therapy services of two hours per week, because he claimed Student required a significant amount. He also said Student did not waive the right to in-person services and Parent wanted an intensive reading program with one-to-one tutoring at some point during the week.

Throughout the December 2, 2021 IEP team meeting, Student's attorneys and lay advocate asked a multitude of questions and voiced their concerns. The evidence established that those questions and concerns were addressed by members of Etiwanda's IEP team. For example, during Stanley's presentation of Student's goal progress, attorney Burgermeister and lay advocate Peters asked questions about Student's reading ability, accuracy, and levels, which Student's special education teacher Tamara Garibay and Etiwanda special education program specialist Cari Stanley addressed. Attorney Burgermeister asked questions about the assessments which were addressed by members of the IEP team. He also directed specific questions to school

psychologist Tungate, including Student's level of aggression, which Tungate addressed. In fact, Tungate specifically addressed Parent's previously reported concerns about Student's behavior. Etiwanda also responded to attorney Bayne's questions regarding Teneriello's observations of Student and Student's accommodations. Peters also asked a number of questions in various areas, reflected in the IEP team meeting notes. Among many other things, in response to Peters' concerns, Garibay reported there were intensive academic supports embedded in the instruction and there were eight students and five adults in her special day classroom. The evidence established Student's legal team, retained by Parent, were permitted to, and did ask questions throughout the IEP team meeting on December 2, 2021, where the results of the psychoeducational assessment, academic assessment, and functional behavior assessment, and Student's performance levels, were reviewed.

The same was true of the January 6, 2022 IEP team meeting, when the speech and language, occupational therapy, physical therapy, and health assessments were reviewed. Specifically, Student's legal team was given the opportunity to and did ask questions, and the school district members of the IEP team responded. For example, Peters asked about Parent's input for the speech and language assessment. He also had a question about the physical therapy assessment. Etiwanda responded to those questions. Peters was specifically asked if he had questions about the assessment by the occupational therapist, but he had none at that time. Peters also asked questions about Student's proposed goals and reading abilities, and requested a Lindamood-Bell reading program, and Stanley responded to Peters' concerns. At Peters' prompting, Parent shared that Student had a condition called pigeon chest that was not listed in the health history. Pigeon chest was an abnormal protrusion of the chest that may or may not cause any problems or limitations. School nurse Katrib informed the IEP team

Student did not have any health concerns that impacted her educationally. Although Katrib did not believe pigeon chest was a significant medical condition for Student based on the information Parent provided, Katrib told Parent that if it became a concern, Parent should contact the school. To further address Parent's concerns, the next day, Etiwanda provided Parent forms to fill out regarding any issues with Student's condition, but Parent never returned those forms.

At the January 6, 2022 IEP team meeting, Peters stated he did not want to review all of the pages of the IEP and only wanted to discuss the offer of FAPE because Student's team already had copies of the draft IEP. Etiwanda members explained that the IEP team needed to review the goals, supports and services prior to making an offer of FAPE because all of these areas needed to be addressed to discuss placement. The IEP team reviewed eligibility, statewide assessments, and proposed goals.

At the February 9, 2022 IEP team meeting, the IEP team reviewed

- a new proposed math goal,
- special factors,
- supports/accommodations,
- services,
- placement,
- extended school year,
- transition to middle school,
- transportation, and
- Etiwanda's complete offer of special education and related services.

Among other things, the IEP team specifically discussed Student's request for full-time placement in a general education setting and Parent's request for a behavior intervention plan. During the meeting, attorney Bayne asked questions and lay advocate Peters asked a multitude of questions, all of which the IEP team addressed. Peters complained the IEP team had not reached out to Parent since the last meeting. Garibay pointed out there was ongoing communication sent home to Parent, which consisted of daily planners, nightly homework, weekly Wednesday folders, as well as reminder messages to which Garibay only once received a response from Parent. Etiwanda's counsel, also in attendance at the meeting, stated the IEP team meeting was a perfect opportunity for Parent to share what has been happening since the last meeting, and asked twice if Parent had any information to share with the IEP team at that time. Peters stated Parent did have information to share but refused to allow Parent to share it, stating that he wanted to see how the IEP team was addressing Student's needs before sharing any information with the IEP team.

Later, Peters falsely asserted Parent had not been able to provide input during the IEP team meeting. Etiwanda's counsel again invited Parent to share any concerns she had and specifically told Parent the IEP team would be happy to consider it. Peters again wrongly claimed the offer of FAPE was made without Parent input, that he had expressed their concerns, and that they were done. Etiwanda's counsel pointed out that before any offer of FAPE was made, Etiwanda had given Parent a multitude of opportunities to provide input and that the IEP team was happy to discuss Parent's concerns. Peters responded by falsely asserting that it was obvious the IEP team did not

want Parent's input, and it should be ashamed. He also said he felt Etiwanda did not want to include Parents in the decision, announced that the discussion would continue in a different forum, implying legal proceedings, and then Parent, Bayne and Peters left the meeting.

In addition to the discussions held at the three IEP team meetings discussed above, on February 17, 2021, Etiwanda sent a letter to Parent and her counsel responding specifically to Peters' requests made at the outset of the December 2, 2021 IEP team meeting. Parent never responded, other than filing the March 14, 2022 due process filing at issue.

Significantly, Parent's admissions at hearing belie Student's claim that she was denied a FAPE by Etiwanda's failure to consider Parent's concerns. The evidence definitively established Parent had the opportunity to voice her concerns and participate in the IEP process. At hearing, Parent admitted her lay advocate spoke for her and that his statements at the outset of the December 2, 2021 IEP team meeting reflected Parent's concerns at that time. Indeed, when asked at hearing if she asked any questions or provided input to the IEP team over the course of the three IEP team meetings held to develop the December 2, 2021 IEP, Parent said no, and that her advocate spoke for her. Significantly, Parent also admitted she was given the opportunity to ask questions and provide input to the IEP team. Student's contention that a denial of FAPE occurred because Etiwanda denied and allegedly disregarded Parent's requests not only demonstrates a fundamental misunderstanding of the applicable legal standard but ignores the overwhelming evidence supporting Etiwanda's

position and the dearth of evidence supporting Student's claim. Etiwanda considered Parent's concerns and was not required to adopt Parent's views with which it disagreed.

The evidence established Parent was provided with the opportunity to meaningfully participate in the development of the December 2, 2021 IEP through the assessment process that preceded the December 2, 2021 IEP, and at the three IEP team meetings held to develop that IEP. Parent was informed about Student's problems, attended the IEP meetings with her attorneys and lay advocate, and had the opportunity to express disagreement regarding the IEP team's conclusions, and request revisions in the IEP.

If Parent was at all prevented from giving input at the IEP team meetings, it was due solely to the actions of Peters, which would not be the first time Peters engaged in similar conduct during an IEP team meeting. (See *Amaya v. Chaffey Joint Union High School District* (C.D.Cal.) ED-CV 5:20-1903-JFW(SHKx) April 28, 2022["see also *Guevara, et al., v. Chaffey Joint Union High School District*, Case No. CV 20-1929-FMO (SP) (ALJ Kong ruling in favor of the District and reporting same behavior by Peters in the Decision of OAH Case No. 2020010176)."].) There was no persuasive evidence presented by Student that Etiwanda failed to consider Parent's concerns during the IEP team process in developing the December 2, 2021 IEP, or that Etiwanda's offer of special education and related services was predetermined.

Etiwanda did not deny Student a FAPE in the development of Student's December 2, 2021 IEP by failing to consider Parent's concerns regarding Student.

ISSUE 2A: DID ETIWANDA DENY STUDENT A FAPE IN THE DECEMBER 2, 2021 IEP BY FAILING TO OFFER SUFFICIENT PROGRAMS AND SUPPORTS TO ENABLE STUDENT TO RECEIVE EDUCATIONAL BENEFIT IN THE AREA OF ACADEMIC INSTRUCTION?

ISSUE 2E: DID ETIWANDA DENY STUDENT A FAPE IN THE DECEMBER 2, 2021 IEP BY FAILING TO OFFER SUFFICIENT INTENSIVE ACADEMIC INSTRUCTION TO ADDRESS STUDENT'S READING SKILLS?

Student argued the academic program Etiwanda offered in the December 2, 2021 IEP was not sufficiently intensive to enable Student to receive educational benefit in the area of academic instruction. Student claimed she had not made notable progress over the years and had steadily maintained a kindergarten to first grade level reading ability because Etiwanda's program was inadequate, and it remained inadequate for Student's transition to middle school for the 2022-2023 school year. With regard to reading, Student contended she required more intensive instruction to address Student's reading skills. Student argued reading was Student's most glaring deficit, which was likely beyond the ability of Etiwanda to adequately address in a special day class because Student's reading skills had not improved and she could not read. Student inconsistently argued on the last day of hearing that Student required something like a Lindamood-Bell program, but on the first day of hearing had argued Etiwanda was not required to offer a Lindamood-Bell program for Student to receive a FAPE.

Etiwanda contended Student did not meet her burden of proof on Issues 2A and 2E. Etiwanda argued it offered specialized academic instruction in English language arts, math, and Universal Access, which included implementation of a state-approved,

research-based reading intervention program and math interventions along with modified curriculum, accommodations, and other necessary supports and services. Etiwanda argued Student had an intellectual disability, and as such, her overall skill levels were in the extremely low to very low range, and while Student could make progress with the appropriate supports and services, progress would be slow. Etiwanda asserted that during the 2021-2022 school year when Student was consistently attending school and receiving her supports and services, she made significant progress in academic areas. With regard to reading, Etiwanda argued that Student did not offer any evidence regarding what type of reading program might be appropriate. Etiwanda contended that the only testimony regarding Student's unique needs in reading were from Etiwanda's witnesses, who testified that stated the state-approved, research-based reading intervention program called Language! Live implemented by Etiwanda allowed Student to make appropriate progress in light of her specific circumstances when she was at school on a regular basis.

An IEP must contain a statement of the special education and related services and supplementary aids and services to be provided to the pupil, or on behalf of the pupil, and a statement of the program modifications or supports for school personnel that will be provided to enable the student to advance appropriately toward attaining the annual goals and to be involved in and make progress in the regular education curriculum and participate in nonacademic activities, and to be educated and participate with other individuals with exceptional needs and nondisabled pupils. (20 U.S.C. § 1414(d)(1)(A)(i)(IV); Ed. Code, § 56345, subd. (a)(4).)

To determine whether a school district offered a student a FAPE the focus must be on the adequacy of the district's proposed program. (*Gregory K. v. Longview School Dist.* (9th Cir. 1987) 811 F.2d 1307, 1314.) If the school district's program was designed

to address the student's unique educational needs, was reasonably calculated to provide the student with some educational benefit, and comported with the student's IEP, then the school district provided a FAPE, even if the student's parents preferred another program and even if the parents' preferred program would have resulted in greater educational benefit. (*Ibid.*)

No one test exists for measuring the adequacy of educational benefits conferred under an IEP. (*Rowley, supra*, 458 U.S. at pp. 202, 203 fn. 25.) A student may derive educational benefit under *Rowley* if some of his goals and objectives are not fully met, or if he makes no progress toward some of them, as long as he makes progress toward others. A student's failure to perform at grade level is not necessarily indicative of a denial of a FAPE, as long as the student is making progress commensurate with his abilities. (See e.g., *K.D. v. Downingtown Area School District* (3d Cir. 2018) 904 F.3d 248, 255-256; *Walczak v. Florida Union Free School Dist.* (2d Cir. 1998) 142 F.3d 119, 130; *E.S. v. Independent School Dist., No. 196* (8th Cir. 1998) 135 F.3d 566, 569; *In re Conklin* (4th Cir. 1991) 946 F.2d 306, 313; *El Paso Indep. School Dist. v. Robert W.* (W.D.Tex. 1995) 898 F.Supp. 442, 449-450; *M.P. v. Poway Unified School Dist.* (S.D.Cal. July 12, 2010, No. 09 CV 1627) 2010 WL 2735759, at *11.)

An IEP is evaluated in light of information available at the time it was developed; it is not judged in hindsight. (*Adams v. State of Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149 (*Adams*)). An IEP is "a snapshot, not a retrospective." (*Id.* at p. 1149, citing *Fuhrmann, supra*, 993 F.2d at p. 1041.) It must be evaluated in terms of what was objectively reasonable when the IEP was developed, by looking at the IEP's goals and goal-achieving methods at the time the plan was implemented and determining whether the methods were reasonably calculated to confer an educational benefit. (*Adams, supra*, 195 F.3d at p. 1149.)

The “educational benefit” to be provided to a child requiring special education is not limited to addressing the child’s academic needs, but also social and emotional needs that affect academic progress, school behavior, and socialization. (*County of San Diego v. California Special Education Hearing Office* (9th Cir. 1996) 93 F.3d 1458, 1467.) A child’s unique needs are to be broadly construed to include the child’s academic, social, health, emotional, communicative, physical, and vocational needs. (*Seattle School Dist. No. 1 v. B.S.* (9th Cir. 1996) 82 F.3d 1493, 1500, citing H.R. Rep. No. 410, 1983 U.S.C.C.A.N. 2088, 2106.)

Title 34 Code of Federal Regulations part 300.39(b)(3) defines specially designed instruction, used interchangeably with the term specialized academic instruction, as adapting, as appropriate to the needs of a child eligible for special education, the content, methodology, or delivery of instruction to address the unique needs of the child, and ensure access to the general curriculum, so that the child can meet the educational standards within the jurisdiction of the public agency that apply to all children. Specialized academic instruction is an instructional service, individualized based on a student’s needs, and provided by a credentialed special education teacher. (CDE, *Special Education Guidance for COVID-19* (September 30, 2020); Cal. Code Regs., tit. 5, § 3053, subd. (c); see also Ed. Code, § 56001, subds. (n) & (o).)

On the last day of hearing, Student clarified that Issues 2A and 2E were identical claims with regard to reading, so both Issues are addressed together.

Student failed to meet her burden of proof on Issues 2A and 2E. The preponderance of evidence established Etiwanda offered Student appropriate programs and supports to receive educational benefit in the area of academics. Specifically with regard to reading, the weight of evidence proved Etiwanda offered Student a sufficiently

intensive program to address Student's reading skills. Etiwanda's offer of special education and related services to address Student's academic needs was appropriate based on results of its 2021 triennial assessments and Student's needs in the classroom at the time of the IEP team meetings held to develop the December 2, 2021 IEP.

THE 2021 PSYCHOEDUCATIONAL EVALUATION

Etiwanda conducted a psychoeducational evaluation in April and May 2021. Tungate, an Etiwanda school psychologist at Golden Elementary since 2019, performed the evaluation.

Tungate was a school psychologist for 22 years. She held both a bachelor's and master's degree in school psychology and had a pupil personnel services credential in school psychology. Her main duties included conducting evaluations, collaborating with teachers in working on IEPs, and attending IEP team meetings. She has conducted around 1,000 psychoeducational evaluations. Her areas of expertise included conducting functional behavior assessments and collaborating with school staff to develop classroom management plans and behavior intervention plans. Other areas of expertise included response-to-intervention and multi-tiered systems of support such as assisting in academic and behavioral intervention design and implementation, monitoring student progress, and in-training staff regarding response-to-intervention.

Tungate evaluated Student in the following areas: ability, academics, general speech and language, social-emotional functioning, and motor and adaptive functioning as they related to her ability to access the general education curriculum. Tungate used a variety of tools to conduct the assessment, including the Naglieri Nonverbal Ability Test, selected subtests from the Comprehensive Test of Phonological Processing, Second Edition, the Beery-Buktenica Developmental Test of Visual-Motor Integration, Sixth

Edition, the Beery Test of Visual Perception, the Wide Range Assessment of Memory and Learning, Second Edition, selected subtests from the Developmental Neuropsychological Assessment, Second Edition, as well as the Wide Range Achievement Test, Fifth Edition Green Form, and the Achenbach System of Empirically Based Assessment, Teacher Rating Form. Tungate also reviewed the Health and Developmental Form and the results of the Woodcock-Johnson Tests of Achievement IV and the Brigance Inventory of Early Development III administered by special education program specialist Stanley.

Tungate was not permitted to administer a formal cognitive assessment producing an intelligence quotient score because Student was African American. (*Larry P. v. Riles* (9th Cir. 1984) 793 F.2d 969.) Instead, Tungate evaluated Student's different processing areas separately to determine ability level, including

- attention,
- auditory processing,
- executive functioning,
- fine motor functioning,
- fluid reasoning,
- oral language,
- phonological processing,
- visual-spatial processing,
- working memory, and
- long-term recall.

Tungate also conducted a teacher interview, a record review, and observations in various settings, including the classroom, at snack time, during physical education, and transitioning between settings.

Based on the results of her assessment, Tungate determined Student continued to qualify for special education under the eligibility category of intellectual disability. Student's reasoning skills were estimated to be in the Extremely Low to Very Low range. Tungate also concluded Student performed in the Extremely Low to Very Low range in all psychological processing areas measured. Tungate determined Student demonstrated subaverage cognitive functioning and deficits in adaptive behavior, which was consistent with records and previous assessments.

Student also demonstrated significant deficits in all academic areas on the Wide Range Achievement Test, the Woodcock Johnson IV Tests of Achievement, and the Brigance Inventory of Early Development III. The most recent iReady assessment results indicated academic abilities at kindergarten level for English language arts and math. iReady assessments were diagnostic assessments given to all children three times per school year. iReady was a computer-based assessment program that broke down skills for math and reading domains, including

- phonics,
- phonemic awareness,
- vocabulary,
- comprehension literature,
- comprehension informational, and
- high-frequency words.

Based on the results of the academic evaluations, Tungate identified Student's areas of academic need as reading high-frequency words, reading consonant-vowel-consonant word passages, mathematics regarding double-digit addition, reading a clock to the

hour and half-hour, and money quantities, writing regarding spelling consonant-vowel-consonant words, and writing sentences with noun-verb agreement and details.

In the area of social-emotional functioning, Student appeared to enjoy coming to school and interacting with peers and staff. She responded well to behavioral strategies and previous maladaptive behaviors at school were not occurring. Her ability to stay in her seat during instruction and complete tasks had greatly improved. She also continued to benefit from instructional strategies, including visual supports, manipulatives during academic tasks, repeating instructions, and breaking larger tasks down into smaller parts.

THE 2021 ACADEMIC ASSESSMENT

Etiwanda conducted an academic assessment of Student in April 2021, approximately one month after Student returned to in-person learning during the hybrid period, after failing to regularly attend school at Etiwanda for approximately one year. The assessment was performed by Stanley, an Etiwanda special education program specialist since 2019.

Stanley held a master's degree in education: curriculum and instruction, both a mild/moderate education specialist credential and a multiple subject credential, as well as certifications in autism and dyslexia. She had reading specialist training and was trained in many specific reading programs to remediate specific reading deficits, including Language! Live. Her duties included

- classroom management,
- lesson planning,
- curriculum design,

- IEP writing,
- supporting the specialists/teachers,
- facilitating training to staff, and
- conducting assessments at 17 Etiwanda schools.

She worked for Etiwanda since 2007, including as a professional development provider, a fifth-grade general education teacher, and a special education teacher in a special day classroom for kindergarten and middle school.

Stanley administered the Woodcock-Johnson Tests of Achievement IV and the Brigance Inventory of Early Development III. Stanley administered the Brigance Inventory to obtain additional data because she could not obtain baseline scores on some of the Woodcock-Johnson subtests to obtain an overall standardized score. The Brigance Inventory was for students with the lowest skill levels, to assess isolated specific skills within literacy and math, which Stanley used to gauge Student's abilities. The Woodcock-Johnson focused on the application of the skill level whereas the Brigance Inventory looked at the individual foundational skills.

During the three days of testing, for one to two hours per day, Student was attentive and appeared to try her best. She was provided breaks during testing and needed preferred reinforcers, such as a token game, preferred breaks to walk/play outside, and computer time, to maintain focus during long assessment periods. The results of the Brigance Inventory helped to determine the areas in which Student had academic needs. Student mostly scored or had a level of skill associated with a standard taught at roughly a kindergarten level, although she scored a little higher in oral

comprehension. Based on the results of her assessment, Stanley recommended specialized academic instruction in the areas of reading, writing, and math, including specific skill areas.

Based on the academic assessment, Stanley recommended Student receive specialized academic instruction in the same specific areas of academic need reported by Tungate.

THE 2021-2022 SPECIAL DAY CLASSROOM

For fifth grade, Student attended Garibay's mild/moderate special day class for English language arts, math, and Universal Access during the 2021-2022 school year. Universal Access was time set aside for all students, who were placed in small groups based on ability and need, to receive more individualized attention in areas of deficit.

Garibay was an education specialist who worked for Etiwanda since 2016. She held a master's degree in special education with a specialization in mild/moderate disabilities, and a special education mild-moderate teaching credential. She passed the California highly qualified teacher exam, which included establishing that she understood foundational reading skills, including phonics and phonemic awareness. Her duties included providing specialized academic instruction, differentiating instruction, modifying programs, and providing accommodations to help students learn at their ability levels. Her teaching experience included teaching transitional kindergarten through eighth grade independent study and home school programs for students with mild-to-moderate disabilities, providing resource specialist instruction while co-teaching a sixth-grade general education class, and teaching special day

classes including a fourth- and fifth-grade combination class, and seventh and eighth grades. She was also an Etiwanda long-term general and special education substitute teacher between 2016 and 2017.

Garibay was assigned to work in Student's special day class at Golden Elementary in August 2021 and was implementing Student's August 2020 IEP. In the fall 2021, there were seven or eight fourth and fifth grade students in the classroom, along with at least three aides, specifically two instructional aides and a classroom aide. Garibay's classroom was very structured and there were tools in the classroom to assist students, including manipulatives and math charts. The special day classroom was a language-rich multisensory environment. Garibay used visuals, graphic organizers, chunking concepts and skills, hands-on manipulatives, and whiteboards, among other things. As compared to the general education classroom, which was at a faster pace with significantly more students and without a credentialed special education teacher, the special day class students worked at a slower pace with fewer students and more academic support including a credentialed special education teacher trained to deliver instruction to students with special needs.

Unlike in the general education classroom, where students were generally taught using the Common Core State Standards, Student received differentiated instruction to work on the foundational skills she lacked through the Core Content Connectors. The special day classroom provided students more intensified instruction, which required the instructor to look at the lesson, break it down and determine the standards the student needed to know, and then "backing into" those standards from where the student currently presented. To deliver instruction to the special day class students, the special day class instructor was required to "tear apart" the lesson, color code, use multimedia

supports and charts, or whatever was necessary for the students to gain knowledge from the lesson. This was a more individualized type of instruction that required more time be put into the lesson to differentiate it for understanding by students with learning differences.

In the special day class program, Student received both whole-group and small-group instruction, in a “triangulated” form, working on core instruction based on a modified curriculum using Common Core Connectors, IEP goals, and areas of deficit identified by iReady assessment data obtained three times a year. iReady assessments identified a student’s deficits and the next steps of instruction to get the student on level. If there were deficits identified, students worked on this during Universal Access time along with IEP goals. In the special day class program, there were also learning centers, and students rotated between stations to work on math and English language arts. Thus, for parts of the day, students worked in small groups of similar levels of ability, where they received individualized attention to work on targeted skills in particular domains based on their needs. Students also worked on their own personalized learning plan with staff who provided the students individualized support in areas identified in their IEPs and took data.

As part of the intense supports in the special day class, students used a reading program called Language! Live. Language! Live was an intensive core replacement program that worked on all five areas of literacy to address the foundations of literacy while integrating text to accelerate students’ reading proficiency. The class worked on Language! Live every day. The classroom instruction also provided accommodations and intensified teaching specifically designed to support Student’s reading skills.

Student's special day program based math instruction in Garibay's classroom primarily on Go Math, Etiwanda's math curriculum, a program all fourth- and fifth-grade general education classes used. However, the math instruction in the special day program did not just "teach to the book" as might be typical in the general education classroom. In contrast, the special day classroom used, among other things, scaffolding and intensified, differentiated instruction to promote understanding, working backwards from a student's present levels of performance to the standard being taught.

In the special day class program, Student received instructional strategies and materials with a primary focus on the Core Content Connectors to work on the most basic or foundational skills related to topics in common core standards in math and English language arts. As a special education teacher, Garibay provided a level of differentiated instruction which was not part of the regular general education class.

Student made progress in the special day program during the 2021-2022 school year. By December 2, 2021, Student had met or exceeded two of her four academic goals and partially met the other two goals. On iReady assessments, Student had grown 46 points in literacy, from a kindergarten overall reading level, to a first-grade level since the beginning of the 2021-2022 school year when she had been attending Garibay's class full-time. In addition, Student's math scores increased 49 points, going from an overall kindergarten level to an overall second-grade level. She went from a reading fluency of four words per minute when reading a passage within a short-a word family, to 25 words per minute with one error. As measured by the Brigance Inventory in April 2021, Student had zero percent accuracy telling time to the hour and half hour. By February 9, 2022, she had mastered telling time with over 80 percent accuracy to both the hour and the half hour.

At the time of the December 2, 2021 IEP, Student was attentive in class and retained information presented when instruction was consistently and explicitly presented with visuals and specially designed intensive supports to help develop understanding. For formal math instruction, the supports required for meaningful learning and concept retention could be as simple as manipulatives and using a pizza for fractions, or as specific as color-coding to differentiate the steps to overcome the natural difficulty of memorizing sequential steps. These specially designed supports could be removed after much practice within an isolated skill, which allowed Student's knowledge to become more abstract. Student had success in her ability to expand upon her math skills and keep a moderate pace with the on-level curriculum while using specially designed supports to bridge knowledge gaps that rote memorization and drills had not afforded her. Student's overall reading was constricted due to her challenges with accurately decoding and encoding one-syllable words with short-vowel sounds, causing her reading to be laborious. As with math, Student showed improvement when intensely and consistently working on reading skills when color-coded supports were provided to help differentiate sounds, along with aligning sounds to match consonants and vowels.

THE DECEMBER 2, 2021 IEP OFFER OF SPECIAL EDUCATION AND RELATED SERVICES

The December 2021 IEP offered special education and related services similar to the August 2020 IEP which Garibay had been implementing for Student in the special day classroom during the 2021-2022 school year. Specifically, the December 2, 2021 IEP offered the following: For the balance of the 2021-2022 regular school year, Student's fifth grade year, specialized academic instruction in a mild-moderate special day class at Golden Elementary for the entirety of her day -- English language arts, math and

Universal Access – with the exception of recess, lunch, physical education, library, social studies, and science in the general education setting. This offer of specialized academic instruction amounted to 68 percent of time outside the regular class/activities, and 32 percent of time in the regular class/activities.

For sixth grade, Student was scheduled to transition to middle school for the 2022-2023 school year at Day Creek Intermediate School, her middle school of residence. Etiwanda offered a similar program to what was proposed for the remainder of fifth grade. In middle school, Student would receive specialized academic instruction in a mild-moderate special day class in English language arts, math, and Universal Access. She would be in general education for the balance of her day, including physical education, an elective, social studies, and science. The December 2, 2021 IEP also offered Student specialized academic support in the general education classroom for social studies and science. This offer of specialized academic instruction amounted to 43 percent of time outside the regular class/activities, and 57 percent of time in the regular class/activities. The IEP stated Student would not participate in regular core academic subjects including English language arts and math because she required substantial supports to achieve gains in the grade-level/age-appropriate curriculum.

The December 2021 IEP also offered other supports and services to support academics, including consultation between specialized academic instructor and the speech-language pathologist, between the specialized academic instructor and the school psychologist, consultation between the specialized academic instructor and the occupational therapist, each for 10 minutes per month. The IEP also offered consultation between the special education teacher and the general education teacher for 10 minutes per week.

The IEP also offered 13 goals, along with short-term objectives, seven of which goals were in reading, writing, and math, one goal for handwriting, and five communication goals, as more fully discussed in Issue 2B, below. It also offered program accommodations including manipulatives, visuals, and graphic organizers for math instruction, graphic organizers and visuals for English language arts instruction, and adaptive paper for writing, text-to-speech/read aloud, speech-to-text/dictation for writing longer passages, a multiplication chart, presentation supports to deliver formal math instruction and anchor sequential steps such as with color-coded steps to help differentiate, multimedia supports to anchor math and reading concepts, sensory tools of TheraPutty and a "disco sit," aide support during mainstreaming discussed in Issue 2G, and various behavioral supports as discussed in Issue 2H. Adaptive paper was a special type of lined paper which helped Student properly align the letters she wrote. TheraPutty was a resistive type of putty students could squeeze or pull with their hands. The "disco sit" was a cushion that was blown up with air to give students some movement on their seats, so the seat was not so hard and allowed students to "get their wiggles out."

The IEP also offered Student program modifications in the form of instructional strategies and materials with a primary focus on the Core Content Connectors, which were linked to grade-level Common Core State Standards and Next Generation Science Standards. The IEP also provided for Student to take alternative statewide assessments because she required curriculum with substantially adapted materials and customized methods of accessing information, and alternative ways of demonstrating skills and appropriately assessing across academic settings. As special factors, the IEP specified that Student required assistive technology and/or services, and that Student would be

provided with the same support all students received to access the curriculum. It specified that Student would be provided with a

- word processing device,
- highlighters,
- sentence frames,
- place value chart,
- graphic organizers, and
- manipulatives.

It stated Student would have access to a disco sit and TheraPutty. All students at Golden Elementary were provided with a word processing device in the form of a Chromebook.

The IEP also offered Student related services in the areas of speech and language and occupational therapy discussed in Issues 2C and 2D, below. The IEP also proposed extended school year services in the form of specialized academic instruction, occupational therapy, and speech and language services. Student was also offered transportation.

ETIWANDA'S ACADEMIC PROGRAM APPROPRIATELY ADDRESSED STUDENT'S ACADEMIC NEEDS

Student argued she required a more intensive academic program than Etiwanda offered in the December 2, 2021 IEP, but Student presented no persuasive evidence to support this claim. Student also failed to comprehensively explain the inherent contradiction in her position that she required a more intensive academic program and at the same time, insisted she should have been in a general education setting 100 percent of the time, addressed in Issue 2F.

As explained more fully in Issue 2F, Etiwanda's witnesses credibly testified why and how the offered program was appropriate for Student given her unique needs in the area of academics. Student was properly on a modified curriculum because of her ability level. This provided Student with the extra intensive support to work on her foundational math and literacy skills through Core Content Connectors. The evidence established that the special day program provided Student with intensified supports she needed to access and benefit from her educational program, including a reading program called Language! Live, which worked on the foundations of literacy while integrating text to accelerate Student's proficiency. The classroom instruction provided accommodations and intensified instruction, including differentiation of the lessons specifically designed to support Student's reading skills.

The weight of evidence established Student made progress in academics in the special day class program during the 2021-2022 school year. Student not only had the extra intensive academic support of a smaller student-to-adult ratio, but a credentialed special education teacher with aide support in the classroom. Student was also offered seven specific goals to work on her academics in reading, writing, and math, addressed in Issue 2B. Student was also offered other intensive supports in accommodations, including differentiated instruction tools and aide support to assist Student in the area of academics, along with program modifications and other supports to help her access and benefit from her academic program.

The weight of evidence established that the middle school program offered was appropriate to address Student's academic needs. It provided an equivalent program to that offered at Golden Elementary, taking into consideration the differences in the daily schedule and structure differences once Student matriculated to middle school. Among

other things, the amount of time Student was in science, social studies, and physical education in middle school was longer, and middle school added an elective period.

In her closing argument, Student argues that she has had no measurable academic improvement in the last four or five years. However, Student ignores the fact that Student was basically out of school for a year between March 2020 and March 2021 and likely experienced some regression during her long absence. Significantly, Parent admitted Student did not regularly attend Golden Elementary during distance learning through March 2021, which could have had a negative effect on her academic progress. As discussed above, there was no convincing evidence that demonstrated how much academic instruction Student received during the distance learning period.

Parent testified Student “kind of” struggled when Student was online during distance learning, but the weight of evidence did not establish this. In fact, Brittany Borbon, Student’s Golden Elementary fourth-grade special day class teacher during the 2020-2021 school year, testified that while Student needed some support logging in, once she was on Zoom, she did not have any trouble participating in virtual instruction. When Borbon called Parent in the beginning of the school year 2020-2021 school year to follow-up about Student’s lack of attendance, Parent claimed she was going to do her own schooling at home. However, when Borbon tried to clarify the type of program Student would be attending, Parent did not have an answer.

Although Parent stated at hearing to have seen no improvement in Student’s academic abilities, her testimony was not persuasive. Parent initially claimed to sit with Student to read with her, but she hesitated when asked how often that occurred, before saying it was Monday through Friday. Later, Parent denied reading with Student every day, claiming that a member of her household staff read to Student if not Parent. When

asked if she or staff worked with Student on the iReady program in writing or math, Parent “believed” staff worked with Student, but when asked if that was at the beginning of the 2020-2021 school year, Parent was not sure. Parent also said Student did not practice with the iReady program at home. In addition, Parent admittedly never observed Student in her special day class program and never requested to observe Student. She also admitted she had never contacted Student’s current special education teacher about Student’s academic progress. Parent was not even certain that she consented to the August 2020 IEP. All of these things cast doubt on the validity of Parent’s assertions about Student’s lack of improvement.

The preponderance of evidence proved Student did not regularly participate in asynchronous instruction during the hybrid period after March 2021 or regularly do assigned homework in Garibay’s class during the 2021-2022 school year. In Student’s closing argument she takes issue with the testimony of Etiwanda’s witnesses on this point. However, Student proffered no evidence from Parent or anyone else to specifically rebut this testimony or persuasively demonstrate that this failure to participate in instruction had no effect on Student’s academic progress after March 2020.

In any event, the law requires that Etiwanda’s offer be evaluated as of the time it was made, not the four- or five-year period before the offer was made. (*Adams, supra*, 195 F.3d at p. 1149.) Student’s expected progress was slow because her low ability level, and the “snapshot” rule mandates that the offer for special education and related service be evaluated as of the time it was made. In this case, as of the date of the IEP, Etiwanda offered Student sufficient programs and supports to enable Student to make academic progress appropriate in light of Student’s circumstances. (*Rowley, supra*, 458 U.S. at pp. 201-204; *Endrew F., supra*, 580 U.S. at p. 1000.)

LINDAMOOD-BELL

At the January 6, 2022 IEP team meeting, Stanley explained to Parent that Student was receiving an intensive reading program and math program in Garibay's classroom and that all of the skill/curriculum areas addressed in a Lindamood-Bell program were currently being addressed in Student's current reading program. Stanley also shared that the assessments conducted pinpointed Student's reading ability and that the proposed goals, supports, and accommodations were at the level of intensity Student required. Stanley also pointed out Student's growth academically since she had been attending school regularly. In response, lay advocate Peters insisted Student would benefit from a Lindamood-Bell afterschool program.

There was no persuasive evidence to support Student's request for a Lindamood-Bell program. Among other things, Student failed to prove either what a Lindamood-Bell program consisted of or that Lindamood-Bell was "more intensive" than the program offered by Etiwanda. Stanley persuasively explained at hearing that Student was already being provided with a reading program comparable to a Lindamood-Bell program in the form of Language! Live, implemented in Garibay's special day classroom.

As part of Stanley's dyslexia certification, she analyzed reading programs, including Lindamood-Bell. She also conducted extensive research on multiple reading programs. She compared the Language! Live, which was the intensive core replacement reading program used in her classroom, to the Lindamood-Bell program. She concluded that Language! Live worked on all five areas of literacy and covered the

same areas as Lindamood-Bell. Student did not require Lindamood-Bell reading intervention services because Student's program addressed all of the areas of literacy Student required.

Etiwanda did not deny Student a FAPE in the December 2, 2021 IEP by failing to offer Student sufficient programs and supports to enable Student to receive educational benefit in the area of academic instruction. Etiwanda did not deny Student a FAPE in the December 2, 2021 IEP by failing to offer Student sufficient intensive academic instruction to address Student's reading skills.

ISSUE 2B: DID ETIWANDA DENY STUDENT A FAPE IN THE DECEMBER 2, 2021 IEP BY FAILING TO OFFER ADEQUATE GOALS FOR STUDENT?

On the first day of hearing, Student contended all of the goals offered in the December 2, 2021 IEP were insufficient and that behavior goals should have been offered. Student also confirmed the only area of need in which a goal was not offered was behavior. On the last day of hearing, Student argued that the goals lacked ambition, were insufficient, and that Student was not engaged in reaching a higher level of accomplishment. Student contended the writing goals were repetitive, but Student's attorney was unable to explain how they were repetitive and argued it was a waste of time to take the time to explain it to the ALJ. In her closing brief, Student argues Student was not provided appropriate goals, citing to the testimony of her occupational therapy expert JanDee Goodis.

Etiwanda contends Student did not meet her burden of proof on this issue. Etiwanda argues that its witnesses testified as to the appropriateness of the goals and there was no testimony or other evidence to dispute this evidence. Etiwanda asserts

that Goodis did not have enough information to determine if additional goals were necessary and that her testimony was speculative at best. It also claims that Goodis admitted Student's occupational therapy goal was appropriate.

Student's claim regarding the lack of behavior goals is addressed in Issue 2H.

For each area in which a special education student has an identified need, the IEP team must develop 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, subd. (a)(2); *Letter to Butler* (OSERS March 25, 1988).) An IEP must contain a statement of measurable annual goals designed to: (1) meet the individual's needs that result from the individual's disability to enable the pupil to be involved in and make progress in the general curriculum; and (2) meet each of the pupil's other educational needs that result from the individual's disability. (20 U.S.C. § 1414(d)(1)(A)(i)(II); 34 C.F.R. § 300.320(a)(2)(i); Ed. Code, § 56345, subd. (a)(2).)

The purpose of goals is to permit the IEP team to determine whether the pupil is making progress in an area of need. (Ed. Code, § 56345; see also, 64 Fed. Reg. 12,471 (1999).) In developing the IEP, the IEP team shall consider the strengths of the child, the concerns of the parents for enhancing the education of their child, the results of the initial evaluation or most recent evaluation of the child and the academic, functional, and developmental needs of the child. (20 U.S.C. § 1414(d)(3)(A); 34 C.F.R. § 300.324(a).) The IEP team need not draft IEP goals in a manner the parents find optimal, as long as the goals are sufficiently measurable. (*Bridges ex rel. F.B. v. Spartanburg County School Dist. Two* (D.S.C., Sept. 2, 2011, No. 7:10-cv-01873-JMC) 2011 WL 3882850, at *6.)

A procedural violation results in a denial of a FAPE only if the violation:

- (1) impeded the child's right to a FAPE;
- (2) significantly impeded the parent's opportunity to participate in the decisionmaking process; or
- (3) caused a deprivation of educational benefits.

(20 U.S.C. § 1415(f)(3)(E)(ii); 34 C.F.R. § 300.513(a)(2); Ed. Code, § 56505, subd. (f)(2);

Target Range, supra, 960 F.2d at p. 484 ["... procedural inadequacies that result in the loss of educational opportunity, [citation], or seriously infringe the parents' opportunity to participate in the IEP formulation process, [citations], clearly result in the denial of a FAPE."].) Stated another way, a procedural violation "will be 'actionable' only 'if [it] affected the student's substantive rights.'" (*Leggett v. Dist. of Columbia* (D.C. Cir. 2015) 793 F.3d 59, 67, quoting *Lesesne ex rel. B.F. v. Dist. of Columbia* (D.C. Cir. 2006) 447 F.3d 828, 832, 834.)

The December 2, 2021 IEP identified Student's areas of need as communication, fine motor, reading high-frequency words, reading consonant-vowel-consonant word passages, mathematics of double-digit addition, reading a clock to the hour and half-hour, and money quantities, and writing for spelling, consonant-vowel-consonant words, and writing sentences with noun-verb agreement and details.

The offer of special education and related services in the December 2, 2021 IEP contained 13 new goals, specifically:

- two reading goals with one about high-frequency words and the other for decoding fluently,

- three math goals with one about addition and subtraction, the second about operations and algebraic thinking, and the third about quantities of money,
- two writing goals with one about spelling and the other about simple sentences, one fine motor goal regarding handwriting, and
- five speech and language goals.

The preponderance of evidence established the 13 goals in the December 2, 2021 IEP were based on Student's present levels of performance, which came from the information obtained during Etiwanda's March/April/May 2021 triennial assessments, the result of Etiwanda's diagnostic assessments administered during the 2021-2022 school year to all students, Student's progress at the time of the IEP team meetings held to develop the December 2, 2021 IEP and input from the members of the IEP team. Student did not prove that the goals were inappropriate or that Student did not have a reasonable chance of attaining the goals within a year. The goals were measurable and addressed each area of unique need identified by the IEP team as of February 9, 2022 when Etiwanda made its offer of FAPE. Student failed to prove Etiwanda offered inappropriate goals in the December 2, 2021 IEP, or that the failure to offer an appropriate goal significantly interfered with Parent's participation rights or caused a deprivation of educational benefit or impeded Student's right to a FAPE.

COMMUNICATION GOALS

Rodriguez was a licensed, credentialed, and certificated speech -language pathologist employed by Etiwanda for five years and assigned to Golden Elementary for three years. She participated in the preparation of the December 2, 2021 IEP, including the present levels of performance and the five speech and language goals in the area of

communication, based on the results of the speech and language evaluation she conducted in March, April, and May 2021, as more fully detailed in Issue 2C. At the time of the December 2, 2021 IEP, Student had met two of her speech goals and partially met her third speech goal in the area of articulation from the August 2020 IEP. Rodriguez collaborated with Student's teacher regarding Student's goal progress.

In the area of communication, Etiwanda's December 2021 IEP offered five goals, which addressed Student's

- deficits in correctly pronouncing the /R/ sound,
- difficulties with vocabulary, comparatives and superlatives and past tense verbs,
- difficulties beginning and ending conversations, and correctly producing the /S/ sound and /S/ blends.

At hearing, Rodriguez opined that the speech and language goals Etiwanda offered addressed all areas of unique need related to communication because they addressed the areas in which Student had weaknesses based on Etiwanda's assessments and Rodriguez's collaboration with Student's teacher.

Rodriguez's testimony was corroborated by school psychologist Tungate. Tungate thought all of the goals were appropriate because they were based on the needs that were identified in the assessment reports and addressed all areas of unique needs at the time of the December 2, 2021 IEP.

Student presented no specific argument or evidence that any of the offered communication goals were inappropriate. Student failed to prove Etiwanda committed a procedural violation by failing to offer appropriate speech and language goals. To the extent any goal was in any way inappropriate, Student failed to demonstrate how that

significantly impeded Parent's opportunity to participate in the decisionmaking process, caused a deprivation of educational benefits, or impeded Student's right to a FAPE.

FINE MOTOR GOAL

Passons was a licensed and certified occupational therapist employed by Etiwanda for over 15 years. She participated in the preparation of the December 2, 2021 IEP, including present levels of performance, and prepared the occupational therapy fine motor goal regarding handwriting based on the results of her April 2021 occupational therapy evaluation as more fully discussed in Issue 2D. As of December 2, 2021, Student had partially met her August 2020 IEP visual motor goal, which required Student to write four sentences with up to three cues, within one-fourth inch of the line with 80 percent accuracy in four of five trials. Student was able to copy four sentences within one-fourth inch of the line with greater than 80 percent accuracy with three to five cues using adaptive paper in four of five trials, had attempted to self-correct some letter size and alignment errors without prompting, and showed improvement in alignment of words on regular class worksheets to within one-fourth of an inch.

In the area of fine motor, the December 2, 2021 IEP handwriting goal worked on Student's visual-motor abilities by focusing on writing through copying. Student could copy three sentences and demonstrated 57 percent accuracy with letter sizing within one-eighth inch of a line with 28 letter size errors out of 65 attempts on a class worksheet. The new goal required her to write within one-eighth inch of the line with appropriate sizing with 80 percent accuracy in four trials. In Passons's opinion, the goal addressed Student's unique needs as related to fine motor development, addressed by

occupational therapy, because it focused on Student's visual-motor coordination needs. Passons's testimony regarding the appropriateness of the fine motor goal was also corroborated by school psychologist Tungate.

The testimony of Student's expert, licensed occupational therapist Goodis, was unpersuasive in establishing that the offered occupational therapy goal was inappropriate. Her testimony was unclear and inconsistent. In certain parts of her testimony, she seemed to agree that the handwriting goal was appropriate and in other parts of her testimony she was evasive in answering questions about the goal or criticized it. Significantly, when asked about the fine motor goal, Goodis did not say the goal was inappropriate for Student. She said she hated the word "appropriate," but later admitted the fine motor goal was "not a bad goal." She also denied that the goal was not ambitious enough and stated she would be "nit-picky" about it in other ways.

Goodis's criticisms had less to do about the inappropriateness of the fine motor development goal Etiwanda offered and more about other goals that could have been offered. However, Student's counsel made clear on both the first day of hearing and the last day of hearing that, with the exception of the failure to offer a behavior goal, Student was only challenging the appropriateness of the goals that were actually offered. Even so, Goodis's testimony was unconvincing.

As more fully explained in Issue 2D, below, Goodis appeared biased, and she had no adequate familiarity with Student or Student's needs upon which to base an opinion about the adequacy of Etiwanda's offer of special education and related services. She only conducted what she described as a "quick," one-time, 15-minute FaceTime observation of Student in the home and spoke to Parent over the phone for 10 minutes, the day after the hearing began. She not only failed to thoroughly review Student's

educational records, but she never spoke to any of Student's teachers or service providers or observed any of the classes Student attended. During her testimony, she also repeatedly qualified many of her opinions with statements indicating that she did not have enough information to give a clear and definitive opinion related to Student because she never assessed Student or adequately observed her. For example, Goodis admitted at one point that she could not draw any conclusions from her one-time "quick observation." When asked if Student required more testing, she qualified her answer by emphasizing she was only with Student for 15 minutes.

As discussed in Issue 2D, Goodis appeared confused during her testimony. Her testimony was contradictory, convoluted, confusing, and was not definitive or clear as to Student. The same was true as it related to the occupational therapy goals Goodis claimed she would have added to the IEP. For example, she said that within the school, if there was a physical education "kind of" goal, not specific to physical therapy or occupational therapy, "you may want to have" a perform-jumping-jack or bounce-the-ball-10-times-alternating-hands "type of goal." But then she said, that as far as an occupational therapist in the school, "you probably would not have that as a goal." At the same time, she also admitted that regarding Student's ability to participate in general education physical education, she saw no concerns in the documentation by her physical education teacher.

At another point, Goodis opined if Student had difficulty opening containers, she "probably" would have that as a goal. Also, Goodis stated, "If you wanted to address like the bilateral, those kind of issues, y'know, I would y'know, put something in there." In relation to the writing goal, she "would add y'know different caveats and you can have a whole separate goal for that too, y'know, y'know" She claimed if she did further tests that demonstrated Student had some perceptual difficulties, she would

“probably do some kind of perceptual goals.” She claimed that the perceptual goals would depend on if it is “the motoric part of perception” or “the pure perception part” because “you could have a goal that [Student] will use sticks y’know and imitate different – being very not, y’know not detailed as a school would be –but y’know would be able to imitate different patterns with a stick.” At one point, Goodis was asked what further test she might do, but she did not point to a specific test. Instead, she emphasized the importance of observations. Her statement negatively impacted the credibility of her opinions because she only observed Student once in the home for 15 minutes. In fact, Goodis’s testimony did not provide clear support for any claims Student raised.

Goodis asserted Student had issues with letter formation in that Student reversed some of her letters during Goodis’s brief observation and in some of the work samples from fourth grade. However, Goodis’s testimony was equivocal when asked if the letter reversals were something addressed by occupational therapy. She said, “it should be,” but then said, “maybe you send in for further testing.” She did not adopt or endorse the suggestion that it was a standard fine motor development goal to be worked on by an occupational therapist to write letters in the correct way. Goodis’s testimony was insufficient to establish that Student should be assessed for dyslexia.

Goodis also expressed many of her opinions as a personal preference, rather something amounting to a violation of standard practice in the school-based occupational therapy industry, or a procedural violation of special education law. For example, when asked if the goals should have addressed formation of letters, she responded “it would have been nice” but “I am not this O.T.” When asked if she thought

there were enough occupational therapy goals for Student in the 2021 IEP, she said “not if I was the O.T.” Because many of her opinions seemed to be more a matter of her personal preference, they did not establish a denial of FAPE.

Both the lack of clarity in Goodis’s testimony and the qualifications she made to her opinions negatively affected the overall weight given to her testimony. Student failed to prove Etiwanda committed a procedural violation by failing to offer appropriate fine motor development goals to be worked on with an occupational therapist. To the extent any goal was in any way inappropriate, Student failed to demonstrate that it significantly impeded Parent’s opportunity to participate in the decisionmaking process, or deprived Student of educational benefits, or impeded Student’s right to a FAPE.

ACADEMIC GOALS – READING, WRITING AND MATH

Education specialist Stanley participated in the drafting of the new academic goals offered in the December 2021 IEP. She collaborated with Garibay, Student’s 2021-2022 special day class teacher, to prepare the goals.

In the area of reading, the December 2021 IEP offered two goals. The first addressed Student’s inability to read more than 14 of 20 high-frequency words with more than 70 percent accuracy. The new goal required her to read 25 words with 90 percent accuracy in four consecutive trials. The other reading goal addressed Student’s decoding difficulties. She read 10 consonant-vowel-consonant one-syllable words with 87 percent accuracy. And when provided with frontloading vocabulary terms and visual supports associated with a pre-primer passage, Student read the passage with

prompting/pointing to the visuals at 25 words per minute with 96 percent accuracy. The new decoding goal required her to fluently read a pre-primer passage independently with 80 percent accuracy in four consecutive trials.

In math, Student was offered an addition and subtraction goal, addressing her deficits that area. At the time of the IEP, Student was able to add up to 10 using visuals and/or manipulatives with 95 percent accuracy, and up to 25 using visuals at 89 percent accuracy. She was able to subtract using visuals up to 20 with 78 percent accuracy. She was working on addition and subtraction problems involving regrouping at a level of 50 percent accuracy of multi-digit addition and subtraction problems. The new goal required Student, when provided with five addition and subtraction problems with regrouping up to 1000, to solve the problems with 80 percent accuracy in four consecutive trials.

Another math goal that was an extension of the first math goal involved word problems. At the time of the IEP, Student was able to solve subtraction problems for comparison situations and solve subtraction problems by counting, able to write multiplication sentences to represent equal groups, repeated addition, and to represent objects, and she knew multiplication/division fact families using a chart. The new goal required Student, when reading with staff support or listening to one-step real world word problems, to use addition and subtraction to solve situations by selecting the correct method of operation based on the keywords in the word problem with 80 percent accuracy in four consecutive trials.

The December 2, 2021 IEP did not offer Student a math goal in the area of telling time. Although the December 2021 IEP identified telling time to the nearest hour and half-hour as an area of need and Etiwanda proposed a telling time goal at the January 6,

2022 IEP team meeting, Student's teachers continued to monitor Student's progress throughout the development of Student's December 2, 2021 IEP across the three IEP team meetings. As reflected in the IEP notes, by the time of the February 9, 2022 IEP team meeting, Student had mastered the skill that the proposed time-telling goal addressed with 80 percent accuracy, so that telling time goal was no longer appropriate. Accordingly, Etiwanda proposed a different new goal in math for word problems, which required Student to select the correct operation for addition and subtraction. This was explained to Parent at the February 9, 2022 IEP team meeting.

Another new math goal addressed Student's needs regarding quantities of money. At the time of the December 2021 IEP, Student could receptively identify all coins and their quantity, and a one-dollar bill, but she was unable to combine like quantities for adding efficiently up to one dollar, which she was doing at 40 percent accuracy with maximum prompting. The new math goal required Student, when provided with multiple coins, visuals/manipulatives, to match the corresponding like coins, then combine them to solve a math/money problem with 80 percent accuracy in four consecutive trials.

In the area of writing, Student was offered a spelling goal. Student formulated and dictated complete sentences and then copied them on paper, but she continued to need support in writing consonant-vowel-consonant words independently. She decoded 10 consonant-vowel-consonant one-syllable words with 87 percent accuracy and encoded consonant-vowel-consonant words at 70 percent accuracy with visual support and maximum adult prompting for sound-letter correspondence. The new writing goal in spelling required Student, when provided adaptive paper

and Elkonin boxes with visuals of color-coded consonant and vowels, and given 10 consonant-vowel-consonant words, to spell the words with 80 percent accuracy in four consecutive trials.

Although Student had demonstrated the ability to formulate, dictate and copy sentences, she needed support to write sentences independently. Another new writing goal required Student, when provided with a graphic organizer and adaptive paper, to independently write a simple sentence containing one noun, one verb, and at least two details in four consecutive trials over a three-week period.

At hearing, education specialist Stanley explained that the academic goals were drafted based on the assessments, current data, and Garibay's observations in Student's fifth-grade special day class. These goals were appropriate at the time they were proposed because they addressed areas of need necessary for Student to continue to make gains in literacy and math. The academic goals addressed all of Student's unique needs related to academics at the time of the December 2, 2021 IEP. As persuasively explained by Garibay, in reading, Student needed to focus on foundational skills and part of that focus required work on high-frequency words and being able to master and decode them fluently. Student was able to make sound-to-letter correspondence and blend, but she was not doing it fluently to read, so Stanley wanted to increase Student's skill in that area. Stanley also wanted to pinpoint areas of addition and subtraction so Student could access higher-level math. With regard to writing, Stanley and Garibay wanted to work on Student's spelling so she could correctly write words in sentences.

Stanley's testimony about the appropriateness of the goals was persuasive for the same reasons as her testimony was persuasive regarding Student's program as addressed in Issue 2F. Stanley's testimony about the goals was also corroborated by

special education teacher Garibay, who worked with Student each weekday during the 2021-2022 school year in her special day class and was responsible for implementing Student's academic goals from the August 2020 IEP. Garibay's testimony confirmed the goals Etiwanda offered were appropriate at the time the IEP was developed. In Garibay's opinion, the proposed academic goals focused on strengthening Student's foundational literacy and math skills and addressed all areas of unique need. Garibay based her opinions on teacher observations, her work with Student, diagnostic assessments, and the progress Student had made since returning to school. Garibay's and Stanley's testimony regarding the appropriateness of the academic goals was corroborated by school psychologist Tungate.

Passons also corroborated the appropriateness of two of the writing goals from an occupational therapy perspective. Passons helped develop the two writing goals insofar as they allowed Student to use adaptive paper. She testified that these two goals together with the fine motor goal addressed Student's unique needs as related to occupational therapy because they addressed Student's visual-motor needs and supported staff who were working with Student on her academics through the use of adaptive paper.

Student presented no specific evidence that any of the academic goals were inappropriate. Student failed to prove Etiwanda failed to offer appropriate academic goals. To the extent any goal was in any way inappropriate, Student failed to demonstrate that it significantly impeded Parent's opportunity to participate in the decisionmaking process, or deprived Student of educational benefits, or impeded Student's right to a FAPE. Etiwanda did not deny Student a FAPE in the December 2, 2021 IEP by failing to offer appropriate academic goals.

ISSUE 2C: DID ETIWANDA DENY STUDENT A FAPE IN THE DECEMBER 2, 2021 IEP BY FAILING TO OFFER SUFFICIENT SPEECH AND LANGUAGE SERVICES?

On the last day of hearing Student argued she needed more speech services, particularly more individual speech services as well as more time to work on her pragmatics and articulation. In the closing brief, Student reiterates those concerns and argues that Student's overall receptive and expressive language skills are impaired/delayed, and that the December 2021 IEP did nothing to address Student's needs.

Etiwanda contends Student did not meet her burden of proof on this issue. It argues that Etiwanda's speech-language pathologist Rodriguez credibility testified as to the appropriateness of the services offered and there was no evidence contradicting her testimony.

Speech and language services are a related service which is "required to assist a child with a disability to benefit from special education." (34 C.F.R. § 300.34(a).)

Student presented no persuasive evidence to dispute the appropriateness of the speech therapy services offered in the December 2, 2021 IEP. The offer of speech services was based on the recommendation of Etiwanda's speech-language pathologist Rodriguez after assessing Student in Spring 2021.

Rodriguez, a licensed, credentialed, and certificated speech-language pathologist, had both a bachelor's and master's degree in communicative disorders. She worked as a speech therapist aide and speech therapist between 1994 and 2001 at another school district, and was a speech-language pathologist since at least 2002, including

employment at Loma Linda University Medical Center and Children's Hospital. Her duties at Etiwanda included

- conducting speech and language assessments,
- providing services, creating goals,
- working with IEP teams, and
- consulting with parents and staff.

She assisted with programming and developing augmentative communication systems for about 40 or 50 non-verbal students over the course of her career. At the time of the hearing, she was working with two students who used a communication device.

Rodriguez provided speech and language services to Student since 2019. She prepared and implemented the three communication goals in Student's August 4, 2020 IEP. At the time of the hearing, Rodriguez had been working with Student twice a week in group sessions of three students, including Student, working on Student's articulation goal, and her letter-R goal, which had not yet been met, and reviewing the goals Student already met. Rodriguez was unable to work on the goals offered in the December 2, 2021 IEP because Parent did not consent to the IEP.

Rodriguez assessed Student in March and May 2021, in all areas of suspected speech and language disability. The assessment included standardized tests, including the Goldman-Fristoe Test of Articulation, Third Edition, Test for Auditory Comprehension of Language, Fourth Edition, Test of Expressive Language, Receptive One-Word Picture Vocabulary Test, Expressive One-Word Picture Vocabulary Test, and Clinical Evaluation of Language Fundamentals, Fifth Edition, Pragmatics Profile. These tests covered receptive and expressive language and vocabulary, articulation, and pragmatic social language. As part of her assessment, Rodriguez also reviewed Student's records and

developmental file, and obtained a language sample and teacher and Student input. She also conducted observations and a hearing screening. As discussed in Issue 1 above, Parent never filled out the Clinical Evaluation of Language Fundamentals 5 Pragmatics Profile and the Parent Input form despite repeated requests for her to do so, although Rodriguez did speak to Parent on the telephone and obtained some input.

Based on the assessment results, Rodriguez concluded Student continued to present with a speech-sound disorder. Student's articulation skills were characterized by sound distortions and substitutions that were not age appropriate. The articulation errors that most impacted Student's intelligibility were /R/, /S/, and /S/ blends, and Rodriguez opined such sounds affected her speech intelligibility during communication with non-familiar people in various social settings. Student's receptive and expressive language skills were approximately less than the first percentile, and her pragmatic social language skills were low or very low. Her voice and fluency skills were not areas of concern and within expectancy for her age and gender. Rodriguez recommended continued eligibility for special education and related services under the category of speech and language impairment, and that Student continue to receive speech-language services. She prepared her assessment report prior to the IEP team meeting that was supposed to be held in May 2021, but later revised the date on her report to December 2, 2021, to conform with the first triennial IEP team meeting date.

The December 2, 2021 IEP offered Student a total of 55 30-minute group speech and language therapy sessions outside the classroom during the regular school year for a total of 1,650 minutes yearly until December 2, 2022, and one 30-minute individual session each week during the 2022 extended school year.

Rodriguez explained at hearing that the speech services would have been provided, on average, two times per week because there were some weeks Student would not have received speech because of other activities, some shortened school days, and school breaks. That level of service would have enabled Student to make progress on the five communication goals offered in the December 2, 2021 IEP. It was an appropriate level and type of service because the goals were drafted for Student specifically and Student's speech therapy sessions would have addressed those goals. In addition, Student was already in a language-rich environment in her special education classroom, which addressed language skills and gave her a sufficient opportunity to practice. The speech consultation offered in the IEP also provided additional support to enable the classroom staff to help Student implement what she learned in her speech therapy sessions. Rodriguez recommended consultation between any specialized academic instructor and the speech-language pathologist as a support because consultation was important for generalizing skills from the speech therapy setting to the classroom, to make certain the speech services were working in the classroom and to give the teacher suggested strategies and supports that would be useful in the classroom, when needed. The level of extended school year speech services was an appropriate amount to prevent any regression beyond what Student could recoup within a reasonable time at the start of the 2021-2022 school year. Rodriguez credibly explained at hearing why the speech services were more appropriately provided outside of the classroom. Moreover, according to Rodriguez, Student did not require a communication device to interact with peers. She was verbal and could communicate her wants, needs, thoughts and ideas verbally, and was able to do so successfully. Rodriguez' opinions were credible based on her credentials, expertise, experience, assessment, and familiarity with Student.

At the December 2, 2021 IEP team meeting, Peters requested that Student receive three hours of speech therapy per week and an iPad to communicate with peers. However, the evidence failed to establish that the IEP team had information justifying Peters's requests. There was no evidence Peters had any expertise or other credentials that supported the level of speech services he requested on Student's behalf. When Parent was asked at hearing about the level of speech services Etiwanda offered, Parent's response was that she believed Student would benefit from more speech services because she does not always speak clearly and a little more speech services "would not hurt." This testimony together with the other evidence at hearing failed to prove the inadequacy of Etiwanda's offer of speech and language services. Nor did Student prove that she required more individual speech services or additional therapy services to work on pragmatics and articulation.

Etiwanda did not deny Student a FAPE in the December 2, 2021 IEP by failing to offer Student sufficient speech and language services.

ISSUE 2D: DID ETIWANDA DENY STUDENT A FAPE IN THE DECEMBER 2, 2021 IEP BY FAILING TO OFFER SUFFICIENT OCCUPATIONAL THERAPY SERVICES?

On the last day of hearing, Student contended Etiwanda should have offered Student more than 30 minutes per week of occupational therapy services. Student argued her writing needed to be addressed more diversely, that she needed higher level goals, and that it was inappropriate to require Student "to trace letters endlessly." Student argued she needed more individualized services and more push-in services inside the classroom so that she was part of a group. Relying on Goodis's testimony,

Student argues in her closing brief that she should be assessed for dyslexia, that Student had difficulty anchoring her paper and crossing mid-line, and that TheraPutty was not working if Student did not like it, among other things.

Etiwanda contends Student did not meet her burden of proof on this issue. Etiwanda asserts that the only testimony Student offered on this issue was from Goodis, who did not have sufficient information to make recommendations about occupational therapy necessary to address Student's needs. It argues Goodis never assessed Student and relied solely on a 15-minute interview with Student, a 10-minute discussion with Parent, and a review of an assessment, work samples and notes from March and April 2021. It asserts Goodis did not have current information from the 2021-2022 school year, did not conduct an in-school or in-person observation of Student in any setting, and did not speak to anyone in the school district. Etiwanda argues Goodis's testimony should be given little-to-no weight and that Student did not require additional occupational therapy.

Occupational therapy services are a related service that is "required to assist a child with a disability to benefit from special education." (34 C.F.R. § 300.34(a).)

Student did not prove by a preponderance of the evidence that Etiwanda denied Student a FAPE by failing to offer sufficient occupational therapy services in the December 2, 2021 IEP.

In the December 2, 2021 IEP, Etiwanda offered 30 minutes per week of occupational therapy delivered individually for the regular school and extended school year. The IEP also offered consultation between the occupational therapist and special education teacher for 10 minutes per month. Etiwanda's December 2, 2021 IEP offer

was based on the recommendations of its occupational therapist Passons after the IEP team reviewed the results of the April 2021 occupational therapy assessment and Student's present levels of performance at the IEP team meetings held to develop the December 2, 2021 IEP.

Passons held a bachelor's degree in occupational therapy and was licensed and certified to provide occupational therapy in California. She was assigned to handle five schools within Etiwanda, including Golden Elementary. Her duties at Etiwanda included providing services to students, consulting with and training staff, conducting evaluations, and attending IEP team meetings.

Passons provided occupational therapy services to Student since first grade. She attended Student's August 4, 2020 annual IEP team meeting and helped develop that IEP, including the present levels of performance in

- the area of fine motor development,
- the visual-motor/writing goal, and
- the offer of occupational therapy services for 30 minutes per week.

She was responsible for implementing the August 4, 2020 IEP as it related to occupational therapy. Student did not regularly attend occupational therapy services available during virtual learning between March 2020 and March 2021, and Parent never contacted Passons to discuss any concerns related to Student's participation in occupational therapy services.

The April 2021 occupational therapy assessment Passons conducted consisted of observations in the classroom, during physical education, and in a quiet room for standardized testing and clinical observations. Passons tested Student over three separate sessions on a one-to-one basis. She conducted a chart review, including a

review of the Health and Developmental History form and Parent Questionnaire filled out by Parent, and a review of work samples. She conducted a teacher interview and unsuccessfully attempted to interview Parent by phone on three separate occasions to ask follow-up questions. Passons also administered the standardized fine motor subtests of the Bruininks-Oseretsky Test of Motor Proficiency, Second Edition, according to the directions of the test publisher, and the Sensory Processing Measures, School Form and Home Form.

On the Bruininks, Student scored “Well Below Average” in Fine Motor Precision, Fine Motor Integration, and Manual Dexterity. The precision subtest required

- filing in shapes,
- keeping the pencil within the lines of a thin maze,
- folding paper along printed lines, and
- cutting out a circle.

The integration subtest required copying of various shapes. Student rushed through this test, which impacted her score. Manual dexterity was a timed subtest of 15 seconds and involved tasks such as stringing blocks, sorting cards, and placing pegs in a pegboard. Student stopped during this test to adjust her mask, make neat piles of cards, and slowly pull blocks to the end of the string, all of which adversely impacted her score. Passons concluded that although Student scored in the well below average range on the Bruininks, her classroom performance of copying letters from a model, fine motor cutting skills, and bilateral coordination skills indicated a higher level than the testing results. Student could copy three sentences and demonstrated 57 percent accuracy with letter sizing within one-eighth inch of a line with 28 out of 65 letter size errors on a class worksheet. At hearing, Passons further explained that the test results were not accurate estimates of Student’s abilities in the classroom setting. For example,

in fine motor integration, Student had the ability to copy from a close model and from the board, which is why Passons found Student's abilities in the classroom to be higher for integration of the skill than what was reflected in testing.

The Sensory Processing Measure provided norm-referenced standard scores for two higher-level integrative functions, praxis/motor planning, and social participation, and the five sensory systems of visual, auditory, tactile, proprioceptive, and vestibular functioning. Passons used this measure because Parent had previously indicated during a prior assessment that there were concerns in the home and Passons wanted to take another look at these areas to determine if Student was having issues in the classroom. Passons scored the forms based on the recommendations of the test publisher. On the school form, Student scored in the Typical range in all areas. On the home form in the areas of vision and hearing, Student scored in the Typical range. In the areas of touch, body awareness, and balance and motion, Student's scores were elevated to the Some Problems range. Parent's scores in planning and ideas were also in the Some Problems range, and Parent's rating of Student's Social Participation was in the range of Definite Dysfunction.

Passons compared the School and Home Form responses. Clinical observations were a way to further look at the domains being examined to determine the existence or non-existence of an issue at school. During Passons's observations of Student during physical education, Student participated with peers during stretching activities, following directions. She participated in an obstacle course hopping over items, walking across a balance beam, and going through hoops and across steppingstones. She did multiple repetitions of the obstacle course. Passons observed that Student was able to imitate body postures to follow stretches. She maintained her body in specific positions and

showed awareness of her body in space. Although Parent had reported balance and coordination issues, Passons observed that Student had good timing and sequencing of motor movements without losing her balance.

Student demonstrated appropriate bilateral coordination with cutting skills and stringing blocks during testing. She was able to sit in a chair and retrieve an item from the floor without loss of balance, and she was able to catch a ball at midline. Passons also observed adequate tactile/proprioceptive based skill of sequential finger touching, and adequate or good vestibular-proprioceptive-based skills of crossing midline, balance activities during physical education, and bilateral coordination fine motor skills when using scissors and stringing beads. Student demonstrated good simple in-hand manipulation skills for shifting and turning pencil end-to-end and a right-handed functional grasp on a pencil.

Student's performance with sensory motor skills that required integration with the proprioceptive system, also called body awareness, combined with input from tactile and vestibular systems did not show deficits. During classroom observations, Student completed workbook pages. She did rush through with writing but slowed down and corrected work when prompted. She had access to TheraPutty and sat on her disco sit and did not demonstrate restlessness or fidgeting behavior. She transitioned between activities and gathered her materials when prompted. She was provided with adaptive writing paper to promote letter sizing and alignment when copying from a model.

Passons did not observe Student having any difficulties with sensory systems during her clinical observations. Although Parent reported issues, they were not significant issues in the school setting. Based on Passon's observations, sensory processing issues were not impacting Student's day in the school setting. Passons

concluded Student qualified for occupational therapy and accommodations such as adaptive paper for letter size and precision, as well as increased time to complete writing and manual dexterity tasks, and access to accommodative sensory tools of a disco sit and TheraPutty.

Passons participated in the development of Student's December 2, 2021 IEP. She prepared the fine motor development present levels of performance, which included a summary of information resulting from her April 2021 evaluation and a December 2021 update of Student's present levels of performance.

At hearing, Passons explained that she did not agree with lay advocate Peters' assertion made at the December 2, 2021 IEP team meeting that Student required two hours of occupational therapy services per week. Student was making good progress with occupational therapy at 30 minutes per week of individual services and 10 minutes of consulting once a month, which Passons had been implementing from the August 4, 2020 IEP. Passons opined that the same amount of occupational therapy services offered by Etiwanda in the December 2, 2021 IEP was appropriate because that was what Student required based on her level of progress. The new occupational therapy-related goals could be implemented with the offered frequency and duration of service, and the consultation time was sufficient so Student's teacher could effectively implement the strategies and accommodations in the classroom. Passons's opinions were credible based on her credentials, experience, and familiarity with Student.

Student unpersuasively argues the opinions of Student's expert, occupational therapist Goodis, proved that the occupational therapy services offered in the December 2, 2021 IEP were inadequate. Goodis was a licensed occupational therapist. She was a school-based occupational therapist between 1986 and 1989, and between

2005 and 2011, but since 2014, she provided private occupational therapy services based on a medical model. She was unfamiliar with the Ecological Model of Student Performance, which Passons used as a guide through the assessment process. It was an educational model that took into account the curriculum, the educational environment, and the student's abilities to determine current levels of performance. The Guidelines for Occupational Therapy and Physical Therapy in California Public Schools published by the Department of Education indicated the Ecological Model of Student Performance was the model best practiced in the school environment. Goodis claimed to be familiar with these Guidelines, but her testimony was unconvincing. When asked how she was familiar with the Guidelines, she said, "Because we, I have to, uh um," and then laughed nervously. Goodis continued, "There's a, there's a book, that's about, that talks about the guidelines and stuff ... there's a handout thing, public y'know handout." She then claimed she looked at the Guidelines "probably a couple of years ago."

Goodis gave no definitive or clear opinion establishing the inadequacy of Etiwanda's offer of occupational therapy services in the December 2, 2021 IEP. Her testimony about the adequacy of the occupational therapy services offered was inconsistent, and otherwise unpersuasive. When asked if she knew what occupational therapy services were offered in the December 2, 2021 IEP, she claimed she did not know about that specific IEP, but believed it was 30 minutes a week of pull-out services. Notably, at one point, she testified she would not have recommended occupational therapy for Student beyond 30 minutes per week and admitted that for the one occupational therapy goal in Student's IEP, the amount of services Etiwanda offered may have been adequate. Even when asked whether 30 minutes a week would have been sufficient if she had recommended additional occupational therapy goals for Student, her testimony still failed to establish Etiwanda offered an inadequate amount of

occupational therapy services. Although Goodis surmised that 30 minutes would probably be insufficient in that scenario, she qualified her answer, opining that the 30 minutes would have been adequate if the school district had a good aide in the classroom that “could do like more one-to, y’know, not one-to-one, but more one-to-one with her to work on the added goals.” At another point, Goodis claimed she would have added an additional 15 minutes of occupational therapy to work on additional goals. However, she claimed this would have been the “ideal” situation, indicating that she was speaking both in the abstract and in generalities. Goodis’s testimony did not establish that Etiwanda failed to offer a sufficient amount of occupational therapy services in the December 2, 2021 IEP.

Student also failed to establish that a specific method of delivery for the occupational therapy services was required in this case. Again, Goodis spoke in generalities about the service method and not specifically about Student’s situation. Goodis claimed that she “liked” to deliver push-in services, rather than pull-out services, but confessed it depended on the goal and the child. She explained that she “liked” to keep the child in the classroom where printing usually occurred, and qualified her answer, “but that’s me.” She claimed that the “super-ideal situation” was one-half individual services outside of the classroom, and one half in the classroom, and that there were benefits to both. She also opined that depending on the child, the best-case scenario was push-in, but “if the child y’know is a little bit more distracted or has whatever, I like to do, let’s say it’s 30 minutes,” and that “maybe” she would do alternative weeks on a push-in and pull-out basis.

Goodis failed to demonstrate an adequate familiarity with Student or her program, and appeared biased. She admitted she was being paid by Student’s attorney for her testimony (as opposed to her time). Moreover, she was designated as an expert

to testify on Student's behalf before she had ever talked to Parent or observed Student. In fact, Goodis only conducted a 15-minute FaceTime observation of Student on May 4, 2022 in the home by videocall, the day after the hearing began. Also, Goodis only spoke to Parent on the same day for about 10 minutes. Significantly, she never observed Student in a school or academic setting. She never observed any Etiwanda program or Student's special day class or any of the general education classes Student attended. Moreover, she never spoke to Passons or anyone else from Etiwanda. Nor did she ever request to speak to anyone at Etiwanda, although she admitted she did speak to Student's attorneys and lay advocate Peters. She did not seem to have a clear understanding of or was evasive about Student's participation in virtual instruction during distance learning. She also never administered any standardized, criteria-based, or norm-referenced assessments and never prepared any reports regarding her observations or assessment of Student. When asked if she knew whether Parent shared her concerns with school staff or IEP team, she said, "I heard through the grapevine she has."

Although Goodis initially claimed she read every piece of paper sent to her by Student's counsel, she later admitted, "I did not read totally everything" and said she only "scanned" and did not spend a lot of time reviewing Student's psychoeducational report. Significantly, she was not familiar with the IEP at issue. For example, she said she was not familiar with that IEP and when asked about Etiwanda's December 2, 2021 offer to mainstream Student during science and social studies, she conceded, "I did not know that." She also never reviewed any of Student's work samples from the 2021-2022 school year, despite the evidence of Student's progress during the 2021-2022 school year.

During her testimony, Goodis criticized Etiwanda's occupational therapy assessment. However, she conceded the tools Passons used were adequate to address Student's needs. In addition, many of Goodis's comments about the assessment seemed to be expressions of her personal preference as to how she would have conducted the evaluation, rather than fatal inadequacies in the evaluation itself. She believed the tools of evaluation Passons used were appropriate to assess Student's needs, but she would have added one for visual perception. However, she also conceded that as part of Etiwanda's April 2021 psychoeducational assessment, Student was administered a test for visual perception. Notably, Goodis admitted she had "no idea" if Student's scores in visual perception were commensurate with her overall abilities level. Goodis's responses during this line of questioning were otherwise defensive and appeared evasive; in fact, at one point, she said she might be confusing Student's results with another child. When asked if it was important to know what Student's overall abilities were to determine if something was an area of unique need, she said that it was important for a child to have the cognitive ability to understand the directions. She did not know if Student understood the directions on this test.

Goodis's own testimony undermined the value of her limited observation and opinions precisely because her observation was so brief, and she did not assess Student. When speaking about whether Student required more testing, Goodis emphasized that she was only with Student for 15 minutes. During her testimony, she pointed out that she did not conduct the testing, so there were things she did not know. When asked what tests she would have given to clarify certain of Student's skills, Goodis pointed to no test, but underscored the importance of doing observations. She basically admitted

Passons was in a better position to understand Student's needs specifically because Passons had conducted the evaluation and because assessors do not necessarily put everything in their reports. Goodis admitted Passons might have a lot more information than Goodis had from just reading Passons's report.

Goodis's opinions were undermined by her own testimony in other ways. She explained that the medical model of occupational therapy differed from a school-based model in that the medical model addresses a child's skills and abilities whereas in school, the concern was with school skills like writing, reading, and math. However, she was confused as to whether she was testifying in a special education due process hearing or in a fair hearing, such as for services from a regional center under the Lanterman Act, where the medical model might be at issue. In fact, some of Goodis's testimony reflected that confusion as she appeared to be giving testimony based more on a medical model rather than on a school-based model. She said she had never testified in any special education due process hearings as a school-based occupational therapist, although she admitted she had testified for Student's attorneys, but she did not know if it was on one or two occasions. As discussed in Issue 2B, much of Goodis's testimony was confusing and contradictory, which adversely affected her credibility.

In weighing the evidence, Passons's opinions were more credible than Goodis's opinions. The evidence established Goodis had no adequate familiarity with Student or Student's needs upon which to base an opinion about eligibility for special education and related services, or the type, amount, or frequency of school-based occupational therapy as a related service. There was also no evidence Peters had any expertise or

other credentials that supported his request for two hours per week of occupational therapy services for Student at the December 2, 2021 IEP team meeting. Etiwanda did not deny Student a FAPE in the December 2, 2021 IEP by failing to offer sufficient occupational therapy services.

ISSUE 2F: DID ETIWANDA DENY STUDENT A FAPE IN THE DECEMBER 2, 2021 IEP BY FAILING TO OFFER STUDENT PLACEMENT WITH NEURO-TYPICALLY DEVELOPING PEERS TO THE MAXIMUM EXTENT POSSIBLE FOR THE 2021-2022 SCHOOL YEAR AND EXTENDED SCHOOL YEAR?

On the last day of hearing, Student argued she would greatly benefit from increased time with her general education peers, relying on Goodis's testimony, and that Student should have been placed in general education 100 percent of her school day. Student contended she could be successful in general education if provided an aide. Student claimed when children are "constantly" in a special day class, they are not provided the right kind of modeling and encouragement from peers or instruction from a teacher that enables progress. Inexplicably, Student also argued it was not necessary for Student to be mainstreamed in English language arts and math because there were other ways to increase Student's time in general education, such as in social studies and science or in non-academic settings and that Etiwanda did not offer general education in those subjects. In her closing brief, Student argues that she would make more progress and thrive if she were in a general education setting for a larger portion of her day.

Etiwanda contends Student did not meet her burden of proof. Etiwanda argues it offered placement with typically developing peers to the maximum extent appropriate for Student. Etiwanda contends it only recommended Student be in a mild/moderate special day class placement for math, English language arts, and Universal Access, and the remainder of Student's day was in general education with aide support during mainstreaming where she could socially benefit from exposure to typical peers.

Etiwanda contends Student required intensive intervention in the areas of reading, writing and math that required the expertise of a credentialed special education teacher in a highly structured classroom with a small student-to-staff ratio and instructional strategies designed to assist students with similar disabilities. Etiwanda claims there was no testimony or evidence that Student's unique needs in the areas of reading and math could be appropriately addressed in the general education setting with a one-to-one aide or that Student could make appropriate progress or access and benefit from the general education setting in those subjects. Etiwanda argues that it offered placement in the least restrictive environment and Student's claim that she required a more intensive program is inconsistent with her position that Student required general education placement 100 percent of the time.

A school district must deliver each child's FAPE in the least restrictive educational environment appropriate to the needs of the child. (20 U.S.C. § 1412(a)(5)(A); 34 C.F.R. § 300.114; Ed. Code, § 56342, subd. (b).) A special education student must be educated with non-disabled peers to the maximum extent appropriate and may be removed from the regular education environment only when education of the child in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily. (20 U.S.C. § 1412(a)(5)(A); 34 C.F.R. § 300.114(a)(2).)

In determining the educational placement of a child with a disability, a school district must ensure that:

- 1) the placement decision is made by a group of persons, including the parents, and other persons knowledgeable about the child, the meaning of the evaluation data, and the placement options, and takes into account the requirement that children be educated in the least restrictive environment;
- 2) placement is determined annually, is based on the child's IEP and is as close as possible to the child's home;
- 3) unless the IEP specifies otherwise, the child attends the school that he or she would if non-disabled;
- 4) in selecting the least restrictive environment, consideration is given to any potential harmful effect on the child or on the quality of services that he or she needs; and
- 5) a child with a disability is not removed from education in age-appropriate regular classrooms solely because of needed modifications in the general education curriculum. (34 C.F.R. § 300.116.)

To determine whether a special education student could be satisfactorily educated in a regular education environment, the Ninth Circuit Court of Appeals has balanced the following factors:

- 1) "the educational benefits of placement full-time in a regular class";
- 2) the non-academic benefits of such placement";
- 3) "the effect [the student] had on the teacher and children in the regular class"; and
- 4) "the costs of mainstreaming [the student]."

(*Sacramento City Unified School Dist., Board of Education. v. Rachel H.* (9th Cir. 1994) 14 F.3d 1398, 1404 (*Rachel H.*) [adopting factors identified in *Daniel R.R. v. State Board of Education.* (5th Cir. 1989) 874 F.2d 1036, 1048-1050] (*Daniel R.R.*); see also *Clyde K. v. Puyallup School Dist. No. 3* (9th Cir. 1994) 35 F.3d 1396, 1401-1402 [applying *Rachel H.* factors to determine that self-contained placement outside of a general education environment was the least restrictive environment for an aggressive and disruptive student with attention deficit hyperactivity disorder and Tourette's syndrome].) Whether education in the regular classroom, with supplemental aids and services, can be achieved satisfactorily is an individualized, fact-specific inquiry. (*Daniel R.R., supra*, 874 F.2d at p. 1048.)

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

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

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

Under *Rachel H.*, the analysis of whether an offer of placement is appropriate begins with evaluating whether or not a general education setting is appropriate for Student. Here, the weight of evidence established that Student could not be appropriately educated in the general education environment for math, English language arts, and Universal Access. The evidence established placing Student in a full-time general education setting was inappropriate because the educational benefits would have been very low due to Student's limited abilities, and the type of support and accommodations Student required in the classroom for Student to satisfactorily learn.

SPECIAL EDUCATION PROGRAM SPECIALIST STANLEY'S OPINION

Special education program specialist Stanley participated in the development of Student's December 2, 2021 IEP. She did not agree with Parent's request for a general education placement 100 percent of the time, because Student needed an intensive reading and math program with a specialist to work on those specific areas of need and to continue to make the gains Etiwanda saw Student achieve in Garibay's classroom.

Stanley persuasively testified Student required specialized academic instruction in a special day class for literacy and math. She explained that the amount of time a student was in a general education setting included a determination of a student's needs and the level of support they required. Some children, like Student, required more intensive supports that were within a designated program and with a smaller student-to-staff ratio with specialists who can accommodate and modify the lessons based on the student's level of need. Student's ability level was most aligned to those Core Content Connectors, which focused on the foundational skills for her to progress

to higher level content areas. Stanley agreed with the recommendation of the IEP team for focusing on the Core Content Connectors presenting Student with a modified curriculum in academic areas.

While educators can sometimes make accommodations to a certain extent in the general education classroom, Stanley did not believe that was appropriate in Student's case. In the general education classroom, the students were working on common core standards. In contrast, Student required a modified curriculum in the core academic areas based on the results of Etiwanda's assessments, along with extensive supports to maintain and grow her skills. Stanley explained Student required an intensive program aligned to the Core Contents Connectors. It would have been very difficult to provide Student with the level of intensive service with a specialist she required while in a general education classroom working on the common core standards where the skill level in the classroom among her peers was completely different.

Stanley provided examples. Student was working on foundational skills, including working on her ability to spell whole words and take those words and put them into complete sentences. In contrast, students at the fifth-grade level were

- comparing and contrasting literature pieces,
- looking at the author's purpose and theme,
- writing narratives and responses to literature, and opinion, informational and argumentative writing pieces.

Fifth-grade general education math students were also working on decimals, addition, subtraction, multiplication, and division past 1000 to the one-millionth place.

Stanley believed Etiwanda's offer for mainstreaming Student was the maximum extent appropriate for her because Student required the intensive support of a special day class to address her deficits in literacy and math. Student required systematic teaching using intervention programs to make appropriate progress toward her academic goals in reading, writing, and math. In Stanley's opinion, those interventions were being provided to her in the special day class including the Language! Live core replacement program, which was helping Student improve her reading. Stanley supported her opinions as to the appropriateness of the program by pointing to Student's progress, including Student's iReady assessment results and performance in Garibay's classroom.

Stanley was convincing when she explained why Etiwanda offered mainstreaming Student in social studies and science classes. Social studies and science were content-based subjects, as opposed to skill-based subjects like math and English language arts. Although social studies and science required language skills, they were focused more on testing knowledge, not skills. Student had a relative strength in oral comprehension, and in science and social studies classes, she could listen to the stories/content and dictate her answers to writing as a form of accommodation for written assignments, quizzes, or tests. Student had alternate ways of displaying her knowledge of content in science and social studies. That was not possible where, for example, the actual skill being taught was reading.

Stanley did not think Student could increase her time in general education during fifth grade beyond the 32 percent offered, even with a one-to-one aide. Stanley explained Student required extensive supports in both literacy and math with a specialist to provide the level of support she required, which she would not get in the general education setting with a one-to-one aide who was not a specialist, meaning a

credentialed special education teacher, an education specialist. In her opinion, Student's academic goals could not be implemented in the general education English language arts, math, and Universal Access with the support of a one-to-one instructional assistant. Student required extensive modifications and was working on the Core Content Connectors modified standards. Even with the support of an aide in the general education classroom, Student would require a specialist working with her to ensure she received any modifications aligned to modified standards of the common core standards.

In Stanley's view, the program Etiwanda offered appropriately provided Student with the intensive instruction she required where she could work on her deficits in reading, writing, and math in the special day classroom, but also gave her access to general education peers through social studies and science content. Stanley also agreed with the IEP team's recommendation for mainstreaming in middle school for all courses besides English language arts, math, and Universal Access, because the placement offer for middle school provided for the same intensified support in the special day class for literacy and math and was consistent with the program in her current setting where she had achieved success.

Stanley's opinions were credible based on her credentials, experience with reading programs and as both a fifth-grade general education teacher and special day class teacher, and because she was familiar with Student. She conducted the 2021 academic achievement assessment, observed Student in the special day classroom, collaborated with Garibay, and attended all of the IEP team meetings held to develop the December 2, 2021 IEP during which the triennial assessments were reviewed, Student's present levels of performance and progress were discussed, and input from the IEP team was obtained. Although Stanley never observed Student in a general

education academic setting, that setting was unavailable during the COVID-19 hybrid period when Stanley conducted her assessment. Student also failed to prove this would have made any difference, given Stanley's experience as a fifth-grade general education teacher, the other evidence adequately establishing her familiarity with Student, and the corroborating opinions of Etiwanda's other witnesses.

SPECIAL EDUCATION TEACHER GARIBAY'S OPINION

Special education teacher Garibay corroborated Stanley's opinions. In Garibay's view, the December 2, 2021 IEP offered the maximum amount of mainstreaming appropriate for Student.

Student was on a modified curriculum, which Garibay thought was "absolutely" appropriate because of Student's intellectual disability and level of skill retention. On the alternative curriculum, Garibay was teaching the Core Content Connectors, which were just the surface of the common core standards to enable Student to obtain a basic understanding of the skill being taught. Student needed the program modifications to access and benefit from her educational program, and these program modifications through the Core Content Connectors provided Student with the intensive support she required.

At hearing, Garibay, a former resource specialist who also co-taught sixth-grade general education, persuasively explained that Student's needs in literacy and math could not be met in a general education setting, even with resource specialist support. Ordinarily, in a general education class, students were able to progress and meet academic standards at the pace and with the modalities the teacher supplied, without needing differentiation of the majority of instruction. Typically, resource specialist

support was a specialized academic instructor who went into the general education classroom and provided support with the core curriculum with the same pacing and alignment to state standards.

However, Garibay explained Student had more significant instructional needs and required intensive supports that were best addressed in the special day classroom, rather than the general education setting. Student, who had an intellectual disability, had difficulty retaining information. Garibay explained Student required concrete and repetitious instruction. She needed implicit, explicit, and intensive instruction. That type and amount of instruction, the modality of small group/individualized attention, and the tools and strategies Student needed were provided in the special day class setting, rather than the general education setting with resource specialist support. According to Garibay, the language arts program in general education was very different than in the specialized academic instruction setting. In the special day class, students were not just listening to the curriculum, but, as with Student, being taught to read, decode, and encode. Comprehension was very different from working on foundational reading skills. The program alignment was very different for a fifth-grade student working on phonetics, decoding, and encoding as targeted skills to increase their ability to read, as compared to a general education fifth grader.

In the special day class, Student had those intensified supports, including the core replacement Language! Live reading program, which provided Student with instruction on literacy foundation while also integrating text to accelerate Student's proficiency. Garibay's classroom was highly structured and provided Student with many opportunities for more individualized support to work on targeted skills as discussed in Issues 2A and 2E above. The supports and accommodations were intensified for

Student based on her level of need, depending on the particular target skill. The accommodations and supports that worked best for Student were the designated intensive supports in the special day classroom that were designed to assist Student in understanding, such as breaking down a math or literacy lesson and presenting it in Google slides, with

- videos,
- visuals,
- color-coded steps,
- multimedia supports, and
- anchor charts.

Consistency with instruction and being very explicit and repetitive with instruction helped Student retain skills during the 2021-2022 school year and advanced her forward academically.

Garibay opined Student's academic goals could not be implemented in a general education classroom with a one-to one aide because Student needed more individualized intensive support. To make appropriate growth, Student required intensive instruction, including the tools and strategies available in the special day class. Student needed extensive supports in different areas to gain reading skills, and to encode and decode. Student's proposed goals were aligned with supports available in the special day class. Garibay testified all of the academic reading goals could be implemented in the special day classroom.

The special day program provided Student with the accommodations for intensified instruction. According to Garibay, not all the accommodations offered were typically available in a general education setting for math and literacy. Some of the

accommodations proposed were very intensive, differentiated instruction tools that are type of support provided in the special day classroom rather than in a general education classroom, including color-coded steps to help Student understand a sequential math process because of difficulties anchoring or retaining the information.

Garibay described Student's progress since August 2021 in the special day class and attributed it to the type of more intensive instruction and supports delivered in the special day class program every day. She testified Student was making progress using the Language! Live program and was continuing to make progress in math. According to Garibay, whose testimony was not contradicted, impeached, or otherwise persuasively challenged, Student had grown tremendously since the beginning of the 2021-2022 school year in both math and reading in the domains that Garibay had worked with Student during Universal Access time for math and reading, and after receiving intensified instruction to work on her IEP goals. Garibay emphasized that this type of intensified instruction was not available in a general education setting because Student's needs and the type of intensive intervention supports she required could not be provided due to the pace of a general education classroom. Garibay believed Student was able to make the type of growth she demonstrated because she was in a program that honed-in on those domains and penetrated them all year.

Garibay agreed with Etiwanda's December 2, 2021 IEP offer of placement and services for remainder of the 2021-2022 school year and for middle school, because of Student's needs, and the intervention supports, accommodations, and program modifications she required. In Garibay's opinion, the least restrictive environment for Student was what Etiwanda offered, citing to the growth Student had achieved since August 2021 in her classroom, which, to Garibay, proved the intensive program was working for Student. Etiwanda's offer of special education and related services was

appropriate because it continued to provide Student with specialized instruction in math and literacy with the core replacement program of Language! Live, which would roll over to middle school. According to Garibay, Student needed this reading program, benefitted from it, and responded well to it. In math, Student would be able to take what she learned for the Core Content Connectors for the next level. Garibay believed the specialized support and interventions for the amount of time and the subjects offered in the December 2, 2021 IEP were appropriate. In middle school, Student would get more time in general education in the additional class periods for electives and in daily physical education. Garibay also agreed with the offer for the extended school year because it would enable Student to retain skills, stay with the routine of what was expected, and give her the structure of school. In Garibay's view, Student loved school and it was important that she not have regression.

Garibay's opinions were persuasive based on her credentials, experience, including her experience providing resource specialist instruction while co-teaching a sixth-grade general education class, teaching in both general and special education classes, and because she was familiar with Student. She was Student's special day class teacher for English language arts, math, and Universal Access for the 2021-2022 school year and worked with her on a day-to-day basis in the classroom. She also attended all of the IEP team meetings held to develop the December 2, 2021 IEP at which the triennial assessments were reviewed, Student's present levels of performance and progress was discussed, and input from the IEP team was obtained. Garibay's testimony was also persuasive because her detailed opinions were corroborated by other witnesses.

SCHOOL PSYCHOLOGIST TUNGATE'S OPINION

Etiwanda's school psychologist corroborated Stanley's and Garibay's opinions at hearing. It was Tungate's opinion that the mild/moderate special day class for most of the instructional day was the least restrictive environment for Student.

Student continued to demonstrate very significant deficits with her processing abilities and that was commensurate with her academic achievement assessments. There were no areas of relative strength in the processing areas. As far as Student's overall profile as a learner, Tungate explained Student required a lot of support with her academics. She needed lots of opportunities, extra time, and extra practice to learn information. Tungate believed Student was able to make progress with appropriate supports, services, and strategies. Tungate clarified that Student's rate of progress in an educational setting would be slow progress because Student had deficits in all of her processing areas. Student's rate of progress was significantly impacted by these deficits so her rate of learning was slower than what would be expected of someone her age.

In Tungate's opinion, Student was getting those necessary supports, services, and strategies in the special day class program as evidenced by the progress Student made in Garibay's classroom during the 2021-2022 school year. In the educational placement in effect at the time of hearing, Student had an intensive reading program within her classroom and was working on her deficit areas to improve her reading, and Garibay was reporting progress. Student was getting the supports, strategies, and intensive instruction she required to make educational progress.

Tungate explained Student's needs could not be met with an increased amount of instructional time in the general education setting because Student required the

specialized academic instruction that was being provided in the special day class program to work on reading, writing, and math. These core subjects were best addressed in the special day classroom. Student required instructional strategies and materials with the primary focus on Core Content Connectors because she had very significant needs in the areas of reading, writing and math. Student was not performing near grade level, so she needed those Core Content Connectors to focus on her educational program. Although the Core Content Connectors were connected to the State Common Core Standards, their modification provided a lot of supports for Student to make progress academically. Tungate also persuasively explained Student's program could not be intensified if she were in general education for 100 percent of the school day, because the level of intensity typical in a fifth-grade classroom would have been less than Student was receiving in her current program. Tungate was not aware of any greater interventions than Student was already receiving that could address Student's academic skills.

Nor did Tungate believe Student's needs could be met with more time in general education with the assistance of a one-to-one aide. A one-to-one aide did not provide the instruction, so Student would not receive the specialized instruction she would receive in the special day class. An aide helped and supported. It was Tungate's view that Student's academic goals and objectives could not be appropriately implemented for her in a general education literacy or math class with the support of a one-to-one aide because the instructional support and strategy Student required was very intensive and were not what was provided within a general education classroom. Although Tungate thought Student would have been behaviorally able to handle a general education class with a one-to-one aide, she believed Student would struggle academically.

Tungate agreed with Etiwanda's December 2, 2021 IEP offer for specialized academic instruction in the mild/moderate special day class for math, English language arts, and Universal Access. She believed it was the least restrictive environment for Student to receive the supports and structured instruction she needed for literacy and math. She also agreed with Etiwanda's offer for Student to attend general education classes for social studies, science, physical education, and any elective classes because those were areas where she could integrate with general education peers and those were not necessarily the core curriculum, so Student would be able to participate in the activities. She also agreed with the offer for the extended school year because it provided Student with the continued opportunity to receive the specialized academic instruction she required and the related services during a longer school break.

Tungate's opinions were credible based on her credentials, experience, and because she was familiar with Student. She conducted the 2021 psychoeducational assessment, observed Student in a variety of settings, attended all of the IEP team meetings held to develop the December 2, 2021 IEP during which the triennial assessments were reviewed, Student's present levels of performance and progress was discussed, and input from the IEP team was obtained. Tungate's testimony was also persuasive because her thoughtful opinions were corroborated by other witnesses.

INSTRUCTIONAL AIDE ROXANNE AMAYA

The opinions of Stanley, Garibay, and Tungate that Etiwanda mainstreamed Student to the maximum extent appropriate was corroborated by other evidence.

Roxanne Amaya, an Etiwanda instructional aide at Golden Elementary for almost nine years, knew Student since first grade. Amaya was one of the instructional aides in

Student's special day classroom during the 2020-2021 and 2021-2022 school years. Her job duties included implementation of IEP goals and otherwise assisting students and teachers. Amaya worked with Student, rotating with the other adult support.

Amaya described Student's progress during the 2021-2022 school year as "great" and said she had "grown so much." Student could read small sentences. Her drawing had improved. She could do the work by herself. She asked for help if she did not understand a word. She did lessons on-line by herself. She led the group sometimes. She was very good at comprehending. She loved to listen to stories and understood the lessons being taught. Amaya explained Student was proud of herself when she completed work and wanted Amaya to see the work she completed on her own. She did not need directions repeated multiple times but repeated instructions to others. Student used the tools in the classroom that she was accustomed to using that could assist her, including math charts, but Garibay also had her own tools she used to assist students. Student had no behaviors that interfered with her access to the curriculum. She just settled down and remained on task and completed her work.

Amaya observed that Student's program gave her opportunities to interact with the general education students during recess, lunch, and physical education. Student interacted with the general student body the same way as she did with everyone, and she socialized the same way with special education and general education students. She loved to talk to everyone. She was comfortable, friendly, kind, and took turns.

Amaya did not believe Student would do well in the general education setting for her academics with an aide to assist her. Amaya had been a one-to-one aide in a general education class. Based on her experience, Amaya thought the faster pace of the general education classroom would have been inappropriate for Student. In contrast,

the special day class worked at a slower pace, and also students worked at their own pace. Amaya opined that if Student were placed in a general education classroom for academics, she would fall further behind.

MIDDLE SCHOOL EDUCATIONAL SPECIALIST AND ASSISTANT PRINCIPAL TYLER KURAMATA

Tyler Kuramata corroborated Etiwanda's position on Issue 2F. Kuramata was an educational specialist at Etiwanda's Day Creek Intermediate School since 2013 and its acting assistant principal between October 2021 and March 2022. He held a master's degree in education as well as a mild-moderate special education teaching credential and a preliminary administrative services credential. His duties had included, among other things, managing a caseload of students with disabilities, collaborating with general education teachers, administration, and parents, as well as supporting students in the general education classrooms, writing IEPs and IEP goals, creating, presenting, and executing multiple lesson plans, and overseeing instructional aides. As an acting assistant principal, he supervised the special day classes at the middle school level.

Although he was unfamiliar with Student, he attended all of the IEP team meetings held to develop the December 2, 2021 IEP, at which the triennial assessments were reviewed, Student's present levels of performance and progress was discussed, and input from the IEP team was obtained. He was present at the IEP team meetings when Etiwanda's proposed offer of special education and related services was discussed. At hearing, he confirmed nothing in the offer seemed inappropriate. He also confirmed that in most cases, a one-to-one aide might be provided in a middle school general education core class for math or English language arts to address behavior, rather than ability.

The offer for middle school was an equivalent program to what Student was receiving in fifth grade, considering the level of specialized academic instruction he understood Student required. Universal Access at the middle school level was part of specialized academic instructional minutes. During this period, Student would work with the special day class math teacher and the special day class English language arts teacher, two days each, to extend curriculum, work on immediate skills, and where she would obtain support for her general education science and social studies classes.

PRINCIPAL JEFF SIPOS

Jeff Sipos, the principal at Golden Elementary since 2018, corroborated Etiwanda's position on Issue 2F. Prior to becoming principal, Sipos was the Director of Pupil Services between 2014 and 2018, and between 1998 and 2014 he worked as either an assistant principal or as a principal for Etiwanda at the elementary and intermediate school levels. He was also a general education middle school science teacher between 1994 and 1997. Sipos held a master's degree in educational administration, an administrative services credential, and a teaching credential. His duties as principal included the general overall operation and functions at Golden Elementary, which had a student body of approximately 900 students, including 125 special needs students.

Sipos interacted with Student around two to three times per week, during arrivals, on hard courts, at lunch, and he walked through her classroom at least once a week. He described her at hearing as delightful, easy to get along with, and a great student on campus. She was warm, caring, and loved to tell people what was going on and give them a hug. She also loved to tell people what she was wearing. She enjoyed writing her name out and wrote her name out for Sipos, typically her whole name, many times either when she stopped by his office or in the classroom. He frequently saw her

interacting with peers, which interactions he described as friendly, warm, and caring. Occasionally, he had difficulty understanding Student because she spoke too quickly or slurred a word.

Sipos attended the December 2, 2021 and January 6, 2022 IEP team meetings held to develop Student's December 2, 2021 IEP. During these meetings he heard the reports about Student's academic present levels of performance, the assessments, and information regarding proposed goals and objectives for her. At hearing, he testified Etiwanda's offer for specialized academic instruction was appropriate based on Student's abilities and needs and where she could succeed. Sipos did not believe Student could make appropriate progress toward her goals and objectives in general education English language arts or in math even if she had a one-to-one aide. He explained Student needed the specific support that occurred inside of a special day class including a special education teacher and instructional aides to access the curriculum and receive instruction. He was generally familiar with state standards for general education fifth grade. He explained there was a different curriculum and interventions available in the special day class setting as compared to the general education program. In his opinion, Student required the curriculum and interventions available in the special day class setting to access and benefit from her educational program based on her present levels of performance and academic needs.

STUDENT'S WITNESSES: GOODIS AND PARENT

Student relied on the testimony of Goodis, her occupational therapy expert, to support the claim Student belonged in general education 100 percent of the time. However, to the extent Goodis was attempting to render such an opinion, her opinion was given no weight. As more fully discussed in Issues 2B and 2D, Goodis was not a

credible witness. Among other things, she had never assessed Student, never thoroughly reviewed her records, never observed her in an academic setting, and otherwise was not sufficiently familiar with Student to render an informed opinion as to whether Student was being mainstreamed to the maximum extent appropriate.

Parent's testimony was also unconvincing on this issue. On the one hand, Parent felt Student needed more time in general education so she could be with her typical peers to get her more motivated. Parent felt Student would "do good" with typical peers if Etiwanda would just give Student a chance to try something different.

Yet, in contradiction to this position, Parent also admitted Student needed a lot of supports because she had not advanced and had not grown. Parent testified she was concerned with Student's reading, writing, and speech. Parent believed Student's main challenges were in reading, some speech and writing, however, reading was Parent's primary concern. Parent believed Student needed a stronger reading program because she had been at the same level for years and Student was now going into middle school. Parent said Student read very little and had to sound out simple words. She could read but required prompting. According to Parent, Student could not sound out more than a one-syllable word. Parent claimed Student got frustrated with the reading and the writing part of her schoolwork and that Student was at a kindergarten level in writing. Student was sometimes able to write her name independently. Sometimes she left off a letter or often wrote a letter backwards. According to Parent, Student struggled with work completion, and sometimes with paying attention and memory. Parent reported Student could not add double digit numbers but could do some single digit addition, and sometimes needed help with subtraction. Student had her own cell phone but did not know what letters to push.

Parent's admissions and the contradiction in her position undermined the validity of her claim that Etiwanda should have offered Student more time in general education.

ETIWANDA OFFERED PLACEMENT WITH NEURO-TYPICALLY DEVELOPING PEERS TO THE MAXIMUM EXTENT APPROPRIATE

Student failed to establish there would be any academic benefit in placing Student full-time in a regular class at the time of the December 2, 2021 IEP. Moreover, any non-academic benefits of such placement were overwhelmingly outweighed by the likely detriment to Student if she were placed in general education full-time. The only evidence Student might have an effect on the teacher and children in the regular class was speech-language pathologist Rodriguez's testimony that modeling of sounds and language and verbalizing separate instruction to Student and Student's responses to that instruction would have been disruptive. Neither party presented evidence on the costs of mainstreaming Student 100 percent of the time.

Balancing the *Rachel H.* factors, the preponderance of evidence established the December 2, 2021 IEP team properly concluded specialized academic instruction in the special day classroom for English language arts, math, and Universal Access, rather than in the general education setting, was reasonably calculated to enable Student to make progress appropriate in light of her particular circumstances. As discussed above and as further addressed in Issue 2G, the weight of evidence failed to establish that Student could be mainstreamed in general education with resource support or an aide for the periods of the day these core academic subjects were taught. The evidence demonstrated that providing Student's education in the regular classroom beyond what Etiwanda offered, even with supplemental aids and services, could not be achieved

satisfactorily. Student was not removed from education in age-appropriate regular classrooms solely because of needed modifications in the general education curriculum.

Etiwanda's witnesses, including Stanley, Garibay, Tungate, and Amaya, among others, credibly testified as to the reasons why the special education classroom, with its intensive supports, provided the type of placement appropriate for Student in light of Student's unique needs. They were more credible than Parent and Goodis regarding Issue 2F. Other evidence corroborated that the special day class was an appropriate offer of placement for intensive and highly individualized instruction and support in math and literacy. In the special day class, Student was making progress both academically, as discussed in Issue 2A and 2E, and behaviorally, as discussed in Issue 2H. She was on-task most of the time and easily redirected. She enjoyed learning and was an active participant in the classroom.

The information obtained during the triennial assessments, the iReady assessments, Student's goal progress, and her progress in Garibay's special day classroom, along with other information from the IEP team, indicated Student required differentiated, intensive instruction from a credentialed special education teacher for English language arts, math, and Universal Access to improve her ability to read, write, and do math. The special day classroom was a language-rich multisensory environment and addressed Student's needs to work on foundational skills in literacy and math in smaller groups with its low student-to-teacher ratio, as compared to the higher student-to-adult ratio in the general education classes. For example, Golden Elementary fifth-grade general education teacher Vicky Johnson testified that she had 29 students in her class for the 2021-2022 school year. The special day class proposed by Etiwanda had behavior management systems in place, including positive reinforcement methodologies, classroom staff using positive behavior techniques, and used strategies

similar to the strategies that were used successfully during Etiwanda's assessment process. The middle school provided an equivalent program insofar as the level of specialized academic instruction Student required at the time the December 2, 2021 IEP was developed. Based on her ability level, Student required program modifications that were connected to the core content. The special day class program Etiwanda offered Student was designed so Student was presented with modified curriculum in the core academic areas.

Etiwanda's offer of special education and related services provided opportunities for social interaction with the general education students. With the exception of English language arts, math, and Universal Access, Student was to be mainstreamed for the rest of the school day. She would have access to and opportunities to socialize with general education peers in social studies, math, physical education, library, lunch, recess, and other non-academic time, as well as more opportunities to socialize with neuro-typical peers in the additional elective period during middle school. Etiwanda offered placement to the maximum extent appropriate because it provided Student with both access to general education peers and allowed her to succeed and build confidence to succeed in an educational setting through the special day class component. As far as the extended school year, all the instruction and services offered during that time was for students with IEPs so there was no opportunity for mainstreaming during that time. In any event, the evidence established Etiwanda's offer for the extended school year was appropriate to address Student's possible regression during the extended break from regular classes.

Etiwanda considered the various services options, including general education, general education with specialized academic instruction in the general education classroom, general education with specialized academic instruction in a separate class,

and special education specialized academic instruction in a special day class setting, speech and language therapy, occupational therapy, and physical therapy. The district members of the IEP team determined that the benefits of attending a mild/moderate program on a comprehensive campus with mainstreaming opportunities in a highly structured classroom with a small student-staff ratio and with instructional strategies designed to assist students with similar disabilities and linked to grade-level California Common Core State Standards and Next Generation Science Standards outweighed the benefits of participating in an inclusive program at the time of the IEP. During the February 2, 2022 IEP team meeting, in response to Parent's request for Student to be in general education 100 percent of the time, Etiwanda explained that Student would be in general education for some parts of the day, but the district members of the IEP team felt specialized academic instruction, specifically, for math, English language arts, and Universal Access, was necessary for Student to meet her goals.

Etiwanda did not deny Student a FAPE in the December 2, 2021 IEP by failing to offer Student placement with neuro-typically developing peers to the maximum extent possible for the 2021-2022 school year and extended school year.

ISSUE 2G: DID ETIWANDA DENY STUDENT A FAPE IN THE DECEMBER 2, 2021 IEP BY FAILING TO OFFER STUDENT A ONE-TO-ONE AIDE?

Student's contentions on Issue 2G were moving targets. On the first day of hearing, Student contended Etiwanda should have offered Student both a one-to-one academic aide and a one-to-one behavior aide. On the last day of hearing, Student's counsel stated that Student was withdrawing the claim that Student required a one-to-one behavior aide because Student did not require a behavior aide. Student's counsel also stated Student's current position was that a one-to-one academic aide was

only necessary to accompany her while attending general education classes. In the closing brief, Student now argues that Student should have a temporary one-to-one aide for her transition to middle school.

Etiwanda contends Student did not meet her burden of proof on this issue. Etiwanda argues that there was no evidence Student required a one-to-one aide at any time. It claims the aide support offered during mainstreaming time in the December 2, 2021 IEP as a program accommodation appropriately supported Student's access to the general education setting.

At the outset of the December 2, 2021 IEP team meeting, lay advocate Peters erroneously claimed Student had a one-to-one aide. He said he wanted Student to "continue" to have a one-to-one behavior aide, along with an academic aide. In fact, Student did not have a one-to-one aide of any type at that time.

As addressed in Issue 2H below, Student had no behavior issues that required the support of a one-to-one behavior aide, in any setting, at the time of the December 2, 2021 IEP.

Student also failed to prove she required a one-to-one instructional aide in the special day class. Significantly, Student's special day class already had at least three aides in the classroom along with the credentialed special education teacher for seven or eight students. As discussed in Issues 2A and 2E, above, Student was making progress in the special day classroom with the level of adult support provided in Garibay's classroom. Student was already receiving individualized support just based on the structure and pace of the classroom. Student presented no persuasive evidence she required a one-to-one aide in the special day classroom beyond the support already available in the special day class program.

To the extent Student asserts Etiwanda should have offered a one-to-one aide in the general education setting, Student failed to meet her burden of proof. The December 2, 2021 IEP offered instructional aide support during mainstreaming as a form of accommodation. For middle school, Etiwanda also offered specialized academic instruction support from a credentialed special education teacher called a resource specialist for the general education class subjects of social studies and science. As compared to elementary school, social studies and science classes in middle school were for longer periods of the day.

Student failed to produce any specific evidence that the aide support offered in the December 2, 2021 IEP was inadequate for science and social studies. As discussed in Issue 2F, social studies and science were content-based subjects unlike the skill-based subjects of literacy and math. Although social studies and science required language skills, they focused more on testing knowledge rather than foundational skills. Because Student had a relative strength in oral comprehension, Student had alternate ways of displaying her knowledge in the content-based courses of science and social studies. She could listen to the stories/content and dictate her answers as a form of accommodation. Stanley testified Student was doing well mainstreaming in social studies, science, and physical education. Although Stanley based her assertions on discussions with Student's teacher, Student never offered any evidence contradicting Stanley's statements or asserted reports despite Student's burden of proof on this issue. Student also failed to proffer any specific evidence at hearing to support her latest assertion that Student should be provided with a temporary one-to-one aide during her transition to middle school.

None of the witnesses who testified at hearing thought Student required a one-to-one aide, except Student's fourth-grade special day class teacher. However,

Borbon's testimony was not convincing on this issue. Specifically, Borbon initially stated that based on her observations of Student in August 2020, she felt Student would benefit from having one-to-one support in an in-person classroom setting. She explained that based on her interactions with Student during virtual learning in August 2020, and because Student's academics were not at grade level, having one-to-one support to differentiate the assignments, give Student the necessary accommodations, and help her access the curriculum would be beneficial. Borbon stated having this type of adult support in an in-person general education setting would also be helpful to Student.

However, Borbon also was quick to qualify her statements, which undercut any value they had. Borbon volunteered that she had not seen Student during the 2021-2022 school year, was unfamiliar with Student's present levels of performance, and therefore did not have adequate understanding of Student's needs at the time the December 2, 2021 IEP was developed. Borbon confessed her knowledge of Student was very limited because she only saw Student during distance learning. She admitted she did not have enough information about Student to render an opinion as to how Student would perform in a general education classroom with one-to-one aide. In fact, Student only attended Borbon's class during August 2020, and that was only for virtual learning, which Borbon admitted was a very different platform. The last time Borbon saw Student was August 2020, around eight months before Etiwanda conducted its 2021 triennial assessments, more than a year before the first of three IEP team meetings held to develop the December 2, 2021 IEP, and a full 15 months before Etiwanda made its offer of special education and related services at the February 9, 2022 IEP team meeting. Significantly, Borbon did not attend any of the IEP team meetings held to develop the

December 2, 2021 IEP, and it was not established at hearing that she was familiar the IEP. Borbon's testimony failed to establish Student required a general education one-to-one aide.

Student failed to prove Etiwanda denied Student a FAPE in the December 2, 2021 IEP by failing to offer a one-to-one aide.

ISSUE 2H: DID ETIWANDA DENY STUDENT A FAPE IN THE DECEMBER 2, 2021 IEP BY FAILING TO OFFER APPROPRIATE BEHAVIOR INTERVENTIONS AND BEHAVIOR GOALS FOR THE 2021-2022 SCHOOL YEAR?

On the first day of hearing, Student contended Etiwanda should have offered Student a behavior intervention plan and behavior goals to address Student's distractibility and other maladaptive behaviors found in the functional behavior analysis evaluation. On the last day of hearing, Student contended there was a lot of testimony about Student's distractibility. Student argued she could have attained her goals more quickly if she had been offered goals that addressed her distractibility and work habits. Student contended a behavior intervention plan was necessary because she had an issue with completing her work and maintaining her attention. Student argued her progress in the area of behavior should have warranted increased supports. In her written closing argument, Student reiterates the same contentions.

Etiwanda contends Student did not meet her burden of proof on this issue. It argues that Student presented no evidence that she demonstrated any significant behaviors that warranted either behavior goals or a behavior intervention plan.

Etiwanda argues its witnesses provided credible evidence Student had made significant progress in the area of behavior and that with the program accommodations offered in the December 2, 2021 IEP, Student did not require any behavioral supports.

In the case of a child whose behavior impedes his or her learning or that of others, the IEP team must consider, when appropriate, “the use of positive behavioral interventions and supports, and other strategies, to address that behavior.” (20 U.S.C. § 1414(d)(3)(B)(i); 34 C.F.R. § 300.324; Ed. Code, § 56341.1, subd. (b)(1).) An IEP that does not appropriately address behavior that impedes a child’s learning denies a student a FAPE. (*Neosho R-V School Dist. v. Clark* (8th Cir. 2003) 315 F.3d 1022, 1028-1029.)

Student did not prove Etiwanda denied Student a FAPE by failing to offer appropriate behavior interventions and behavior goals in the December 2, 2021 IEP. As part of the December 2, 2021 IEP offer of special education and related services, Etiwanda offered Student a host of accommodations to support behavior, including frontloading of behavioral expectations, first-then contingencies, visuals of expected behavior, and other classroom behavior supports such as a visual schedule, visual timers, and positive reinforcement, including positive praise, as well as sensory tools in the form of TheraPutty and a disco sit. The evidence failed to establish Student required any specific goals, services, or additional supports to address her behavior at school to access and benefit from her education.

Specifically, prior to the December 2, 2021 IEP, Etiwanda conducted a functional behavior assessment of Student in April and May 2021. Christina Teneriello, a board-certified behavior analyst since 2016 who had been employed by Etiwanda since 2015, conducted the assessment and prepared a written report dated May 25, 2021. At the time of the hearing, Teneriello was assigned to three Etiwanda elementary schools

and three Etiwanda middle schools. She held bachelor's degrees in both psychology and human development with an emphasis in child development, and a master's degree in teaching with an emphasis in applied behavior analysis. Her duties at Etiwanda included collaborating with staff on behavior support systems within the classroom, collaborating with and teaching staff how to implement behavior intervention plans to fidelity, and otherwise addressing the needs of children with behavioral needs. She also conducted functional behavior assessments, seven to ten evaluations in the year prior to her testimony, which she estimated took about two to three weeks each to complete. Between 2015 and 2020, Teneriello was also a senior consultant with a private applied behavior analysis company, during which time she conducted around 20 to 25 functional behavior assessments in the home. Prior to that, she was a registered behavior technician at an applied behavior analysis nonpublic agency, where she worked in both the school and home settings.

Teneriello was already somewhat familiar with Student prior to conducting the 2021 functional analysis assessment. She provided staff support and assistance in Student's kindergarten special day class and was responsible for training staff on implementing Student's prior behavior intervention plan and worked directly with staff pertaining to her plan. As part of her assessment, Teneriello conducted a records review that included a review of Student IEPs from 2014, 2016, 2017, 2018, and the August 4, 2020 IEP. By the time of the August 4, 2020 IEP team meeting, staff reported Student's behavior had significantly improved and she did not display elopement or aggressive behavior toward staff and peers. However, she still needed support to attend and focus, and redirection to not speak out of turn.

As part of her April/May 2021 assessment, Teneriello conducted interviews of Parent and staff, including occupational therapist Passons, Golden Elementary school

principal Sipos, and speech-language pathologist Rodriguez. Teneriello also interviewed Marilyn Olson, a speech-language pathologist who provided speech sessions to Student before March 2020. Teneriello also interviewed Danielle Pinkerton, Student's teacher during 2018-2019 and 2019-2020 school years, because Borbon, Student's special day class teacher for the 2020-2021 school year, was on maternity leave at the time of the assessment.

Parent reported to Teneriello she was concerned with Student hurting others, and attention-seeking behaviors. Parent gave an example of when Student pushed a peer off the stairs, which resulted in a broken finger, because Student wanted to be in front of another child. Parent reported Student engaged in aggressive behaviors if activities and games were not done the way Student wanted or she was jealous.

Occupational therapist Passons reported Student politely declined activities but was easily directed with choices and that Student's attention seeking behaviors had decreased compared to prior years. She also reported Student was easily redirected even when Student exhibited a "delay" in working.

Principal Sipos described Student as delightful, noting she was extremely well-behaved and participated with peers during assemblies. Sipos observed Student enjoyed social interaction and positive attention and he did not see any eloping behavior. Student engaged in minimal task avoidance, comparing Student's behavior two years earlier to her later behavior.

Speech-language pathologist Rodriguez reported Student had a short attention span and sometimes required breaks between tasks. She observed Student to be distracted with outside noises and had some difficulty staying on topic. However, Rodriguez did not feel these were problem behaviors. The main issue Rodriguez

observed was Student asked her, "Are we done?" whenever a speech lesson was "pushing her cognitive/communication borders." Rodriguez reported she was able to redirect Student and offered breaks to assist Student during difficult speech tasks.

Special education teacher Pinkerton reported Student had eloped from a designated area during non-preferred activities to gain attention from staff and escape the activity. This was usually preceded by a verbal protest that she could not do a task she perceived was too difficult. However, Pinkerton also reported the problem "was not intense" and that Student was easily redirected back to the designated area using a token economy system.

Olson, Student's former speech-language pathologist, described Student's main behavior issue as escaping the activity if it required Student's attention, was too lengthy, or Student perceived it as too difficult. However, as of March 2020, Student rarely demonstrated escaping from tasks during speech sessions and Olson faded use of a token board. With the use of a timer and verbal redirection, Student cooperated. Olsen noted Student made significant gains attending to tasks, following directions, and completing activities, and engaged appropriately during group sessions.

Although not reflected in her report, Teneriello stated at hearing that she also interviewed the instructional assistants who were providing support in Student's classroom during her assessment. They indicated Student was not engaged in any elopement or aggression.

Teneriello used the Functional Assessment Screening Tool as part of her assessment. It was a questionnaire presented to caregivers to identify a hypothesized function for a given target behavior. Parent and Pinkerton thought Student engaged in behaviors to access attention and preferred items and to escape from tasks and

activities. Rodriguez's responses suggested a functional relation to a social component within the escape from tasks and activities category, and she scored access to attention and preferred items low or at zero.

Teneriello's 2021 behavior assessment also included observations during hybrid learning in April 2021. Teneriello observed Student during the school day on five separate days between April 1 and 21, 2021, ranging from over an hour to three hours each time, for a total of about 12 hours. A registered behavior technician also observed Student on 14 separate occasions between April 1 and 29, 2021, for purposes of maladaptive behaviors data collection. The observations occurred in a variety of settings, including

- during transition into the classroom,
- in the classroom,
- standing in line for and participating in general education physical education,
- during snack time,
- during break time,
- transitioning to the library,
- transitioning back into the classroom after a break, and
- transitioning from the classroom to another room.

Physical education and snack time observations were during times Student had social opportunities to engage with peers.

Based on the observations, maladaptive behaviors were observed only on two days. There were two instances of Student making off-topic comments, which were hypothesized to be an escape function, and four instances of task avoidance. In each

instance, an adult redirected Student back to the task presented, no further escalation of behavior occurred, and Student completed all assigned activities. The function of the behavior was determined to be escape from the non-preferred task or activity. During observation, Student was also able to tolerate denials of her requests without engaging in maladaptive behaviors and was able to transition from preferred to non-preferred tasks without maladaptive behaviors. Teneriello prepared a visual representation of the data gathered. However, some of the data in the graphs was not consistent with the typewritten portion of the report, specifically some of the dates. Teneriello was never asked to explain these discrepancies at hearing, and based on the evidence presented at hearing, the date discrepancies in the graphs appeared to be typographical errors.

Based on the results of her assessment, Teneriello concluded Student's behavior did not impede the learning of Student or peers, and the current accommodations and other behavior interventions, such as visual aids and supports, first-then contingencies, visual schedules, and front-loading of behavioral expectations, among others, had been successful. Student was observed to be easily redirected with the use of verbal reminders back to the task, as well as of expected behaviors in the classroom. Additional supports were not observed to be necessary during assessment for her to participate in the daily classroom routine. Teneriello determined that no formal behavior intervention plan was necessary, but only monitoring was sufficient to support Student accessing her education. Teneriello recommended the current educational setting continue to employ positive behavior intervention and supports such as

- whole class reward systems,
- positive praise statements,
- first/then contingencies,
- verbal frontloading of expected behaviors,

- visual expectations of behaviors,
- earned breaks from non-preferred tasks, and
- visual timers.

Prior to the December 2, 2021 IEP team meeting, Teneriello consulted with Student's 2021-2022 special day class teacher Garibay about the reinforcement systems used in the classroom and how Student was doing. Garibay reported Student was doing "fantastic" behaviorally and was a role model for other students in the classroom. At hearing, Teneriello explained she had been concerned about Student at the beginning of the 2021-2022 school year because she did not attend distance learning after August 2020. However, Student went from the prior behaviors of elopement, aggression, and verbal shout-outs, to stating she did not want to do a task, and with redirection, Student was able to complete tasks without maladaptive behaviors.

Teneriello reviewed the results of the functional behavior assessment at the December 2, 2021 IEP team meeting, and answered questions posed to her. Garibay also shared how Student was doing behaviorally since returning to full-time, in-person learning for the 2021-2022 school year. Student was able to transition independently, as well as remain on task and work collaboratively with peers. There had been no aggression with peers or adults and Student was a great peer model. Teneriello reported the prior concerns were no longer issues. Teneriello opined Student no longer required a behavior intervention plan and did not require a behavior goal.

Lay advocate Peters requested a one-to-one behavior aide at the outset of the December 2, 2021 IEP team meeting. However, based on the functional behavior assessment and participation in the development of the December 2, 2021 IEP, Teneriello did not believe Student required a one-to-one trained behavior aide to access

and benefit from her educational program. In fact, as stated in Issue 2G, Student withdrew the claim pertaining to the one-to-one behavior aide on the last day of hearing.

It was Teneriello's opinion at hearing that the accommodations Student was offered in the December 2, 2021 IEP were appropriate to support Student's behavior and that no other accommodations, supports, or services were necessary to enable her to access and benefit from her education. Teneriello did not recommend consultation time because Student did not have behaviors to warrant it and she was successful in the in the classroom during observation with the supports already in place in the classroom. Teneriello also concluded that Student had successfully responded to her special day placement. Teneriello's opinions were convincing based on her credentials, experience, assessment, and other information shared during the preparation for and at the IEP team meetings during which the December 2, 2021 IEP was developed.

Student failed to proffer any convincing evidence contradicting Teneriello's opinions. There was no persuasive evidence of reports of Student having new or additional behaviors that required additional assessment or observation at the time the December 2, 2021 IEP was developed. Significantly, at hearing Parent denied she had any concerns with Student's behaviors or that Student demonstrated any significant behaviors in the home. Parent also denied Student acted aggressively toward others in the home. Parent claimed Student could focus on a task for about 10 minutes and that Parent rewarded work for task completion. Parent did not recall and was uncertain about expressing any concerns about behavior during the IEP team meetings to develop the December 2, 2021 IEP. Moreover, Student was already receiving behavior consultant services as a result of Student residing in the small family home operated by Parent as discussed in Issue 2I. Although there may have been occasions Student was distracted,

Student failed to establish she was distracted more than what would be expected of a typical child or that her distractibility required any kind of behavior intervention.

Student had been doing well behaviorally during the 2021-2022 school year, and no one at Etiwanda nor Parent ever contacted Teneriello to discuss any behavioral concerns. Although Teneriello's testimony regarding the various Tier supports was confusing and the graphs attached to the report appeared to have errors in the dates, this did not undermine the overall persuasiveness of the findings in Teneriello's report or the significance of Teneriello's conclusions.

The preponderance of evidence established Student did not require a behavior intervention plan or behavior goals at the time of the December 2, 2021 IEP offer of special education and related services. Etiwanda did not deny Student a FAPE in the December 2, 2021 IEP by failing to offer Student appropriate behavior interventions and behavior goals for the 2021-2022 school year.

ISSUE 2I: DID ETIWANDA DENY STUDENT A FAPE IN THE DECEMBER 2, 2021 IEP BY FAILING TO OFFER PARENTS TRAINING TO ADDRESS STUDENT'S NEEDS ARISING FROM INTELLECTUAL DISABILITY AND SPEECH AND LANGUAGE IMPAIRMENT?

On the last day of hearing, Student contended Parent could use additional support to learn about a child with an intellectual disability and speech and language impairment. Student argued it "wouldn't hurt" and would be a "positive outreach" to Parent. In her written closing argument, Student withdrew Issue 2I.

Etiwanda contends Student did not meet her burden of proof on this issue. Etiwanda argues there was no evidence regarding any specific training Parent required, and Parent testified she already had specific training and experience working with students with developmental disabilities in her occupation as owner/operator/administrator of licensed small family home with children with developmental disabilities.

Related services required to assist a student with exceptional needs to benefit from special education may include parent counseling and training. (Ed. Code, § 56363, subd. (b)(11).) Parent training means assisting a parent in understanding the special needs of the student, providing the parent with information about child development, and helping the parent acquire necessary skills to facilitate the implementation of the student's IEP. (34 C.F.R. § 300.34(c)(8)(i)-(iii).)

Student presented no persuasive evidence she was denied a FAPE because Etiwanda did not offer Parents training to address Student's needs arising from intellectual disability and speech and language impairment in the December 2, 2021 IEP. In fact, when asked at hearing about training by her own attorney, Parent specifically denied she could benefit from training in how to deal with Student's special needs.

Significantly, Parent was a vendor with Inland Regional Center, operating two facilities, for which she was an administrator and a direct support professional for the small family home where Student lived for the nine years prior to the hearing, and an adult residential facility at another location. As an administrator for 20 years, Parent provided oversight of the facilities, which included supervising a staff of 10 and management over the entire operation of the two facilities she ran. As a direct support

professional, she cared for people with special needs, including providing one-to-one support. Parent received four years of training to operate the small family home and about two years of training to become a direct support professional for a small family home.

The small family home Parent operated and where Student lived was licensed to serve children with developmental disabilities and employed eight staff members in the home. All eight staff members had similar credentials as Parent in that all of them were direct support professionals, and two were administrators. As administrator, Parent attended IEP team meetings, which she estimated to be around 20, for those students for whom she held educational rights. Parent also had training in special needs education, and she characterized her duties as oversight of facilities for children and adults with special needs, but she had no training in speech and language therapy or occupational therapy.

Student received services as a result of living in the small family home, including weekly behavior consultant services. The behavior consultant came into Parent's home every Thursday and worked directly with Student and the other people living in the home.

Parent did not require training for Student to receive a FAPE. Etiwanda did not deny Student a FAPE in the December 2, 2021 IEP by failing to offer Parents training to address Student's needs arising from intellectual disability and speech and language impairment.

ISSUE 3: DID THE DECEMBER 2, 2021 IEP OFFER STUDENT A FAPE IN THE LEAST RESTRICTIVE ENVIRONMENT APPROPRIATE FOR STUDENT, SUCH THAT ETIWANDA MAY IMPLEMENT THE IEP WITHOUT PARENT'S CONSENT?

Etiwanda contends it satisfied both the procedural and substantive requirements of offering a FAPE to Student in the December 2, 2021 IEP, and to the extent a procedural violation occurred, it did not result in the denial of FAPE to Student or impede Parent's ability to participate in the IEP process. Etiwanda contends it attempted to comply with the procedural requirements for developing and holding the IEP as set forth in the January 2021 written agreement between the parties, but it was unable to comply with some requirements because of Parent's unavailability and lack of response. Etiwanda claims it made multiple attempts to schedule the IEP team meeting and scheduled it as soon as it could be arranged to include Parent. Etiwanda contends it appropriately assessed Student in all areas of suspected disability such that Etiwanda was able to appropriately identify Student's unique needs, and it appropriately addressed those needs with goals and objectives in all areas of need, along with program accommodations and modifications. Etiwanda contends it offered placement and services in the least restrictive environment in which Student could make appropriate progress toward the goals and objectives proposed, specifically, general education placement the entire day, with the exception of specialized academic instruction for math, English language arts, and Universal Access.

Student contends Etiwanda denied Parent meaningful participation in the IEP process. Student claims Etiwanda did not address Parent's concerns about Student's

academic progress and that it failed to offer FAPE in the least restrictive environment for Student. Student asserts Parent made repeated efforts to attend the IEP team meetings and participated as part of the team and made requests, all of which were rejected. Student claims Etiwanda did not encourage positive communication with Parent and engaged in conduct to alienate Parent, which interfered with Parent's meaningful participation in the IEP process. Student argues Parent did not deserve a take it-or-leave-it IEP. Student maintains Parent had a right not to sign the IEP, that Etiwanda made no case for implementing the IEP without Parent's consent, and that it would be a gross procedural violation to allow Etiwanda to implement the December 2, 2021 IEP. In her closing brief, Student relies on the arguments made regarding Student's Issue 1.

The legal analysis of a school district's compliance with the IDEA consists of two parts. First, the tribunal must determine whether the district has complied with the procedures set forth in the IDEA. (*Rowley, supra*, 458 U.S. at pp. 206-207.) Second, the tribunal must decide whether the IEP developed through those procedures was designed to meet the child's unique needs, and reasonably calculated to enable the child to receive educational benefit. (*Ibid.*) A hearing officer shall not base a decision solely on nonsubstantive procedural errors, unless the hearing officer finds that the nonsubstantive procedural errors resulted in the loss of an educational opportunity to the pupil or interfered with the opportunity of the parent or guardian of the pupil to participate in the formulation process of the IEP. (Ed. Code, § 56505, subd. (j)); see also, 20 U.S.C. § 1415(f)(3)(E)(i); 34 C.F.R. § 300.513(a); *Roland M. v. Concord School Committee* (1st. Cir 1990) 910 F.2d 983, 994 (*Roland M.*) [Courts must strictly scrutinize IEPs to ensure their procedural integrity, but it must be tempered by considerations of fairness and practicality: procedural flaws do not automatically render an IEP legally defective.].) When confronted with the situation of complying with one procedural

requirement of the IDEA or another, the agency must make a reasonable determination of which course of action promotes the purposes of the IDEA and is least likely to result in the denial of a FAPE. (*Doug C. v. Hawaii Dept. of Education* (9th Cir. 2013) 720 F.3d 1038, 1046 (*Doug C.*))

Parental consent for an assessment is generally required before a school district can assess a student. (20 U.S.C. § 1414(c)(3); 34 C.F.R. § 300.300(c)(1); Ed. Code, § 56381, subd. (f).) A school district has 60 days from the date it receives the parent's written consent for assessment, excluding vacation and days when school is not in session in excess of five schooldays, to complete the assessments and develop an IEP, unless the parent agrees in writing to an extension. (Ed. Code, §§ 56043, subds. (c) & (f), 56344, subd. (a).) The personnel who assess the student shall prepare a written report and provide it to the parent. (20 U.S.C. § 1414(b)(4)(B); Ed. Code, §§ 56327, 56329, subd. (a)(3).)

Each public agency must take steps to ensure that one or both of the parents of a child with a disability are present at each IEP team meeting or afforded the opportunity to participate, including (1) notifying parents of the meeting early enough to ensure that they will have an opportunity to attend and (2) scheduling the meeting at a mutually agreed on time and place. (34 C.F.R. § 300.322(a).) In addition to other requirements, the notice must indicate the purpose, time, and location of the meeting and who will be in attendance. (34 C.F.R. § 300.322(b)(1)(i).) It must also inform the parents of the provisions in 34 Code of Federal Regulations part 300.321 relating to the participation of other individuals who have knowledge or special expertise about the child. (34 C.F.R. § 300.322(b)(1)(ii).)

Unless excused by the parent in writing, the public agency must ensure the IEP team for each child with a disability includes

- the parents of the child;
- a regular education teacher if the child is, or may be, participating in the regular education environment;
- a special education teacher; and
- a representative of the school district who is qualified to provide or supervise specially designed instruction to meet the unique needs of children with disabilities, is knowledgeable about the general education curriculum, and is knowledgeable about available resources.

(34 C.F.R. § 300.321.) The IEP team is also required to include an individual who can interpret the instructional implications of assessment results, and at the discretion of the parent or school district, to include other individuals who have knowledge or special expertise regarding the child. (34 C.F.R. § 300.321(a).)

An IEP is a written document for each child with a disability that includes:

- a statement of the child's present levels of academic achievement and functional performance, including how the child's disability affects the child's involvement and progress in the general education curriculum; and
- a statement of measurable annual goals, including academic and functional goals, designed to meet the child's needs that result from the child's disability to enable the child to be involved in and make progress in the general education curriculum, and meet each of the child's other educational needs that result from the child's disability. (20 U.S.C. § 1414(d)(1)(A); 34 C.F.R. § 300.320; Ed. Code § 56345.)

The IEP must also contain a statement of how the child's goals will be measured. (20 U.S.C. § 1414(d)(1)(A)(i)(III); Ed. Code, § 56345, subd. (a)(3).) The IEP must include appropriate objective criteria, evaluation procedures, and schedules for determining, on at least an annual basis, whether the annual goals are being achieved. (*Jessica E. v. Compton Unified School Dist.* (C.D. Cal. 2017, No. CV16-04356-BRO) 2017 WL 2864945; see also Ed. Code, § 56345; 20 U.S.C. § 1414(d)(1)(A)(i).)

An IEP must include a statement of the special education and related services, based on peer-reviewed research to the extent practicable, that will be provided to the student. (20 U.S.C. § 1414(d)(1)(A)(i)(IV); 34 C.F.R. §300.320(a)(4); Ed. Code, § 56345, subd. (a)(4).) It must also contain a statement of supplementary aids, services and program modifications or supports that will be provided, along with an explanation of the extent to which the pupil will not participate with nondisabled pupils in the regular class. (20 U.S.C. § 1414(d); Ed. Code, § 56345, subd. (a).) The IEP must include a projected start date for services and modifications, as well as the anticipated frequency, location, and duration of services and modifications. (20 U.S.C. § 1414(d)(1)(A)(i)(VII); 34 C.F.R. § 300.320(a)(7); Ed. Code, § 56345, subd. (a)(7).)

The IEP need only include the information set forth in title 20 United States Code section 1414(d)(1)(A)(i), and the required information need only be set forth once. (20 U.S.C. § 1414(d)(1)(A)(ii); 34 C.F.R. § 300.320(d); Ed. Code, § 56345, subds. (h) & (i).)

The IDEA requires school districts to establish and maintain procedures to ensure children with disabilities and their parents are guaranteed procedural safeguards with respect to the provision of FAPE by such agencies. (20 U.S.C. § 1415(a).) A written explanation of all the procedural safeguards under the IDEA shall be included in the notice of a parent's or guardian's rights. (Ed. Code, § 56321, subd. (a).) A copy of the

procedural safeguards must be given by a school district to a particular parent of a child with a disability a minimum of once a year. (20 U.S.C. § 1415(d)(1)(A); 34 C.F.R. § 300.504(a); Ed. Code, § 56301, subd. (d)(2).) Education Code section 56500.1, subdivision (b) requires that parents be informed about procedural safeguards at an IEP team meeting.

As explained below and in the relevant portions in Issues 1 and 2A through 2I, above, Etiwanda substantially complied with all the procedural and substantive requirements of the IDEA and California law regarding the December 2, 2021 IEP developed at the IEP team meetings held on December 2, 2021, January 6, 2022, and February 9, 2022. To the extent there were any procedural errors, the weight of evidence established they did not interfere with Parent's opportunity to participate in the process for formulation of the December 2, 2021 IEP or result in the loss of educational opportunity for Student. (20 U.S.C. § 1415(f)(3)(E)(i); Ed. Code, § 56505, subd. (j); *Roland M.*, *supra*, 910 F.2d at p. 994; *Doug C.*, *supra*, 720 F.3d at p. 1046.) The preponderance of evidence established the special education and related services offered in the December 2, 2021 IEP were reasonably calculated to enable Student to receive educational benefit appropriate for Student's circumstances. The December 2, 2021 IEP offered Student a FAPE.

IEP MEETING NOTICES AND TIMELINESS OF THE DECEMBER 2, 2021 IEP

THE PARTIES' JANUARY 2021 AGREEMENT

On January 19, 2021, the parties entered into a written agreement regarding Student's triennial reassessment and three-year IEP review. The parties agreed that by signing the January 19, 2021 Agreement, Parent consented to the pending August 17, 2020 assessment plan, which Parent never signed. The parties agreed

Etiwanda would convene an IEP team meeting on or before May 25, 2021, to review the results of the assessments and develop Student's triennial IEP to be implemented during the 2021-2022 regular school year. Parent specifically waived the statutory timeline for Student's triennial assessments and IEP meeting, and the annual IEP team meeting due in August 2021, which annual IEP team meeting the parties agreed to hold within one year following the triennial IEP team meeting. Student also waived all educationally related claims through the end of Etiwanda's 2021 extended school year session.

THE IEP TEAM MEETING NOTICES

Pursuant to the terms of the January 19, 2021 Agreement, on April 16, 2021, Etiwanda sent to Parent and Peters by email an IEP meeting notice for Student's annual and triennial review on May 14, 2021. Etiwanda received no response from Parent or Peters, the lay advocate working at the law firm which represented Student.

On April 23 and 29, 2021, Etiwanda sent to Parent and Peters another meeting notice for Student's annual and triennial IEP review on May 14, 2021. Etiwanda received no response from Parent or Peters to either notice.

On May 6, 2021, Etiwanda sent to Parent by mail and email and to Peters by email a letter explaining the efforts Etiwanda made to schedule Student's triennial IEP team meeting for May 14, 2021, enclosing another copy of the meeting notice and requesting a response. A copy of Parent's Procedural Safeguards and new IEP team meeting notice dated May 5, 2021, for the May 14, 2021 meeting date was included with the May 6, 2021 letter. Etiwanda received no response to this letter.

On May 7, 2021, Etiwanda sent to Parent by mail and email and to Peters by email a letter summarizing the efforts Etiwanda had made to schedule Student's

triennial IEP team meeting for May 14, 2021. The letter also advised Parent that because she had not responded to any of the letters agreeing to the May 14, 2021 date, Etiwanda was releasing the date and Etiwanda was instead proposing a May 19, 2021 meeting date, enclosing a new meeting notice for that date. On May 13, 2021, Peters finally responded, advising Etiwanda to select a new date due to Parent's unavailability.

On May 13, 2021, Etiwanda sent to Parent by mail and email and to Peters by email a letter summarizing the efforts Etiwanda had made to schedule Student's triennial IEP team meeting for May 14 and 19, 2021. The letter also advised Parent Etiwanda was instead proposing a May 25, 2021 meeting date, enclosing a new meeting notice for that date, and asking Parent to return it as soon as possible. Etiwanda received no response to this letter.

On May 18, 2021, Etiwanda sent to Parent by mail and email and to Peters by email a letter summarizing the efforts Etiwanda had made to schedule Student's triennial IEP team meeting for May 14, 19, and 25, 2021. The letter enclosed another meeting notice for May 25, 2021, once again requesting Parent return it. Parent did not respond to this letter. May 25, 2021 was the last day of the 2020-2021 regular school year, and school resumed for the 2021-2022 regular school year on August 9, 2021.

On July 20, 2021, Etiwanda resumed its efforts to schedule Student's triennial IEP team meeting. It sent to Parent by mail and email and to Peters by email a letter summarizing the efforts Etiwanda had made to schedule Student's triennial IEP team meeting for May 14, 19, and 25, 2021. The letter also advised Parent that Etiwanda was now proposing an August 17, 2021 meeting date because Parent had never responded to the prior letter, enclosed a new meeting notice for that date, and asked Parent to return it as soon as possible.

On July 28, 2021, Etiwanda sent to Parent by mail and email and to Peters by email a letter summarizing the efforts Etiwanda had made to schedule Student's triennial IEP team meeting for May 14, 19, and 25, 2021. The letter also advised Parent that Etiwanda had not received any response to the proposed August 17, 2021 meeting date. Another meeting notice for August 17, 2021 was included with the letter, requesting the Parent return it. Etiwanda received no response to this letter.

On August 3, 2021, Etiwanda sent to Parent by mail and email and to Peters by email a letter summarizing the efforts Etiwanda had made to schedule Student's triennial IEP team meeting for May 14, 19, and 25, 2021. The letter also advised Parent that Etiwanda had not received any response to the proposed August 17, 2021 meeting date. A new meeting notice for August 17, 2021 was included with the letter, requesting that Parent return it. Etiwanda received no response to this letter.

On August 6, 2021, Etiwanda's counsel spoke to lay advocate Peters, claiming that he would respond to the meeting notice later that day, but he never did. On August 10, 2021, Etiwanda's counsel contacted Student's counsel by email, but received no response.

On August 12, 2021, Etiwanda sent to Parent by mail and email and to Peters by email a letter summarizing the efforts Etiwanda had made to schedule Student's triennial IEP team meeting for May 14, 19, and 25, 2021, and August 17, 2021. The letter also advised Parent that because Etiwanda had not received any response to the proposed August 17, 2021 meeting notice, it was releasing the date and rescheduling the meeting for August 31, 2021. A new meeting notice for August 31, 2021, was included with the letter, requesting Parent return it. Etiwanda received no response to this letter.

On August 19, 2021, Etiwanda sent to Parent by mail and email and to Peters by email a letter summarizing the efforts Etiwanda had made to schedule Student's triennial IEP team meeting for May 14, 19, and 25, 2021 and August 17 and 31, 2021, 2021. The letter also advised Parent that Etiwanda had not received any response to the proposed August 31, 2021 meeting notice. Another meeting notice for August 31, 2021, was included with the letter, requesting Parent return it. Etiwanda received no response to this letter.

On August 20, 2021, Etiwanda sent a copy of the meeting notice for August 31, 2021, to Parent by placing it in Student's backpack. The same day, Etiwanda's counsel sent an email to Peters to remind Parent about the August 31, 2021 proposed meeting date.

On August 26, 2021, Etiwanda personnel contacted Parent by telephone to remind Parent about the August 31, 2021 proposed meeting date and left a message when Parent did not answer.

On August 26, 2021, Etiwanda sent to Parent by mail and email and to Peters by email a letter summarizing the efforts Etiwanda had made to schedule Student's triennial IEP team meeting for May 14, 19, and 25, 2021 and August 17 and 31, 2021, 2021. The letter also advised Parent that Etiwanda had not received any response to the proposed August 31, 2021 meeting notice. Another meeting notice for August 31, 2021 was included with the letter, requesting Parent return it. Etiwanda received no response to this letter.

On August 27, 2021, Etiwanda's counsel spoke to Student's counsel's office by telephone and was informed Student's counsel would notify Etiwanda "today or over the weekend" about whether Parent could participate in the August 31, 2021 IEP team meeting.

On August 30, 2021, Etiwanda contacted Parent by telephone to remind Parent about the August 31, 2021 meeting, and when Parent did not answer, left a voicemail message. The same day, Etiwanda's counsel contacted Student counsel's office by email, requesting a response by noon as to whether Parent would be able to attend the proposed August 31, 2021 IEP team meeting. Etiwanda received no response. At 4:08 PM Etiwanda's counsel contacted Student counsel's office notifying them Etiwanda was releasing the August 31, 2021 date since Parent had not responded.

On August 30, 2021, Etiwanda sent to Parent by mail and email and to Peters by email a letter summarizing the efforts Etiwanda had made to schedule Student's triennial IEP team meeting for May 14, 19, and 25, 2021 and August 17 and 31, 2021, 2021. The letter also advised Parent that Etiwanda had not received any response to the proposed August 31, 2021 meeting notice and requested Parent provide three proposed meeting dates by September 3, 2021. Etiwanda received no response to this letter.

On September 7, 2021, Etiwanda sent to Parent by mail and email and to Peters by email a letter summarizing the efforts Etiwanda had made to schedule Student's triennial IEP team meeting for May 14, 19, and 25, and August 17 and 31, 2021, and that no response had been received to the August 30, 2021 letter requesting Parent propose three dates she was available for the triennial IEP team meeting. In this letter, Etiwanda proposed three meeting dates for September 17, 23, and 24, 2021, and included a

meeting notice for each of the three dates. The letter requested Parent confirm her attendance and informed Parent that if she refused to respond, Etiwanda would hold the meeting without Parent on September 24, 2021.

On September 8, 2021, Parent sent a response by email merely acknowledging receipt of the September 7, 2021 letter.

On September 9, 2021, Etiwanda sent to Parent copies of the same three meeting notices for IEP team meetings on September 17, 23, and 24, 2021 by placing them in Student's backpack.

On September 14, 2021, Etiwanda sent to Parent by mail and email and to Peters by email a letter summarizing the efforts Etiwanda had made to schedule Student's triennial IEP team meeting since April 2021, and that to date, Parent had failed to confirm her availability for or agree to attend any IEP team meeting, and that no response had been received to either the August 30, 2021 letter requesting Parent provide proposed IEP meeting dates, or the September 7, 2021 letter, proposing three options for an IEP team meeting in September. Etiwanda sent copies of new meeting notices for the same proposed three meeting dates of September 17, 23, and 24, 2021. The letter again requested that Parent confirm her attendance at one of the meetings and informed Parent that if she refused to respond, Etiwanda would hold the meeting without Parent on September 24, 2021.

Having heard no response to the September 7, 2021 letter, on September 16, 2021, Etiwanda notified Student's counsel's office that it was releasing the September 17, 2021 meeting date. The same date, additional copies of the meeting notices for the two

remaining dates were sent to Student's counsel by email. Etiwanda also sent additional copies of these notices to Parent by placing them in Student's backpack on September 16, 2021.

On September 22, 2021, Etiwanda sent to Parent by mail and email and to Peters by email a letter summarizing the efforts Etiwanda had made to schedule Student's triennial IEP team meeting since April 2021, and that to date, Parent had failed to confirm her availability for or agree to attend any IEP team meeting. The letter advised Parent that because she had not responded to the meeting notices for September 17 and 23, 2021, it was requesting that Parent confirm her attendance on the proposed September 24, 2021 date. Etiwanda informed Parent that if she did not respond, the meeting would be held without Parent on September 24, 2021 at 9:00 AM. Etiwanda received no response to this letter.

On September 24, 2021, prior to the meeting, Etiwanda received a notification from Peters that a family member had an injury that prevented Parent from attending the September 24, 2021 IEP team meeting. Based on that message, Etiwanda did not proceed with the IEP team meeting that day.

On September 27, 2021, Etiwanda sent to Parent by mail and email and to Peters by email a letter requesting that Parent provide three proposed IEP meeting dates by October 1, 2021. Etiwanda received no response to this letter.

On October 1, 2021, Etiwanda sent to Parent by mail and email and to Peters by email a letter informing Parent it was scheduling Student's IEP team meeting for October 28, 2021, whether or not Parent attended. The letter also enclosed a copy of the meeting notice for October 28, 2021.

On October 14, 2021, Peters sent an email to Etiwanda stating Parent was unavailable on October 28, 2021, but could be available on October 20 or 25, 2021. Special Education Director Elizabeth Freer reached out to the members of the IEP team, but not all 11 members were available on either of the dates Parent requested. The next day, Etiwanda notified Parent all 11 district team members could not be available on such short notice and proposed November 10 and December 2, 2021, as dates on which all team members could be available.

On October 20, 2021, Etiwanda sent a letter summarizing the efforts made to schedule the IEP team meeting since April, and enclosed meeting notices for the proposed dates of November 10, and December 2, 2021. The letter requested that Parent promptly respond, and that if no response was received, the meeting would be held without Parent on December 2, 2021. Etiwanda received no response to this letter.

On November 5, 2022, Etiwanda sent to Parent by mail and email and to Peters by email a letter summarizing the efforts Etiwanda had made to schedule Student's triennial IEP team meeting since April 2021. The letter informed Parent that because she had not responded to the meeting notice for November 10, 2021, it was releasing the November 10, 2021 date. It also requested that Parent confirm her attendance on the other proposed date of December 2, 2021. Etiwanda informed Parent that if she did not respond, the meeting would be held without Parent on December 2, 2021, at 9:00 a.m. The letter also enclosed a meeting notice for December 2, 2021.

On November 8, 2021, Parent responded to Etiwanda's request, "We are working on dates." On December 1, 2021, Etiwanda sent a reminder to Parent about the December 2, 2021 IEP team meeting, with a Zoom link for the meeting.

On December 2, 2021, an IEP team meeting was held. Before the meeting could be concluded, Peters requested that the meeting be reconvened because Parent was tired. The IEP team agreed to reconvene, and the meeting was reconvened on January 6, 2022, with Parent in attendance. The meeting was unable to be concluded on January 6, 2022, and the parties agreed to reconvene at a later date to conclude the meeting.

On January 13, 2022, Etiwanda provided Student and Peters with a meeting notice and a Zoom link for the proposed January 25, 2022 continuation IEP team meeting. Thereafter, having received no response from Parent, Etiwanda provided another copy of the meeting notice and Zoom link and phone-in participation numbers for the proposed January 25, 2021 IEP team meeting.

On January 24, 2022, Peters sent Etiwanda an email stating Parent was available for the January 25, 2022 IEP team meeting.

On January 25, 2022, the Etiwanda IEP team members gathered for the IEP team meeting, but neither Parent, Peters, nor anyone representing Student or Parent attended the meeting. After waiting 20 minutes for Parent and Parent's representatives to join, the IEP team was dismissed.

On January 25, 2022, more than one hour and 20 minutes after the start time of the IEP team meeting, Peters sent an email to Etiwanda's counsel falsely claiming that no phone-in participation numbers were provided to Parent.

On January 31, 2022, Etiwanda provided Student and Student's representative with a meeting notice, a Zoom link and phone-in participation numbers for a proposed

February 9, 2022 IEP team meeting. Receiving no response to the notice, on February 8, 2022, Etiwanda's counsel sent Peters a reminder about the meeting.

The last of the three IEP team meetings held to develop the December 2, 2021 IEP was held on February 9, 2022.

ETIWANDA TIMELY NOTICED AND CONVENED THE IEP TEAM MEETINGS
HELD TO DEVELOP THE DECEMBER 2, 2021 IEP

The IEP team meeting notices sent out by Etiwanda notified Parent of the meeting early enough to ensure she and any representatives or advisors she wanted to join had an opportunity to attend the meetings and Etiwanda made reasonable attempts to schedule the meetings on mutually agreed upon dates and times, and that the meeting would be held virtually by Zoom which made participation safer and more convenient to attend than an in-person meeting. With the exception of the notices for the January and February 2022 IEP team meetings, which were not in evidence, the meeting notices indicated

- the purpose of the meetings,
- the date and time,
- who would attend, and
- that Parent had the right to have other individuals present who had knowledge or special expertise about Student.

Even if the January and February 2022 meeting notices were defective, there was no evidence that they either resulted in Student's loss of educational opportunity or interfered with the opportunity of Parent to participate in the IEP process.

Etiwanda proved it timely convened the IEP team meetings held to develop the December 2, 2021 IEP. By the January 2021 written agreement, Parent agreed to extend the deadlines for conducting the assessments and holding Student's triennial review and waived any procedural violations through the end of the 2021 extended school year. Etiwanda took reasonable efforts to schedule the IEP team meeting prior to May 25, 2021, even rescheduling it when no response was received from Parent or Peters agreeing Parent would attend the proposed meetings. The evidence proved Etiwanda also made multiple reasonable attempts after May 25, 2021, to reschedule the IEP team meeting so Parent could attend, including letters, emails, and phone calls.

The evidence proved the failure to hold the IEP team meeting prior to May 25, 2021, and then prior to December 2, 2021, was due solely to Parent's failure and refusal to timely respond to Etiwanda's efforts to schedule the meeting. Each time a meeting was proposed, Etiwanda had to coordinate the schedules of the multiple members of Student's IEP team, to make certain they were available and that the meeting time did not conflict with other IEP team meetings. Special Education Director Freer coordinated with each of the team members to ensure they were available on each of the dates proposed to Parent and a lot of effort went into coordinating dates because of the number of people involved. With numerous school-based members on Student's IEP team, it was difficult for Etiwanda to coordinate their calendars for availability because they had other responsibilities, including other IEP team meetings or services to provide to other students. The weight of evidence established Etiwanda worked diligently to find dates and times that the entire school-based team was available and hold those dates and times proposed on everyone's calendar so they did not schedule anything else during those times.

At hearing, Parent offered no adequate justification for her failure to respond to Etiwanda's numerous requests over the entirety of the approximately six-month period. While there might have been some legitimate reasons for Parent not being available on particular date(s), that was not established, and the preponderance of evidence indicated it was Parent's and her lay advocate's disinterest or indifference in scheduling the meeting that resulted in the delay. When confronted with the choice of holding the IEP without the Parent or holding it late, Etiwanda's decision to hold it late was reasonable because that course of action promoted the purposes of the IDEA, specifically Parent participation, and was least likely to result in the denial of FAPE. (See *Doug C.*, *supra*, 720 F.3d at p. 1046.)

Etiwanda did not commit a procedural violation by not holding Student's triennial team meeting until December 2, 2021, and not concluding the review until the February 9, 2022. To the extent there were any procedural errors in the noticing, scheduling, or holding the meetings, the weight of evidence proved they did not result in Student's loss of educational opportunity or interfere with the opportunity of Parent to participate in the IEP process.

IEP TEAM MEETING PARTICIPANTS

All required IEP team members attended the December 2, 2021, January 6, 2022, and February 9, 2022 IEP team meetings. However, to the extent there were procedural errors in the IEP team composition at any particular meeting, the preponderance of evidence established that they did not interfere with Parent's opportunity to participate in the formulation process of the December 2, 2021 IEP or result in the loss of educational opportunity to Student.

Specifically, Parent, Peters, and at least one of Student's attorneys attended each of the three IEP team meetings held to develop the December 2, 2021 IEP. In addition, at each meeting, there was a special education teacher, and a representative of the school district who was:

- qualified to provide or supervise specially designed instruction to meet the unique needs of children with disabilities;
- knowledgeable about the general education curriculum; and
- knowledgeable about Etiwanda's available resources.

The IEP team meetings also included an individual who could interpret the instructional implications of Student's evaluation results. In particular, all of the following people attended each IEP team meeting: Student's special education teacher Garibay, Golden Elementary general education fifth grade teacher Johnson, Day Creek acting assistant principal and educational specialist Kuramata, special education program specialist Stanley – who conducted Student's 2021 academic assessment –, school psychologist Tungate – who conducted Student's 2021 psychoeducational evaluation –, board certified behavior analyst Teneriello – who conducted Student's 2021 functional behavior evaluation –, speech-language pathologist Rodriguez – who conducted Student's 2021 speech and language assessment –, occupational therapist Passons – who conducted Student's 2021 occupational therapy assessment –, and school nurse Katrib – who conducted Student's 2021 health assessment.

Furthermore, there was a Golden Elementary administrator present at each IEP team meeting held to develop the December 2, 2021 IEP: Principal Sipos attended the December 2, 2021 and January 6, 2022 meetings, and assistant principal Georgia Wayne attended the December 2, 2021 and February 9, 2022 meetings.

Physical therapist Heildelman – who conducted Student’s 2021 physical therapy evaluation, attended both the December 2, 2021 and February 9, 2022 IEP team meetings. Heildelman was unable to attend the January 6, 2022 meeting, so licensed physical therapist Slone Allen attended in her place. Allen was qualified and able to interpret the results of Student’s physical therapy evaluation, which was reviewed at the January 6, 2022 IEP team meeting. Heildelman reviewed Student’s assessment report with Allen prior to the January 6, 2022 IEP team meeting. After reviewing the report, Allen asked the IEP team members if there were questions, and Peters stated there were no questions. At the February 6, 2022 IEP team meeting, Heildelman was present and available for any questions in relation to her report or recommendation that Student did not qualify for physical therapy services.

None of Student’s general education teachers attended any of the IEP team meetings held to develop the December 2, 2021 IEP; however, fifth-grade general education teacher Johnson attended all of the meetings. She has attended about 20 IEP team meetings as a general education teacher and sometimes answered questions about the general education curriculum. At Student’s IEP team meetings no one directed any questions or concerns to her. She was familiar with fifth-grade state standards and the pacing requirements in her classroom for teaching core content subjects for fifth-grade general education and could have answered questions about those topics at the IEP team meetings. She was available to answer questions about fifth-grade state standards or the core content. She could have answered questions about behavioral expectations in her fifth-grade general education classroom.

Besides general education teacher Johnson, there were other people at the IEP team meetings familiar with Student and a general education setting, including Stanley, Garibay, and Sipos. There was no evidence presented that the absence of Student’s

general education teacher either interfered with Parent's meaningful participation the IEP process or resulted in the loss of an educational opportunity. Notably, in Student's written closing argument she does not take issue with the composition of IEP team at the meetings held to develop the December 2, 2021 IEP. Even if there was a procedural error, there was no evidence that it resulted in a loss of educational opportunity for Student or interfered with the opportunity of Parent to participate in the formulation process of the IEP.

PARENT PARTICIPATION IN THE DEVELOPMENT OF THE DECEMBER 2, 2021 IEP

As addressed in Issue 1, the weight of evidence established that Parent meaningfully participated in the development of the December 2, 2021 IEP. Parents were provided with Parent's Procedural Safeguards as an attachment to some of the IEP team meeting notices scheduling Student's triennial review and prior to the IEP team meetings. Another copy of the Parent's Procedural Safeguards was sent to Parents on February 17, 2022.

THE DECEMBER 2, 2021 IEP

SPECIAL EDUCATION ELIGIBILITY CATEGORIES

The weight of evidence established Student was qualified for special education eligibility under the eligibility categories of intellectual disability and speech and language impairment. Etiwanda's recommendations for eligibility were made based on Student's triennial assessments, including the 2021 psychoeducational evaluation and 2021 speech and language evaluation as discussed in Issues 2A, 2E and 2C. Notably,

Student did not produce any persuasive evidence challenging Student's eligibility, or the categories in which Etiwanda found Student eligible for special education and related services.

PRESENT LEVELS OF PERFORMANCE IN THE DECEMBER 2, 2021 IEP

As discussed above with regard to Student's Issues 1 and 2, the December 2, 2021 IEP included a statement of Student's present levels of academic achievement and functional performance. Student's present levels of performance were based on

- the information it obtained during Etiwanda's March/April/May 2021 triennial assessments,
- the result of Etiwanda's diagnostic assessments administered during the 2021-2022 school year to all students,
- Student's progress at the time of the IEP team meetings held to develop the December 2, 2021 IEP, and
- input from the members of the IEP team.

The evidence established all of Etiwanda's assessors were qualified to conduct the 2021 evaluations performed in preparation for Student's December 2, 2021 IEP. Except as limited by COVID-19 protocols or Parent's failure to respond or participate, the assessors used multiple instruments and a variety of assessment tools including record review, observation, interview, and standardized and non-standardized instruments to evaluate Student in the areas of health, academic achievement, psychoeducation, communication, functional behavior, occupational therapy and physical therapy, which

included cognitive functioning/processing, social-emotional/behavior functioning, adaptive behavior and gross and fine motor development, among other things.

The assessment instruments were designed to gather information on Student's functional, developmental, and academic levels to guide Student's IEP team in determining Student's special education eligibility and designing an educational program to meet her needs. The components of the multidisciplinary assessment were sufficiently comprehensive to identify all of Student's educational needs.

GOALS OFFERED IN THE DECEMBER 2021 IEP

The preponderance of evidence established that the goals offered in the December 2, 2021 IEP were based on Student's present levels of academic achievement and functional performance and each of the goals had appropriate short-term objectives. As discussed in Issues 2B and 2H, above, Etiwanda offered Student goals in each area of identified need and the preponderance of evidence established they were appropriate at the time the IEP was developed. For the same reasons discussed above, Student did not require a behavior goal for the 2022 extended school year or the 2022-2023 school year at the time of the December 2, 2021 IEP.

The goals were measurable and attainable within a year, and the goals addressed each area of unique need identified by the IEP team as set forth in the December 2, 2021 IEP as modified during the February 9, 2022 IEP team meeting. Notably, there was no persuasive evidence with regard to the goals that Etiwanda either denied Student educational opportunity or interfered with Parent's participation in the IEP process.

SPECIAL EDUCATION AND RELATED SERVICES OFFERED IN THE DECEMBER 2, 2021 IEP

The December 2, 2021 IEP contained a statement of special education and related services, along with the supplementary aids, program modifications and other supports to be provided to Student. It also contained an explanation of the extent to which Student would not participate with nondisabled pupils in the regular class. The IEP included a projected start date for the services, modifications and supports, as well as their anticipated frequency, location, and duration.

As discussed above in Student's Issues 2A and 2C through 2E, the preponderance of the evidence established the specialized academic instruction, occupational therapy, and speech and language therapy Etiwanda offered in the December 2, 2021 IEP was appropriate. The preponderance of evidence also established Student did not require a one-to-one aide, behavior services or training for Parents, as more fully addressed in Issues 2G, 2H, and 2I above. For the same reasons discussed above, Student did not require behavior services for the 2022 extended school year or the 2022-2023 school year at the time of the December 2, 2021 IEP.

PLACEMENT AND PROGRAM MODIFICATIONS OFFERED IN THE DECEMBER 2021 IEP

As discussed above in Student's Issues 2A through 2H, the preponderance of the evidence established the placement and program modifications Etiwanda offered in the December 2, 2021 IEP were appropriate and provided Student a FAPE in the least restrictive environment. For the reasons explained in Student's Issues 2A through 2H,

the placement and modifications offered for the 2022-2023 school year, Student's sixth grade year, were also appropriate at the time they were offered and provided Student a FAPE in the least restrictive environment.

ACCOMMODATIONS, OTHER SUPPORTS, AND SPECIAL FACTORS IN THE DECEMBER 2021 IEP

The December 2, 2021 IEP included a list of proposed program accommodations. The preponderance of the evidence established these accommodations were appropriate for Student at the time of the offer made in the December 2, 2021 IEP. Among other things, Etiwanda witnesses Garibay, Stanley, Tungate, Rodriguez, Teneriello, and Passons all testified as to the appropriateness of the accommodations offered. The evidence established the program accommodations were appropriate for Student at the time of the IEP because they were based on the assessment results and input from the IEP team which identified areas of need, skill areas to target for the IEP goals, and the areas that required support or accommodations for Student to access the core curriculum. Based on the assessments, the observations, the assessment data, and input from the IEP team, Etiwanda identified and offered the accommodations necessary to support Student in accessing and benefiting from her educational program.

Student did not offer persuasive evidence she needed any other accommodations for a FAPE or that the offered accommodations were inappropriate. The only evidence Student proffered to challenge the accommodations was regarding the use of TheraPutty and a disco sit based on the testimony of Goodis. While there was some suggestion Student may not have liked TheraPutty and may not have used it at some point, Passons explained why she recommended these accommodations in the

December 2, 2021 IEP. These were items Student had been using and Passons did not want to fade them out too quickly because Parent had previously reported some sensory issues in the home and Student had only recently returned to full-time in-person learning. Goodis was not a credible witness as further discussed in Issues 2B and 2D above, so her opinions were given no weight. There was no evidence that the inclusion of this sensory accommodation denied Student a FAPE.

Etiwanda proved that the “Other Supports” offered in the form of consultation between providers was appropriate. The offer for consultation time between the support providers was important so there was ongoing collaboration to discuss Student’s progress and determine if anything needed to be adjusted based on Student’s level of progress and to ensure that the teacher could implement the strategies in the classroom. Several of Etiwanda’s witnesses, including Stanley, Garibay, Tungate, Passons, and Rodriguez, testified as to the appropriateness of the consultation time offered in the December 2, 2021 IEP. There was no specific evidence rebutting this testimony.

The offer for consultation between the speech-language pathologist and specialized academic instructor and the offer for consultation between the occupational therapist and the specialized academic instructor are also specifically addressed in Issues 2C and 2D above. Tungate also explained the appropriateness of the consultation between the specialized academic instructor and the school psychologist. Tungate performed Student’s psychoeducational evaluation and the offered consultation time provided support for the teacher to ask questions regarding Student’s program to assist Student in her educational program. Student did not offer persuasive evidence that the consultation time was inappropriate or that additional consultation time was required for Student to receive a FAPE.

The weight of evidence established the special factors were appropriate. The disco sit and TheraPutty are addressed above, and the other items, including the Chromebook, were provided to all students. In addition, as discussed in Issue 2H, the December 2, 2021 IEP correctly reported Student's behavior did not impede the learning of herself or others.

In short, Etiwanda offered Student a FAPE in the December 2, 2021 IEP.

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:

Etiwanda did not deny Student a FAPE in developing Student's December 2, 2021 IEP by failing to consider Parent's concerns regarding Student.

Etiwanda prevailed on Issue 1.

ISSUE 2A:

Etiwanda did not deny Student a FAPE in the December 2, 2021 IEP by failing to offer Student sufficient programs and supports to enable Student to receive educational benefit in the area of academic instruction.

Etiwanda prevailed on Issue 2A.

ISSUE 2B.

Etiwanda did not deny Student a FAPE in the December 2, 2021 IEP by failing to include adequate goals for Student.

Etiwanda prevailed on Issue 2B.

ISSUE 2C.

Etiwanda did not deny Student a FAPE in the December 2, 2021 IEP by failing to offer Student sufficient speech and language services.

Etiwanda prevailed on Issue 2C.

ISSUE 2D.

Etiwanda did not deny Student a FAPE in the December 2, 2021 IEP by failing to offer Student sufficient occupational therapy services.

Etiwanda prevailed on Issue 2D.

ISSUE 2E.

Etiwanda did not deny Student a FAPE in the December 2, 2021 IEP by failing to offer Student sufficient intensive academic instruction to address Student's reading skills.

Etiwanda prevailed on Issue 2E.

ISSUE 2F.

Etiwanda did not deny Student a FAPE in the December 2, 2021 IEP by failing to offer Student placement with neuro-typically developing peers to the maximum extent possible for the 2021-2022 school year and extended school year.

Etiwanda prevailed on Issue 2F.

ISSUE 2G.

Etiwanda did not deny Student a FAPE in the December 2, 2021 IEP by failing to offer Student a one-to-one aide.

Etiwanda prevailed on Issue 2G.

ISSUE 2H.

Etiwanda did not deny Student a FAPE in the December 2, 2021 IEP by failing to offer Student appropriate behavior interventions and behavior goals for the 2021-2022 school year.

Etiwanda prevailed on Issue 2H.

ISSUE 2I.

Etiwanda did not deny Student a FAPE in the December 2, 2021 IEP by failing to offer Parents training to address Student's needs arising from intellectual disability and speech and language impairment.

Etiwanda prevailed on Issue 2I.

ISSUE 3:

The December 2, 2021 IEP offered Student a FAPE in the least restrictive environment appropriate for Student, such that Etiwanda may implement the IEP without Parent's consent.

Etiwanda prevailed on Issue 3.

ORDER

1. All relief sought by Student is denied.
2. Etiwanda may implement the December 2, 2021 IEP without Parent's consent.

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.

Laurie Gorsline

Administrative Law Judge

Office of Administrative Hearings