

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

CASE NO. 2022030985

PARENT ON BEHALF OF STUDENT,

v.

SAN BERNARDINO CITY UNIFIED SCHOOL DISTRICT.

DECISION

September 9, 2022

On March 28, 2022, the Office of Administrative Hearings, called OAH, received a due process hearing request from Student, naming San Bernardino City Unified School District. On May 4, 2022, OAH issued an Order granting the parties joint request for continuance. Administrative Law Judge Deborah Myers-Cregar heard this matter via videoconference on June 28, 29, and 30, 2022.

Libbie Chase, Attorney at Law, represented Student. Parent attended all hearing days on Student's behalf. Karen Gilyard, and Carlos Gonzalez, Attorneys at Law, represented San Bernardino City Unified School District. Dr. Howanna Lundy, Director of Special Education, attended all hearing days on San Bernardino City's behalf.

At the parties' request the matter was continued to August 8, 2022 for written closing briefs, when the record was closed, and the matter was submitted for decision.

ISSUES

1. Did San Bernardino City Unified School District deny Student a free appropriate public education, called a FAPE, from August 16, 2020, through February 21, 2022, by failing to timely conduct assessments and/or appropriately assess Student in the following areas of suspected disability:
 - a. Psychoeducation;
 - b. Educationally Related Mental Health Services;
 - c. Health; and
 - d. Assistive technology?
2. Did San Bernardino City Unified School District deny Student a FAPE at the September 15, 2020 and September 14, 2021 individualized education program, called an IEP, team meetings, by failing to design an appropriate program to meet Student's individual and unique needs in the areas of:
 - a. Social-emotional goals;
 - b. Math goals; and
 - c. Reading goals?

3. Did San Bernardino City Unified School District deny Student a FAPE at the September 15, 2020 IEP team meeting by significantly impeding Parent's ability to participate in the decision-making process by:
 - a. Failing to produce all educational records; and
 - b. Failing to assess Student's lack of social-emotional progress?

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 as the filing party. 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, 16 years old and in 11th grade at the time of hearing, resided within San Bernardino City's geographic boundaries at all relevant times. Student enrolled on August 16, 2020, and Parents withdrew her on February 22, 2022 to attend a charter school of their choosing, identified as Excelsior Charter School. Student was eligible for special education under Other Health Impairment for Attention Deficit Hyperactivity Disorder at the time of the hearing.

ISSUE 1: DID SAN BERNARDINO CITY UNIFIED SCHOOL DISTRICT DENY STUDENT A FREE AND APPROPRIATE PUBLIC EDUCATION, KNOWN AS A FAPE, FROM AUGUST 16, 2020, THROUGH FEBRUARY 21, 2022, BY FAILING TO CONDUCT TIMELY ASSESSMENTS AND/OR APPROPRIATELY ASSESS STUDENT IN THE FOLLOWING AREAS OF SUSPECTED DISABILITY: PSYCHOEDUCATION; EDUCATIONALLY RELATED MENTAL HEALTH SERVICES; HEALTH; AND ASSISTIVE TECHNOLOGY?

Student alleges San Bernardino City failed to timely and appropriately assess Student in all areas of suspected disability since August 2020. Student alleges San Bernardino City was on notice that Student had an IEP and needed a psychoeducational, educationally related mental health, health, and assistive

technology assessment as early as her transfer into and enrollment in the district on August 16, 2020. However, Student's brief concedes that San Bernardino City may not have been on notice of Student's academic regression and social-emotional functioning until the September 2020 IEP team meeting, when the IEP team met after her 30-day interim enrollment.

San Bernardino City alleges it was not required to conduct an interim assessment of Student upon her initial enrollment in its district. San Bernardino City alleges it did not have Student's educational records when she enrolled, and that the case manager requested them, received them, and reviewed them in preparation for her 30-day review as a transfer student at her September 2020 IEP team meeting. San Bernardino City alleges it was not required to conduct assessments prior to Student's triennial reevaluation date.

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; *Endrew F. v. Douglas County School Dist. RE-1* (2017) 580 U.S. 386 [137 S.Ct. 988, 1000].)

AUGUST 16, 2020, ENROLLMENT TO INITIAL SEPTEMBER 15, 2020, IEP TEAM MEETING

The local education agency must ensure that assessments of children with disabilities who transfer from one public agency to another public agency in the same school year are coordinated with the student's prior and subsequent schools, as necessary and as expeditiously as possible to ensure prompt completion of full evaluations. (34 C.F.R. § 300.304(c)(5).)

If a student has an IEP and transfers into a district within the same academic year, the local education agency shall provide the student with a FAPE, including comparable services described in the previously approved IEP, in consultation with the parents for a period not to exceed 30 days, by which time the local education agency shall adopt the previously approved IEP or shall develop, adopt, and implement a new IEP that is consistent with state and federal law. (Ed. Code, §§ 56043, subd. (m)(1), 56325, subd. (a)(1).)

To facilitate the transition of a special education student described above, the new school in which the student enrolls shall take reasonable steps to promptly obtain the pupils records, IEP documents, and other supporting documents and records, from the previous school. (Ed. Code, § 56043, subd. (m)(4).) Upon receipt of a request from a local education agency where a special education student has enrolled, a former education agency shall send these students special education records to the new district within five working days. (Ed. Code, §§ 56043, subd. (o), 56325, subd. (b)(1).)

Student did not establish San Bernardino City was required to assess her before her September 15, 2020 IEP team meeting.

On August 16, 2020, Student, enrolled at San Bernardino City in the 10th grade at age 15, nine months, two weeks after the 2020-2021 school year began. Parents did not provide Student's records or IEP documents to San Bernardino City at the time of enrollment. There was no evidence San Bernardino City had knowledge of her suspected disabilities at the time Parents submitted her enrollment paperwork.

San Bernardino City did not deny Student a FAPE by not assessing Student in all areas of suspected disability during the first 30 days of her enrollment. The evidence established San Bernardino City acted reasonably in requesting those records for the September 15, 2020 IEP team meeting, between the time Student enrolled on August 16, 2020, and the September 15, 2020 IEP team meeting. It was entitled to gather Student's records during the interim 30-day period, before meeting as a team and making decisions whether to reassess Student. (Ed. Code, §§ 56043, subd. (m)(1), 56325, subd. (a)(1).)

ISSUE 1a: PSYCHOEDUCATIONAL ASSESSMENT

Any psychological assessment of students shall be conducted by a credentialed school psychologist trained and prepared to assess cultural and ethnic factors. (Ed. Code, § 56324 subd. (a).)

San Bernardino City took reasonable steps to obtain Student's records from Victor Valley Unified School District, Student's former school district, upon her enrollment. Case manager Juan Hernandez credibly testified that he requested, obtained, and reviewed the records to prepare for the September 15, 2020 IEP team meeting. The evidence did not demonstrate that San Bernardino City had knowledge of Student's needs warranting a psychoeducational assessment because it did not meet as

an IEP team until then. It was entitled to gather and review Student's records during the interim 30-day period, before meeting as a team with Parents and discussing Student's unique needs.

ISSUE 1b: EDUCATIONALLY RELATED MENTAL HEALTH SERVICES ASSESSMENT

Local education agencies are responsible for providing educationally related mental health services which include out-of-home residential services for emotional disturbance, counseling and guidance services, parental counseling and training, psychological services, social work services, and behavior interventions. (Ed. Code, §§ 56836.07, 56363) Therefore, the same assessment rules apply to mental health services.

Between August 16 and September 15, 2020, Student did not establish San Bernardino City had knowledge she required an educationally related mental health services assessment, for the same reasons as stated above regarding the need for a psychoeducational evaluation. Case manager Hernandez acted reasonably in requesting and reviewing Student's records from Victor Valley Unified School District. Although the prior records discussed Student's social-emotional needs, her prior trauma from sexual abuse, and her self-harming coping mechanisms, the IEP team was entitled to review the records with Parents at an IEP team meeting before deciding whether Student required an assessment.

ISSUE 1c: HEALTH ASSESSMENT

Student argues San Bernardino City failed to conduct a health and developmental history report, which should have included Student's history of a sexual assault in foster care and self-harm. Student alleges San Bernardino City was aware of her past history of self-harm by at least the September 2020 IEP team meeting and should have conducted a health history assessment. However, Student's brief only alleges San Bernardino City did not conduct a triennial health assessment due by January 22, 2022.

San Bernardino City does not assert a separate defense as to this claim.

Any health assessment shall be conducted by a credentialed school nurse or physician who is trained and prepared to assess cultural and ethnic factors appropriate to the student. (Ed. Code, § 56324(b).)

San Bernardino City did not deny Student a FAPE by not assessing Student's health during the first 30 days of her enrollment. The evidence established San Bernardino City acted reasonably in requesting those records for the September 15, 2020 IEP team meeting, between the time Student enrolled on August 16, 2020, and the September 15, 2020, IEP team meeting. It was entitled to gather Student's records during the interim 30-day period, before meeting as a team and making decisions whether to reassess Student. (Ed. Code, §§ 56043, subd. (m)(1), 56325, subd. (a)(1).)

ISSUE 1d: ASSISTIVE TECHNOLOGY ASSESSMENT

Student alleges San Bernardino City reviewed her January 2019 assessment which indicated she required the use of a calculator, and therefore it should have assessed her

to determine if she required additional assistive technology such as talk-to text, audio books, text-to-speech, visual aids, or a noise-cancellation system. Student further alleges San Bernardino City became aware of her difficulties with Wi-Fi internet connectivity during the COVID-19 distance learning program as additional justification for needing an assistive technology assessment.

San Bernardino City asserts it was not required to assess Student because it provided her with a Chromebook and a Wi-Fi hot spot to help her with distance learning. It alleges no substantial change in Student's academic performance or her disabling condition warranting an assessment.

A local education agency shall provide the use of school purchased assistive technology devices in a child's home if the IEP team determines the child needs access to those devices to receive a free and appropriate public education. (34 C.F.R § 300.105; Ed Code, § 56043.3.)

Assistive technology device means any item, piece of equipment, or product system used to increase, maintain, or improve the functional capabilities of the special education student. (Ed. Code, § 56020.5.)

San Bernardino City did not deny Student a FAPE by not assessing Student for assistive technology needs during the first 30 days of her enrollment. The evidence established San Bernardino City acted reasonably in requesting those records for the September 15, 2020 IEP team meeting, between the time Student enrolled on August 16, 2020, and the September 15, 2020 IEP team meeting. It was entitled to gather Student's records during the interim 30-day period, before meeting as a team and making decisions whether to reassess Student. (Ed. Code, §§ 56043, subd. (m)(1), 56325, subd. (a)(1).)

SEPTEMBER 15, 2020 IEP TEAM MEETING TO SEPTEMBER 14, 2021

ISSUES 1a, 3b: PSYCHOEDUCATIONAL ASSESSMENT AND FAILING TO ASSESS STUDENT'S LACK OF SOCIAL-EMOTIONAL PROGRESS AT THE SEPTEMBER 2020 IEP TEAM MEETING

Student asserts that San Bernardino City had notice that Student required a psychoeducational assessment by the September 2020 IEP team meeting. Student asserts that her case manager and the IEP team knew she was well below grade level in all academic areas, and failed half her classes during her freshman year. Student alleges the IEP team knew she had engaged in self-harm at her prior school and placement.

San Bernardino City alleges it was not required to reassess her as her most recent triennial assessment was conducted on January 17, 2019. San Bernardino City claims that Student's case manager reviewed her educational records from her prior school and determined there was no substantial change in her academic performance or her disabling condition which would have required an assessment.

A student must be reassessed if the school district determines that the educational or related service needs, including improved academic achievement and functional performance, of the student warrant assessment, or if the parents or teacher request an assessment. (Ed. Code, § 56381, subds. (a),(b).)

A reassessment of a student shall occur not more frequently than once a year, unless the parent and the local education agency agree in writing otherwise, and shall occur at least once every three years, unless the parent and the local education agency agree in writing, that a reassessment is unnecessary, pursuant to Education Code section 56381. (34 C.F.R. § 300.303 (b)(2); Ed. Code, § 56043, subd. (k).)

The requirements to assess a student may be triggered by the informed suspicions of outside experts. Once a school district has notice that a student displayed symptoms of an eligible disability, it must assess the student in all areas of that disability with reliable, standardized testing instruments, utilizing procedures that meet the statutory requirements. Informal observations and the subjective opinions of staff members who dispel such reported suspicion, are not sufficient. The lack of information from such a failure to assess may deny educational opportunities and substantially hinder parents' ability to participate in the IEP process. (*Timothy O. v. Paso Robles Unified School Dist.* (9th Cir. 2016) 822 F.3d 1105 ("*Timothy O.*"), *N.B. v. Hellgate Elementary School Dist.* (9th Cir. 2008) 541 F.3d 1202.)

A referral for an assessment means any written request for assessment to identify a student for special education needs made by a parent, teacher, service provider, or foster parent. (Ed. Code, § 56029.)

The IEP team shall consider all the relevant material which is available on the child. No single score or product of scores shall be used as the sole criterion for the decision of the IEP team as to the child's eligibility for special education, or developing an appropriate program. (20 U.S.C. § 1414(b)(2)(B); Ed. Code, § 56320, subd. (e); Cal. Code Regs., tit. 5, § 3030, subd. (a).)

A school district's failure to conduct appropriate assessments or reassess in all areas of suspected disability may constitute a procedural denial of FAPE. (*Park v. Anaheim Union High School Dist.* (9th Cir. 2007) 464 F.3d 1025, 1031-1033 ("*Park*").)

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

- impeded the child's right to a FAPE;
- significantly impeded the parent's opportunity to participate in the decision-making process; or
- caused a deprivation of educational benefits. (20 U.S.C. § 1415(f)(3)(E)(ii); Ed. Code, § 56505, subd. (f)(2); see *W.G. v. Board of Trustees of Target Range School Dist. No. 23* (9th Cir. 1992) 960 F.2d 1479, 1484. ("*Target Range*")

Parental participation in the IEP and the educational placement process is critical to the organization of the IDEA. (*Doug C. v. Hawaii Dept. of Education* (9th Cir. 2013) 720 F.3d 1038, 1043, ("*Doug C.*").) Parental participation safeguards are "[a]mong the most important procedural safeguards" in the IDEA and "[p]rocedural violations that interfere with parental participation in the IEP formulation process undermine the very essence of the IDEA." (*Doug C., supra*, 720 F.3d at p. 1044, citing *Amanda J., supra*, 267 F.3d at 882, 892.) 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. (34 C.F.R. § 300.501(b).) A parent has meaningfully participated in the development of an IEP when he or she is informed of the child's problems, attends the IEP team 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, 693-5 ("*N.L.*"); *Fuhrmann v. East Hanover Bd. of Educ.* (3d Cir. 1993) 993 F.2d 1031, 1036.)

SEPTEMBER 15, 2020, IEP TEAM MEETING

Student established that, at the time of the September 15, 2020, IEP team meeting, San Bernardino City had sufficient knowledge to determine that Student's educational needs, academic achievement and functional performance warranted reassessment because it reviewed her assessments from 2019, knew it was outdated, and it knew she failed half her classes during her ninth grade year.

At age 14, during ninth grade, for the 2019-2020 school year, Student was in foster care and attended Victor Valley Unified School District. Student was sexually assaulted and cut herself on multiple occasions while in foster care. She was placed on a wait list for psychotherapy at Desert Mountain Children's Center. She had failed half her classes. Student's educational program became virtual beginning March 2020 when the COVID-19 global pandemic required schools to close campuses due to health and safety concerns.

Student and her brothers reunited with her Parents during the summer of 2020. The reunited family lived in one room at a homeless shelter. On August 16, 2022, her Parents enrolled her in 10th grade in San Bernardino City. San Bernardino City provided a virtual learning program for the 2020-2021 school year.

When the September 15, 2020, IEP team met with Parents, it reviewed Student's prior January 14, 2020 IEP. The IEP team discussed her academic and psychosocial history. It reviewed her transcripts, her grades, and her discipline reports. Student failed three of her six classes, with three F's, two D's and one C her first semester, and three D minuses, two Incomplete grades, and one C her second semester. Parents reported concerns with her academics. The IEP team briefly reviewed Student's prior

psychoeducational assessment. That prior assessment was not made part of the record. The September 15, 2020, IEP team had no information whether Student was improving or regressing, and had no progress reports. The IEP team had no information whether Student was capable of performing at a higher level.

The IEP team reviewed the January 2020 IEP. It contained Student's most recent Reading Inventory, taken in May of 2018, and her January 2019 Woodcock Johnson Test of Achievement, Fourth Edition, which is normed to reflect age equivalency, with a score of 100 being an average age equivalent. The January 14, 2020, IEP only reported the grade equivalent, not the age equivalent, and did not include the assessment report as an attachment. Student's academic levels were well below her grade level. Student's scores are discussed in detail in Issues 2a. Her 2019 broad math scaled score was a 62. Her basic reading and oral reading skills were in the fifth grade level, and her passage comprehension scores were in the sixth grade level. However, Student just turned 14 years old and was in ninth grade during the 2019 assessment.

Student's present levels of performance are discussed in detail in Issue 2. The September 15, 2022 IEP team did not discuss whether the prior goals were consistent with the 2019 psychological assessment. The record did not establish how the September 15, 2020 IEP team determined Student's present levels of performance.

At the September 15, 2020 IEP team meeting, San Bernardino City reviewed Student's prior academic records from Victor Valley Unified School District, reviewed her IEP documents, and listened to Parents' concerns and their input. It learned that Student's present levels of performance, from the 2019 psychoeducational assessment and January 2020 IEP, were outdated. It knew she failed half of her classes and struggled with her academic performance. The IEP team knew Student's history of

sexual assault, self-harm, and reunification with her brothers and Parents at a homeless shelter. Parents advised San Bernardino City of Student's difficulty adjusting to her new routine and attending her program in the homeless shelter. The IEP notes showed Parents also reported concerns with Wi-Fi connectivity at the homeless shelter. Student had missed several days of virtual learning at her new school. Student persuasively demonstrated that San Bernardino City had sufficient information to determine that Student required reassessment because of her educational or related service needs, and her lack of academic achievement and functional performance. (Ed. Code, § 56381, subds. (a), (b).)

At hearing, Student's special education teacher, Juan Hernandez, testified he had difficulty understanding the Victor Valley Unified School District's FAPE offer of placement during Student's initial IEP team meeting. He had questions about whether Student should be in special day classes, as she was in the prior district, and he recommended a "wait and see" approach. Hernandez did not make reasonable attempts to contact the prior district to clarify the offer. He did not make reasonable efforts to contact Student's prior teacher to gather information. Additionally, the general education teacher was unable to recommend what placement she would be in. While San Bernardino City's offer of FAPE was not an issue at hearing, it had insufficient information about Student's appropriate placement, her present levels of performance, and her academic needs. It should have assessed Student.

This lack of information and lack of complete records placed San Bernardino City on notice that it did not have sufficient information about Student's present level of academic performance, which further indicated the need for an assessment. San Bernardino City did not provide Student with an assessment plan for

psychoeducation despite its knowledge that her educational or related service needs, and declining academic achievement and functional performance warranted a reassessment.

Based upon the questions the IEP team had about whether Student should be in special days classes, knowing she missed several days of school due to Wi-Fi connectivity, knowing Student was not participating in her program, had difficulty focusing on her on-line assignments due to her attention deficit hyperactivity disorder, had a history of many failing grades, and had IEP goals based on outdated assessments, San Bernardino City had enough information to be aware they should assess Student to determine if special day classes were appropriate. Such notice triggers mandatory statutory procedures a school district must conduct to assess for all areas of the suspected disability. (*Timothy O.*, *supra*, 822 F.3d 1105.)

At the IEP team meeting, Parents noted their concern about Student's appropriate class setting. San Bernardino City's failure to reassess Student significantly impeded Parents' opportunity to participate in the decision-making process regarding Student's IEP for several reasons. First, the IEP team had no current evaluative data upon which to base placement or services. Second, the description of Student's present levels of performance was 18 months old and failed to account for Student's decline during distance learning. Third, case manager Hernandez' testimony established he could not definitively determine whether Student required special day classes, even though the January 2020 IEP clearly stated she had been in a special day class program. Fourth, Student's disability affected her ability to focus and concentrate on virtual learning. Fifth, Student had connectivity issues at the homeless shelter. Without the critical information from a psychoeducational assessment, Parents lacked the ability to

make an informed decision. Without this information, Parents, who represented themselves at the IEP team meeting, had no reason to question the program offered. (*Timothy O., supra*, 822 F.3d 1105.)

That deprivation made it difficult to consider and recommend appropriate services necessary to address Student's unique needs. The failure to assess Student's current psychoeducational status significantly impeded Parent's ability to fully participate in the collaborative IEP process. (*Timothy O., supra*, 822 F.3d 1105.)

SEPTEMBER 16, 2020 THROUGH SEPTEMBER 14, 2021

Between the September 15, 2020 and September 14, 2021 IEP team meetings, San Bernardino City's obligation to assess Student continued, further amplified by Student's declining participation in her classes during distance learning. San Bernardino City had knowledge Student was not signing into her classes, participating, or turning in assignments, and it failed to report on her progress on goals. Student's failing grades and lack of information on her declining performance demonstrated San Bernardino City should have assessed her to determine why she was declining.

ISSUE 1b: EDUCATIONALLY RELATED MENTAL HEALTH SERVICES ASSESSMENT

Student asserts that San Bernardino City had notice that Student required a mental health assessment by the September 2020 IEP team meeting. Student asserts that her case manager and the IEP team knew she was well below grade level in all academic areas, and failed half her classes during her freshman year. Student alleges the IEP team knew she had engaged in self-harm at her prior school and placement.

San Bernardino City argues it was not required to reassess her as her most recent triennial assessment was conducted on January 17, 2019. San Bernardino City claims that the IEP team reviewed her social-emotional status concerns from her prior school and determined there was no new social-emotional concerns or a substantial change in her disabling condition which would have required an assessment. San Bernardino City asserts her needs were being met through private counseling services, and that there was no indication she required more intensive services.

Parents and the Victor Valley Unified School District records informed San Bernardino City of Student requiring mental health counseling, and being on a wait list for those services. Parent also persuasively testified she asked for mental health counseling and assessments, and that her request was not addressed. Although the IEP notes do not reflect that request, Parent's testimony is determined to be credible because her testimony was consistent throughout the hearing. By contrast, San Bernardino City's two witnesses, Juan Hernandez and Jennifer Newman, did not maintain required records, and did not complete and maintain reports when they had a statutory obligation to do so. Their testimony is deemed to be not reliable.

SEPTEMBER 15, 2020 IEP TEAM MEETING

Student established San Bernardino City knew she had symptoms of depression, anxiety, and had engaged in self-harm. Parents' discussions, the January 15, 2020 IEP, and the Victor Valley Unified School District Assertive Discipline Report reviewed at the IEP team meeting, all noted Student said she was suffering because she was pulled out of school so much, and was cutting herself because of home issues. Parent also reported Student opined she needed more time to heal from her experiences from foster care and being in a homeless shelter. Parent reported Student had difficulty

logging on to the virtual learning sessions, paying attention, and had anxiety and depression which affected her ability to focus and pay attention to her classroom sessions. Parent reported Student was struggling to join the classes online.

The school psychologist who attended the IEP did not testify. The IEP notes confirm Student had a history of anxiety and depression, and continued to experience anxiety with distance learning. The IEP notes confirm the school psychologist noted concerns with Student's emotional state. There was no discussion noted about following up with counseling or the need for updated assessments.

Jennifer Newman, another school psychologist who did not attend Student's initial IEP team meeting, opined at hearing that the IEP team failed to assess Student in part because she was not on their radar. Newman opined Student had not shown sufficient levels of prior intervention needed, had not attempted suicide the threshold number of times, had not been hospitalized, and therefore did not demonstrate a potential disability. Newman opined depression and cutting was very common for female high school students, and she could not possibly field all the referrals for assessments of all those students, but did not specify whether it was common among special education students. While Newman opined those students should not be assessed for mental health services until several suicide attempts are made and there are hospitalizations, that opinion is not persuasive, and does not address Student's needs to be further evaluated as a current special education student with mental health concerns. Newman further opined that Student's prior records from Victor Valley Unified School District reporting self-harm by cutting was only a single measure of information. However, that opinion is not persuasive and contradicts the

standards established in *Timothy O, supra*, 822 F.3d 1105, especially as there was ample other evidence of Student's mental health problems exacerbated by the pandemic, problems that occurred in foster care and then Student's housing issues.

SEPTEMBER 16, 2020 THROUGH SEPTEMBER 14, 2021

Between the September 15, 2020 and September 14, 2021 IEP team meetings, San Bernardino City's obligation to assess Student continued, further amplified by Student's declining participation in her classes during distance learning. Student's problems persisted and did not improve.

San Bernardino City had knowledge Student was not signing into her classes and was not participating or turning in assignments, and it failed to report on her progress on goals. It had knowledge Student was failing her classes. San Bernardino City failed to ensure Student had access to her case manager, school counselor, and school psychologist, to report on her feelings identified in her anxiety goal, discussed in Issue 2. Student's failing grades and lack of information on her declining performance demonstrated San Bernardino City should have assessed her to determine the reasons why she was declining.

1c: HEALTH ASSESSMENT

Student argues San Bernardino City failed to conduct a health and developmental history report, which should have included Student's history of a sexual assault in foster care and self-harm. Student alleges San Bernardino City was aware of her past history of self-harm by at least the September 2020 IEP team meeting and should have

conducted a health history assessment. However, Student's brief only alleges San Bernardino City did not conduct a triennial health assessment due by January 22, 2022.

San Bernardino City does not assert a separate defense as to this claim.

SEPTEMBER 15, 2020, IEP TEAM MEETING, AND SEPTEMBER 16, 2020, THROUGH SEPTEMBER 14, 2021

Student did not establish San Bernardino City denied her a FAPE by not assessing her health history. Moreover, Student's argument that San Bernardino City should have included a health history assessment report including information about her history of sexual assault and self-harm is duplicative of the allegation requesting assessments for mental health services addressed in Issue 1b. Student did not prove that a health history assessment would have provided the IEP team with additional information about Student's mental health. Student did not prove the need for a health assessment.

ISSUE 1d: ASSISTIVE TECHNOLOGY ASSESSMENT

Student alleges San Bernardino City reviewed her January 2019 assessment which indicated she required the use of a calculator, and therefore it should have assessed her to determine if she required additional assistive technology such as

- talk-to text,
- audio books,
- text-to-speech,
- visual aids, or
- a noise-cancellation system.

Student further alleges San Bernardino City became aware of her difficulties with Wi-Fi internet connectivity during the COVID-19 distance learning program as additional justification for needing an assistive technology assessment.

San Bernardino City asserts it was not required to assess Student because it provided her with a Chromebook and a Wi-Fi hot spot to help her with distance learning. It alleges no substantial change in Student's academic performance or her disabling condition warranting an assessment.

SEPTEMBER 15, 2020 IEP TEAM MEETING

Student did not prove San Bernardino City denied her a FAPE by failing to assess her for assistive technology at the September 15, 2020 IEP team meeting. Student did not establish San Bernardino City had a reason to suspect she had a disability impacting her ability to access her educational program which required assistive technology services and supports. Student's January 14, 2020, IEP did not put the September 15, 2020 IEP team on notice that she required an assistive technology assessment merely because it suggested she have access to a calculator.

SEPTEMBER 16, 2020, THROUGH SEPTEMBER 14, 2021

Between the September 15, 2020, and September 14, 2021 IEP team meetings, Student had an undisclosed and significant number of absences during the 2020-2021 school year, after the September 15, 2020 IEP team meeting. She and her Parents reported to her teacher that she had trouble with Wi-Fi connectivity at the homeless shelter. San Bernardino City provided Student, and all other eligible students, a Chromebook, Wi-Fi hotspot and telephone number to directly reach its information technology department. Student did not require any special assistance using the

Chromebook or Wi-Fi hotspot. Student's case manager confirmed Student had the ability to sign on to her virtual classes and use the applications. The evidence did not demonstrate that Student required assistive technology to increase, maintain, or improve her functional capabilities.

Student did not establish that these connectivity issues placed San Bernardino City on notice that she had a suspected disability requiring an assessment for assistive technology. Student did not prove San Bernardino City denied her a FAPE for failing to assess her for assistive technology.

SEPTEMBER 14, 2021 ANNUAL IEP UP TO FEBRUARY 21, 2022

ISSUE 1a: PSYCHOEDUCATIONAL ASSESSMENT

Student asserts San Bernardino City continued to have a duty to assess Student for her September 14, 2021 IEP team meeting, through February 21, 2022, the date she withdrew from the district.

San Bernardino City alleges it was not obligated to reassess Student until the triennial IEP review on September 14, 2021. San Bernardino City asserts the review of records, academic assessment, and Health and Developmental History was sufficient to reassess Student to confirm she was still eligible for special education services.

SEPTEMBER 14, 2021 ANNUAL IEP

Student established San Bernardino City should have reassessed Student because her educational or related service needs, warranted assessment. (Ed. Code, § 56381,

subds. (a),(b).) Student established San Bernardino City had sufficient knowledge to raise a suspicion she had educational needs, and that her disability impacted her ability to access her education, warranting a reassessment.

Student's September 14, 2021 triennial reassessment was necessary to determine Student's continued eligibility and current educational or related services needs for the triennial IEP team meeting. Student established her educational and related services needs warranted a reassessment because of her lack of participation and failing all her classes the prior school year. However, San Bernardino City did not get parental consent for the review. Hernandez only assessed Student using one measure, the Woodcock Johnson Test of Achievement. Newman only conducted a records review and did not prepare a necessary report documenting her review. This sole measure was not adequate. Student's special education teacher and the school psychologist did not conduct a necessary psychoeducational assessment.

While the 2020-2021 school year was conducted virtually, the 2021-2022 school year was in person on campus. The September 14, 2021 IEP team noted that during the virtual program, Student did not log on and participate often. Student had a significant number of absences and did not complete most of her schoolwork. She failed all her classes and not completing any credits.

Jennifer Newman, the school psychologist that attended the September 14, 2021 IEP team meeting, testified she sent out an assessment plan to Parents, but she could not locate it. She testified she did not recall receiving consent to assess Student. The school psychologist testified she conducted a review of records only, for the purpose of reestablishing Student's eligibility. She testified she prepared a written report of her review, but could not locate it. The school psychologist explained she did not

remember Student's September 14, 2021 IEP team meeting, and that her memory was not good. Because she failed to provide proof of an assessment plan, consent of the Parents, and a report she claimed she wrote, in addition to admitting she had a poor memory, her testimony is not reliable, and her opinions are not credible.

San Bernardino City conducted a single assessment to determine if Student still qualified for services, but did not conduct a thorough and appropriate triennial evaluation. On August 20, 2021, Student's special education teacher assessed her using the Woodcock Johnson Test of Achievement. Student's scores are discussed in detail in Issue 2b. Student's math scores ranged from a 51 to a 78, with her math calculation score being the lowest. Her broad math score was a 64. Student's reading scores were between 67 and 88, with her reading comprehension being the lowest score. Student's scores were well below the average age equivalent score of 100. She was in 11th grade and 16 years and nine months old at the time.

While Juan Hernandez, Student's special education teacher, claimed he also reviewed her work samples to assess her, Student had not attended many virtual sessions during distance learning, so her special education teacher did not have valid data or sufficient observations to make accurate present levels of performance and goals. His assessment was incomplete because no single score or product of scores is sufficient to be used as the sole criterion for the decision of the IEP team as to the child's eligibility for special education, or developing an appropriate program. (20 U.S.C. § 1414(b)(2)(B); Ed. Code, § 56320, subd. (e); Cal. Code Regs., tit. 5, § 3030, subd. (a).)

Hernandez recalled checking in with Student and her family only a few times that year, and he did not meet with her on a regular basis. His contact with her as her case carrier was inconsistent and his testimony and opinions that he knew her present levels

of performance and she did not require further reassessment were not persuasive. His opinion that the reasons Student did not sign on to join her classes was because she did not have a good internet connection at the homeless shelter was also not persuasive, and did not excuse San Bernardino City from conducting a more thorough triennial assessment.

San Bernardino City did not provide Student with an assessment plan for psychoeducation at or after her triennial IEP team meeting, in spite of its knowledge that her educational or related service needs, and declining academic achievement and functional performance warranted an assessment. The school psychologist's testimony that she sent Parents an assessment plan for a records review is not credible as she could not provide it. This failure to assess resulted in a loss of educational opportunity to Student by not assessing her needs to develop an appropriate program. The failure to assess also seriously infringed on Parent's opportunity to participate in the IEP process by having assessment data reviewed and discussed.

San Bernardino City was required to proposed to assess Student for her triennial review, more than it did, because it was appropriate and necessary to provide updated information about Student to help it develop and offer an appropriate educational program. Notably, Student's Parents did not agree in writing that the triennial reassessment was unnecessary. (Ed. Code, § 56043, subd. (k).)

By failing to properly reassess Student, San Bernardino City did not know what Student's present levels of performance because they were based only on a single test. It knew and suspected her disabilities amplified her not attending school consistently during distance learning. It had no alternative sources of data to use because she was not signing onto the virtual classroom and was not submitting assignments. There were

no daily or weekly classroom logs, quarterly report cards, or other information to consider as a basis for evaluating Student's continuing eligibility for special education and related services. Although San Bernardino City conducted a Woodcock Johnson, Test of Achievement, it had no other information to develop Student's goals and offer placement and services reasonably calculated to afford her an educational benefit appropriate in light of the circumstances. (20 U.S.C. § 1414(a)(2)(A)(i); 34 C.F.R. § 300.303(a)(1); Ed. Code, § 56381, subd. (a)(1),(2).)

As a result of the failure to assess Student, the IEP team did not have sufficient information about her and recommended she attend a continuation school in its district. Parents did not have sufficient information about Student to make an informed decision. Parents felt pressured by San Bernardino City to enroll Student in the continuation school. At San Bernardino City's urging, Parent attended an orientation meeting for the continuation school. but ultimately decided to withdraw Student by February 22, 2022, to enroll her in a charter school they selected.

San Bernardino City's failure to conduct appropriate assessments or reassess in all areas of suspected disability constituted a procedural denial of FAPE. (*Park, supra*, 464 F.3d 1025, 1031-1033.) A procedural violation occurred because the failure to reassess Student impeded her right to a FAPE; significantly impeded Parent's opportunity to participate in the decision-making process; and caused a deprivation of educational benefits. (20 U.S.C. § 1415(f)(3)(E)(ii); Ed. Code, § 56505, subd. (f)(2); see *Target Range, supra*, 960 F.2d 1479, 1484.)

SEPTEMBER 15, 2021 TO FEBRUARY 21, 2022

San Bernardino City's obligation to assess her continued after the September 15, 2020 IEP team meeting. It continued to have had information that Student was unable

to make up the credits she missed. San Bernardino City sidestepped its obligation to properly assess her. Instead, San Bernardino City recommended she attend a continuation school so she could make up more credits. Parents had conversations with staff expressing their discomfort with this plan. At San Bernardino City's urging, Parent attended an orientation meeting for the continuation school. However, Parents were uncomfortable with the placement and withdrew Student on February 22, 2022, so she could attend a charter school instead.

All of these factors provided San Bernardino City with ongoing knowledge that Student was not progressing. Student established San Bernardino City should have reassessed Student because her educational or related service needs, warranted assessment. (Ed. Code, § 56381, subds. (a),(b).) Student established San Bernardino City had sufficient knowledge to raise a suspicion she had educational needs, and that her disability impacted her ability to access her education, warranting a reassessment.

ISSUE 1b: EDUCATIONALLY RELATED MENTAL HEALTH SERVICES ASSESSMENT

Student argues San Bernardino City continued to have a duty to assess Student for her triennial IEP team meeting, up to the date she withdrew from the district.

San Bernardino City asserts it was not obligated to reassess Student until the triennial IEP review on September 14, 2021. San Bernardino City asserts the review of records, academic assessment, and Health and Developmental History was sufficient to reassess Student to confirm she was still eligible for special education services.

Local education agencies are responsible for providing educationally related mental health services which include out-of-home residential services for emotional

disturbance, counseling and guidance services, parental counseling and training, psychological services, social work services, and behavior interventions. (Ed. Code, §§ 56836.07, 56363) Therefore, the same assessment rules apply to mental health services.

SEPTEMBER 14, 2021, IEP TEAM MEETING

Student required an educationally related mental health assessment for the same reasons articulated above, regarding the need for a psychoeducational evaluation. San Bernardino City had sufficient information Student suffered from social-emotional needs, anxiety, and depression, from virtual learning, the prior sexual assault, and her history of self-harm.

San Bernardino City's obligation to assess her continued after the initial September 15, 2020 IEP team meeting. It continued to have had information that Student was a former foster care student and sexual assault survivor with a recent history of self harm had just been reunited with her family, enrolled in its school, failed half of her courses the prior year, and was on a waiting list for mental health services. San Bernardino City learned during the school year that Student was not signing onto her virtual classes and was not participating in her classes, and was not submitting classwork. All of these factors provided San Bernardino City with knowledge that Student had social-emotional needs requiring an educationally related mental health services assessment, not just a record review.

Student established that San Bernardino City had reason to suspect a reassessment was necessary because her disability might be impacting her ability to access her educational program. Student's triennial assessment was necessary to determine Student's continued eligibility for special education services, and her current

educational and functional related services needs for the triennial IEP team meeting. Significantly, Student's Parents did not agree in writing that the triennial reassessment was unnecessary. (Ed. Code, § 56043, subd. (k).)

At the September 14, 2021 IEP team meeting, San Bernardino City knew Student did not attend her virtual classes. The IEP team knew Student was struggling academically. San Bernardino City knew that Student had social-emotional issues because Victor Valley Unified High School records and Parents informed them. Student had been on a waitlist for counseling at Desert Mountain Children's Center. While Parents made a vague reference to Student trying outside counseling services, it did not have independently confirmed information that Student received mental health counseling to address previously known issues created by being sexually assaulted in foster care, and a history of cutting herself. Instead of assessing Student, San Bernardino City advised Parents to seek out private counseling for her social-emotional needs.

SEPTEMBER 15, 2021 TO FEBRUARY 21, 2022

San Bernardino City's obligation to reassess Student continued after the September 14, 2021 IEP team meeting, amplified by Student's inability to complete her assignment packets, and pass her classes. Although there was no information of any recent self-harm, there was also no information that her condition had improved. Parent was able to see scars from prior cutting incidents.

Newman's opinion that Student did not require a mental health assessment was not persuasive. The school psychologist opined that although Student had a history of self-harm and cutting, she had not attempted suicide enough times to warrant a mental health assessment. The school psychologist believed cutting was very common among teenage students. However, Student was eligible for special education, and her acts of

cutting herself demonstrated an area of need. The school psychologist's attempt to normalize acts of self-harm with special education students is not persuasive and does not diminish the obligation to reassess Student. This contradicts the standards established in *Timothy O, supra*, 822 F.3d 1105, because that information gave San Bernardino City knowledge Student had symptoms of a suspected disability. (*A.P. v. Pasadena Unified School Dist.* (C.D. Cal. Jan. 26, 2021, Case No. CV 19-7965-MWF (SSx)) 2021 WL 810416, *7.)

ISSUE 1c: HEALTH ASSESSMENT

Student alleges San Bernardino City failed to conduct a health and developmental history report, which should have included Student's history of a sexual assault in foster care and self-harm, as part of her triennial assessment, due by January 22, 2022. Student asserts that the nurse's telephone interview with Parent was insufficient to provide meaningful information.

San Bernardino City asserts it assessed Student for the August 20, 2021 Health and Developmental History Report which was included at the September 2021 IEP team meeting. It claims it included appropriate information about Student's past history of cutting and self-harm, her sexual assault while in foster care, and her reunification with her family. San Bernardino City alleges it reported that Student was no longer receiving outside counseling services, and offered counseling services at school.

Any health assessment shall be conducted by a credentialed school nurse or physician who is trained and prepared to assess cultural and ethnic factors appropriate to the student. (Ed. Code, § 56324(b).)

SEPTEMBER 14, 2021 IEP TEAM MEETING TO FEBRUARY 21, 2022

Student did not establish San Bernardino City did not conduct a timely and appropriate triennial health assessment.

On August 20, 2021, San Bernardino City conducted a health and developmental history report in preparation for Student's triennial IEP team meeting. Nurse Flores reviewed Student's records, interviewed Parent, and conducted Student's vision, hearing, and dental screening. Student passed all three screenings. Student was living in a Salvation Army homeless shelter with both parents and her two brothers. Student had recently seen her pediatrician and dentist. She contracted COVID-19 in December 2020 but did not suffer from any symptoms. Nurse Flores also noted in her report that Student experienced a sexual assault while in foster care and had received counseling to address emotional issues. Student's attendance improved to 93.7 percent since the school instruction returned to campus for the 2021-2022 school year.

San Bernardino City's health assessment was timely and appropriate. It was conducted by registered school nurse Shannon Flores, who was properly credentialed and trained to conduct a vision, hearing, and dental screening. San Bernardino City did not deny Student a FAPE by not conducting a timely and appropriate triennial health assessment.

Moreover, Student's argument that San Bernardino City should have included an additional health history assessment report, beyond what it provided, to include information about her history of sexual assault and self-harm, is duplicative of the

allegation requesting assessments for mental health services addressed in Issue 1b. Student did not prove that an additional health history assessment would have provided the IEP team with additional information about Student's mental health.

ISSUE 1d: ASSISTIVE TECHNOLOGY ASSESSMENT

SEPTEMBER 14, 2021 IEP TEAM MEETING TO FEBRUARY 21, 2022

Student did not prove San Bernardino City denied her a FAPE by failing to assess her for assistive technology at the September 14, IEP team meeting. Student did not establish San Bernardino City had a reason to suspect she had a disability impacting her ability to access her educational program which required assistive technology services and supports.

Student's January 14, 2020 IEP did not put the September 14, 2021 IEP team on notice that she required an assistive technology assessment merely because it suggested she have access to a calculator.

Although Student had an undisclosed and significant number of absences during the 2020-2021 school year, after the September 15, 2020 IEP team meeting, it did not put San Bernardino City on notice at the September 14, 2021 IEP team meeting that she required an assistive technology assessment. Student and her Parents reported to her teacher that she had trouble with Wi-Fi connectivity at the homeless shelter. San Bernardino City provided Student, and all other eligible students, a Chromebook, Wi-Fi hotspot and telephone number to directly reach its information technology

department. Student did not require any special assistance using the Chromebook or Wi-Fi hotspot. The evidence did not demonstrate that Student required assistive technology to increase, maintain, or improve her functional capabilities.

Additionally, the 2021-2020 school year was in-person on campus, and she did not require the Chromebook and hotspot for virtual learning. Although Student still used those tools for in-person learning, she had the ability to sign on and use the applications.

Student did not establish that these connectivity issues placed San Bernardino City on notice that she had a suspected disability requiring an assessment for assistive technology at the September 14, 2021, IEP team meeting. Student did not prove San Bernardino City denied her a FAPE for failing to assess her for assistive technology.

ISSUE 2: DID SAN BERNARDINO CITY UNIFIED SCHOOL DISTRICT DENY STUDENT A FAPE AT THE SEPTEMBER 15, 2020, AND SEPTEMBER 14, 2021, IEP TEAM MEETINGS, BY FAILING TO DESIGN AN APPROPRIATE PROGRAM TO MEET STUDENT'S INDIVIDUAL AND UNIQUE NEEDS IN THE AREAS OF SOCIAL-EMOTIONAL GOALS, MATH GOALS, AND READING GOALS?

Student alleges San Bernardino City did not develop appropriate and measurable goals to meet her unique needs in social-emotional development, math, and reading. Student further alleges San Bernardino City failed to base the goals on present levels of performance and academic achievement and that Student did not have a reasonable chance of attaining the goals within one year.

San Bernardino City alleges it developed appropriate goals based on the information it had available at the time.

In her brief, Student raises new procedural issues alleging that San Bernardino City did not develop an emergency plan consistent with Senate Bill 98, codified by California Education Code Section 56345, subdivision (a)(9). Student asserts San Bernardino City did not implement her September 2020 IEP, allow her to participate in general education curriculum, or address her academic underachievement during COVID-19 school campus closures. Those claims exceed the scope of the issues presented in this case and will not be addressed in this Decision. (See *M.S. by and through Sartin v. Lake Elsinore Unified Sch. Dist.* (9th Cir. 2017) 678 Fed.Appx. 543 ("*Lake Elsinore*") ; 20 U.S.C. § 1415(f)(3)(B).)

ISSUE 2a: SOCIAL-EMOTIONAL GOALS

SEPTEMBER 15, 2020, IEP TEAM MEETING

An IEP must include a statement of measurable, annual academic and functional goals designed to meet the needs of the student. An IEP must also include a description of how the student's progress toward annual goals will be measured. (Ed. Code, §56345, subds. (a)(2) & (3).) For each area in which a special education student has an identified need, the IEP team must develop measurable annual goals that are based upon the child's present levels of academic achievement and functional performance, and which the child has a reasonable chance of attaining within a year. Goals are deemed appropriate when they address each area of unique need, are based on present levels of

performance, and present a challenging series of objectives. Thus, goals are deemed measurable when they can be measured by grade level and accuracy level. (Ed. Code, § 56345.)

The IEP team need not draft IEP goals in a manner that the parents find optimal, as long as the goals are objectively 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, *6.)

Whether a student was offered or denied a FAPE is determined by looking at what was reasonable at the time the IEP was developed, not in hindsight. (*Adams v. State of Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149, (*Adams*), citing *Furhman v. East Hanover Board of Educ.* (3d Cir. 1993) 993 F.2d 1031, 1041.) This is known as the "snapshot rule."

Failing to develop appropriate and measurable goals may be procedural defects in the development of the IEP. A procedural violation results in liability only if the violation

- impeded the child's right to a FAPE,
- significantly impeded the parent's opportunity to participate in the decision-making process; or
- caused a deprivation of educational benefits. (20 U.S.C. § 1415(f)(3)(E)(ii); Ed. Code, § 56505, subd. (f)(2); see *Target Range, supra*, 960 F.2d 1479, 1484.)

Student's September 15, 2020 IEP was an initial 30-day IEP because she transferred into a new district after the school year began. The IEP team was required to either adopt the previously approved IEP or develop, adopt, and implement a new IEP that is consistent with state and federal law. (Ed. Code, §§ 56043, subd. (m)(1), 56325, subd. (a)(1).)

At the September 15, 2020, IEP team meeting, Student was fifteen years and nine months old. San Bernardino City reviewed Student's January 14, 2020 IEP from Victor Valley Unified School District. Student's January 14, 2020, IEP from Victor Valley Unified School District identified Student's areas of need as reading, writing, math, and social-emotional skills. Parent requested Student be placed in a special day class for her core coursework, and in the general education setting for two electives for 30 percent of her school day. Student had severe attention deficit which made it difficult for her to learn in a general education setting due to the pace and demand of the coursework. She worked better with small group instruction with frequent check-ins for understanding. She had completed 15 credits and had failed 15 credits.

The January 14, 2020, IEP described Student's then present levels of performance as a 15-year-old ninth grader transitioning into high school, making friends with peers and adults, and waiting for counseling services to begin. The January 14, 2020 IEP based Student's present level of performance on her foster home placement in which she was engaging in self-injurious behavior and foster parent's opinion that Student required constant monitoring.

Student's January 2020 behavior goal required Student to report to a case carrier on a weekly basis to discuss progress in class, her foster home placement, and any other emotional distress issues.

The evidence established Student continued to have anxiety as she adjusted to living in a homeless shelter with her family, and the virtual format of her classes. The evidence did not establish if her anxiety was greater or less than in foster care. The evidence showed that Student was never introduced to the school counselor or the school psychologist, and was not provided with their names or contact information. There was no information that Student was making progress on the prior social-emotional goals.

At the September 15, 2020 IEP team meeting, San Bernardino City developed a new social-emotional development goal addressing anxiety. The baseline noted that Student was adjusting to living with her parents in a homeless shelter and continued to have anxiety resulting from distance learning.

The goal addressing anxiety required Student to identify and manage feelings of anxiety by attempting to communicate with teachers, school counselors or school psychologist as needed during the school day as measured by teacher and staff observation or records, by September 15, 2021. By December 15, 2020, Student would identify and manage feelings of anxiety by attempting to communicate with teachers, school counselor or school psychologist as needed during the school day as measured by teachers, staff observations or records. The short-term objectives were repeated verbatim for March 15, 2021 and June 15, 2021.

The new anxiety goal was not appropriate because San Bernardino City did not reassess Student. The new anxiety goal was not appropriate because it was not based on current data with accurate present levels of performance, and therefore was not designed to meet her unique needs. The new anxiety baseline noted Student was adjusting to living with her Parents, continued to have some anxiety from adjusting to

distance learning. San Bernardino City responded to COVID-19, health and safety mandates by providing remote distance learning to all its students. Student was further isolated from her peers and teachers.

The new anxiety goal was not appropriate because it was not based on Student's present level of performance. The IEP team developed this goal based on outdated information from her prior January 14, 2020 IEP team meeting, and not from current information or assessments. Since the January 14, 2020 IEP team meeting, Student was reunited with her family and moved into a homeless shelter. At the time of the September 2020 IEP team meeting, San Bernardino City knew Student experienced instability being away from her parents, and was recently reunited with her family while living in a homeless shelter. This change in placement and in her home-life could have created new and additional needs. San Bernardino City did not have evidence whether Student's emotional state had significantly improved and no longer needed monitoring or required follow up referrals for school-based counseling or outside counseling. San Bernardino City did not assess Student in the area of psychoeducation or educationally related mental health services and was not aware of her current level of functioning.

The new anxiety goal was not appropriate because did not adopt her prior goal, and was not measurable. The new anxiety goal did not contain a requirement for weekly reporting to a case carrier to monitor her progress in class, her new home placement, or any other emotional concerns.

The new anxiety goal was not appropriate because it was not measurable and likely to be achieved within one year. The new anxiety goal was not appropriate because San Bernardino City did not make reasonable attempts to contact her prior

school to determine whether Student made progress on that goal. San Bernardino City did not determine if Student was capable of making progress with that goal, as written.

The new anxiety goal was not appropriate because it was not likely to be achieved within one year and was not measurable based on grade level and accuracy level. Student's prior January 2020 goal had required Student to report to a case carrier on a weekly basis to discuss progress in class, her foster home placement, and any other emotional distress, and the new anxiety goal did not. The new annual goal was identical in wording to the short-term goals, and did not measure or quantify how many times Student would reach out to her case carrier to indicate whether her social-emotional state was improving or worsening. The anxiety goal was not measurable because it was not measurable by grade level and accuracy level.

The new anxiety goal was not appropriate as it did not address Student's unique needs because it did not address the anticipated difficulty in reaching out to her teachers, counselor, and school psychologist during distance learning. It never provided Student with contact information for the counselor and psychologist. The anxiety goal required that by September 15, 2021, Student would identify and manage feelings of anxiety by attempting to communicate with her teachers, school counselor, or the school psychologist as needed during her school day, as measured by her teacher and staff observations or records. The IEP team developed short-term objectives for December 15, 2020, March 15, 2021, and June 15, 2021, which repeated the annual goal verbatim. However, it did not provide Student with necessary information to reach them as needed.

The new goal was not appropriate and denied Student a FAPE. This procedural violation resulted in a loss of educational opportunity to Student because the goals

were developed without sufficient evaluative information about her individual capabilities. Moreover, the procedural violation seriously infringed on Parents' opportunity to participate in the IEP process because they were deprived of vital information necessary for them to meaningfully participate in the IEP process. Parents were not represented by counsel, and had no reason to question the goals. (*Target Range, supra*, 960 F.2d 1479, 1484; *Timothy O., supra*, 822 F.3d 1105.)

SEPTEMBER 14, 2021, IEP TEAM MEETING

Student was 16 years and nine months and in 11th grade during her September 14, 2021 IEP team meeting.

Student established that her social-emotional skills and anxiety were an area of need because her January 14, 2020 IEP and her September 15, 2020 IEP contained behavior and anxiety goals. Additionally, Student had a history of

- a recent foster care placement,
- sexual assault,
- history of self harm,
- a recent reunification with her family in a homeless shelter, and
- anxiety caused by the distance learning format.

Since the September 15, 2020 IEP team meeting, San Bernardino City did not report progress on Student's progress on her prior anxiety goal. It had not provided Student with the necessary information to reach out to the school counselor or school psychologist, as outlined in the goal.

The September 14, 2021 IEP team was required to contain a statement of goals designed to meet Student's unique needs. The goals were required to be appropriate

measurable annual goals based her present levels of performance, likely to be attained within one year, and measurable based upon grade level and accuracy level. San Bernardino City did not do so.

The September 14, 2021 IEP team developed a new social-emotional anxiety goal noting Student's present levels of performance, as reported by Parents, was that Student had depression and anxiety while in foster care. The goal stated that by September 14, 2022, Student would identify and manage feelings of anxiety by attempting to communicate with teachers, school counselor, or school psychologist as needed during the school day as measured by teacher and staff observations or records. For Student's short-term objective, by January 14 2022, Student would identify and manage feelings of anxiety by attempting to communicate with teachers, school counselor, or school psychologist as needed during the school day as measured by teacher and staff observation or records. By May 14, 2022, Student would identify and manage feelings of anxiety by attempting to communicate with teachers, school counselor, or school psychologist as needed during the school day as measured by teacher and staff observations or records.

San Bernardino City did not conduct a mental health assessment of Student. Nor did it interview Student for the IEP team meeting or the development of goals. It knew that Student missed and did not participate in her school program during the 2020-2021 school year. It did not measure progress she made on her prior goal, which contained the exact same language. San Bernardino City did not develop an appropriate goal as it was not based on Student's present levels of performance or reflect goals and objectives which she had a reasonable chance of attaining within a year.

The new anxiety goal was not appropriate because it did not meet her unique needs. It did not contain a requirement for weekly reporting to a case carrier to monitor her progress in class, her new home placement, or any other emotional concerns. San Bernardino City did not have evidence whether Student's emotional state had significantly improved and no longer needed monitoring or required follow up referrals for school-based counseling or outside counseling. At the time of the September 2021 IEP team meeting, San Bernardino City knew Student had reunited with her family while living in a homeless shelter, and did not sign into her virtual classes the prior year.

The new anxiety goal was not appropriate because it was not based on Student's present level of performance. The IEP team developed this goal, which was identical to her September 15, 2020 goal, and was not developed from current information or assessments. It did not report on her progress, or lack of it. San Bernardino City did not assess Student in the area of psychoeducation or educationally related mental health services, and was not aware of her current level of functioning.

The new anxiety goal was not appropriate because it was not based on current data with accurate present levels of performance, and therefore was not designed to meet her unique needs. Student was further isolated from her peers, teachers, and counselors during distance learning the prior school year. The new anxiety goal was not appropriate because it did not address Student's unique needs because it did not address the anticipated difficulty in reaching out to her teachers, counselor, and school psychologist during distance learning. Nor did it provide her with contact information to reach out to them.

Additionally, the new anxiety goal was not appropriate because it was not measurable based on grade level and accuracy level. The new annual goal was identical

in wording to the short-term goals, and did not measure or quantify how many times Student would reach out to her case carrier to indicate whether her social-emotional state was improving or worsening.

The anxiety goal was not measurable because it was not likely to be achieved within one year. The new anxiety goal was not appropriate because San Bernardino City did not make reasonable attempts to determine whether Student made progress on that goal. San Bernardino City did not determine if Student was capable of making progress with that goal, as written. It never reported on her progress on that goal.

These procedural violations resulted in a loss of educational opportunity to Student and seriously infringed on Parents' opportunity to participate in the IEP process. (*Target Range, supra*, 960 F.2d 1479, 1484.)

ISSUE 2b: MATH GOALS

SEPTEMBER 15, 2020, IEP TEAM MEETING

Student established her need for a math goal because her 2019 Woodcock Johnson Test of Achievement identified it as an area of need, and her prior January 14, 2020 IEP noted she was performing well below grade level and contained a goal. Additionally, Student received a grade of a D minus in her ninth grade Integrative Math 1A class.

The September 15, 2020 IEP team reviewed Student's prior January 14, 2020 IEP, which identified Student's present level of performance in math as able to understand grade level concepts with small group support at a modified pace. She was learning the slope formula and the slope intercept equation for lines. According to her January

2019 scores on the Woodcock Johnson Test of Achievement, her math calculation skills were in the third-grade level, and her broad math skills were in the second grade, ninth month level. Her broad math scaled score was a 62, well below an average score of 100. Math was her weakest subject. She struggled with basic math facts which made her work inaccurate even when she understood or knew the formula and steps.

Student's January 14, 2020 math goal required her to use notes and a calculator to graph a linear equation in $y = mx + b$ format with 100 percent accuracy in three out of four trials as measured by student work samples. There were no progress reports on that goal.

The September 15, 2020 IEP team developed a new annual math goal that required Student to add, subtract, and multiply polynomials with no more than one error in calculation in two trials, as measured by student work samples and teacher records. The goal stated it enabled student to be involved in the general curriculum. The goal also established three short-term objectives identical to the goal but diminishing the number of allowable errors from four to two. San Bernardino City did not base this goal on accurate present levels of performance, and did not know what her baseline was or whether she could achieve this goal in one year. Case manager Hernandez did not credibly explain how the baseline was established.

The new math goal was not appropriate because San Bernardino City did not assess Student in the area of psychoeducation or academic achievement. The IEP team developed this goal based on outdated information from her prior January 14, 2020 IEP team meeting, and not from current information or assessments.

The new math goal was not appropriate because San Bernardino City did not determine if Student was capable of making progress with that goal within one year, as

written. San Bernardino City relied on only one outdated measure of her performance, and did not make reasonable attempts to contact her prior school to determine whether Student made progress on that goal.

These procedural violations resulted in a loss of educational opportunity to Student because the evidence showed that the goals were made without sufficient evaluative information about her individual capabilities. The failure to develop an appropriate math goal also seriously infringed on Parents' opportunity to participate in the IEP process because they were deprived of vital information necessary for them to meaningfully participate in the IEP process. Parents were not represented by counsel at this IEP team meeting, and had no reason to question the goals. (*Target Range, supra*, 960 F.2d 1479, 1484; *Timothy O., supra*, 822 F.3d 1105.)

SEPTEMBER 14, 2021, IEP TEAM MEETING

Student established math was an area of need because her January 14, 2020, IEP and September 15, 2020 IEPs had math goals, and her 2021 achievement tests demonstrated an area of need. In addition, Student demonstrated she did not make progress in math for the 2020-2021 school year because she did not pass her classes.

The September 14, 2021 IEP team was required to contain a statement of goals designed to meet Student's unique needs. The goals were required to be appropriate measurable annual goals based her present levels of performance, likely to be attained within one year, and measurable based upon grade level and accuracy level. San Bernardino City did not do so.

The September 14, 2021 IEP team noted Student's present level of performance included multiplying and adding integers and ordered pairs. Student struggled with

basic math facts which made her work inaccurate, even when she understood the formulas. Student's scores on the Woodcock Johnson Test of Achievement, which she took on August 30, 2021, at the age of 16 years and nine months, determined her math calculation skills were scored at a 64, with an age equivalent of nine years and two months. Her math problem solving score was 74, with an age equivalent of nine years and three months. Her applied problems score was a 78, with an age equivalent of nine years and eight months. Her calculation score was a 51, with an age equivalent of seven years and 10 months. Her math facts fluency score was a 78, with an age equivalent of 10 years, and eight months. Her number matrices score was a 75, with an age equivalent of eight years and nine months. Her broad mathematics score was a 64, with an age equivalent of nine years and three months. These scores were statistically significant in the areas of mathematics, broad mathematics, and math calculation skills, because the scores were more than one and a half standard deviations below the norm.

The new math goal developed stated that by September 14, 2022, Student would identify important parts of graphs and tables such as where the graph was increasing, decreasing, positive, or negative in two trials with no more than one error in identifying parts of a graph and tables as measured by student work samples. By January 14, 2022, Student would identify important parts of a graph and tables in two trials with no more than three errors in identifying parts of a graph and tables as measured by student work samples. By May 14, 2022, Student would identify important parts of graphs and tables in two trials with no more than two errors in identifying parts of the graph and tables as measured by student work samples.

The new math goal was not appropriate because it was not based on accurate present levels of performance. San Bernardino City did not conduct a psychoeducational assessment, and it did not have current work samples from Student because she had not participated in distance learning the prior school year. San Bernardino City relied upon a single assessment, which makes the goal unreliable.

The new math goal was not appropriate because it did not have sufficient information to determine if Student could likely attain the goal within one year.

The new math goal was not appropriate because it was not measurable by grade level.

These procedural violations resulted in a loss of educational opportunity to Student because the evidence showed that the goals were made without sufficient evaluative information about her individual capabilities. The failure to develop an appropriate math goal also seriously infringed on Parents' opportunity to participate in the IEP process because they were deprived of vital information necessary for them to meaningfully participate in the IEP process. Parents were not represented by counsel at the IEP team meeting, and had no reason to question the goals. (*Target Range, supra*, 960 F.2d 1479, 1484; *Timothy O., supra*, 822 F.3d 1105.)

ISSUE 2c: READING GOALS

SEPTEMBER 15, 2020, IEP TEAM MEETING

Student established that reading was an area of need because her January 14, 2020, IEP identified that on the Woodcock Johnson Test of Achievement, her oral reading skills were at a Fifth grade, third month level. Her passage comprehension was

at a Sixth grade, third month level. Her basic reading skills were at a Fifth grade, ninth month level. Her reading fluency was at a Sixth grade, ninth month level. A San Diego Quick Assessment of Student taken on January 7, 2020, determined her independent reading level was at a fourth grade level. Student's present level of performance noted her vocabulary and comprehension skills kept her from fully understanding grade level material. Her ability to focus was compromised by her attention deficit hyperactivity disorder. Student's January 14, 2020 IEP contained a reading goal. Student established she continued to struggle in the area of reading with a grade of a D and a D minus in English 9 during ninth grade, her prior school year.

The September 15, 2020 IEP team reviewed Student's January 14, 2020 IEP. Student's prior January 2020 goal for academics, required that Student would cite the textual evidence that most strongly supported an analysis of the written text with an average comprehension or better on four consecutive assigned passages. The aide, general education teacher and the special education teacher were responsible for helping her achieve her goal.

The September 15, 2020 IEP team developed a new reading goal. By December 15, 2020, Student would cite textual evidence to support analysis of information presented explicitly in the text as measured by curriculum-based assessments or student work samples with no more than four errors in citing textual evidence into trials. By March 15, 2021, Student would cite textual evidence to support analysis of information presented explicitly in the text as measured by curriculum-based assessments or student work samples with no more than three errors in citing textual evidence in two trials. By June 15, 2021, Student would cite textual evidence to support

analysis of information presented explicitly in the text as measured by curriculum-based assessments or student work samples with no more than two errors inciting textual evidence in two trials.

The new reading goal was not appropriate because it was not based on Student's present level of performance. The IEP team developed this goal based on outdated information and baselines from her prior January 14, 2020 IEP team meeting, and not from current information or assessments. San Bernardino City did not assess Student in the area of psychoeducation and was not aware of her current level of functioning.

The new goal was not appropriate because San Bernardino City did not determine if Student was capable of making progress with that goal, as written. San Bernardino City did not make reasonable attempts to contact her prior school to determine whether Student made progress on that goal. These procedural violations resulted in a loss of educational opportunity to Student because the evidence showed that the goals were made without sufficient evaluative information about her individual capabilities. The failure to develop an appropriate reading goal also seriously infringed on Parents' opportunity to participate in the IEP process because they were deprived of vital information necessary for them to meaningfully participate in the IEP process. Parents were not represented by counsel at the IEP team meeting, and had no reason to question the goals. (*Target Range, supra*, 960 F.2d 1479, 1484; *Timothy O., supra*, 822 F.3d 1105.)

SEPTEMBER 14, 2021, IEP TEAM MEETING

Student established reading was an area of need because her August 30, 2021, scores on the Woodcock Johnson Test of Achievement demonstrated, her reading score

fell at a 79, with an age equivalent of 10 years and six months. Her basic reading skills score fell at an 85, with an age equivalent of eleven years, three months. Her reading comprehension score fell at a 67, with an age equivalent of eight years and seven months. Her passage comprehension scores fell at a 75, with an age equivalent of nine years and three months. Her oral comprehension score at a 79, with an age equivalent of nine years six months. Her reading recall score fell at a 67, with an age equivalent of seven years and 10 months. Her word attack score fell at a score of 88, with an age equivalent of 10 years, 11 months. Her score was statistically significant for reading comprehension because the scores were more than one and a half standard deviations below the norm. Student was 16 years and nine months old at the time of the assessment.

Student did not attend her virtual classes the previous year, and did not turn in her class assignments. Student did not make progress in reading for the 2020-2021 school year.

The September 14, 2021 IEP team was required to contain a statement of goals designed to meet Student's unique needs. The goals were required to be appropriate measurable annual goals based her present levels of performance, likely to be attained within one year, and measurable based upon grade level and accuracy level.

San Bernardino City did not do so.

The September 14, 2021 IEP team reviewed her recent Woodcock Johnson Test of Achievement scores. It noted Student's present level of performance included she attempted to read grade level texts but struggled with literal analysis of text. She struggled with finding main ideas and themes of grade level passages.

The September 14, 2021 IEP team developed a new reading goal which stated that by September 14th, 2022, she would address a question or solve a problem by integrating and evaluating multiple sources of information as measured by student work samples in two trials with 90 percent accuracy. By January 14, 2022, Student would address a question or solve a problem by integrating and evaluating multiple sources of information as measured by student work samples in two trials with 70 percent accuracy. By May 14, 2022 Student would address a question or solve a problem by integrating and evaluating multiple sources of information as measured by student work samples in two trials with 80 percent accuracy.

The new reading goal was not appropriate because it was not based on accurate present levels of performance. San Bernardino City did not conduct a psychoeducational assessment, and it did not have current work samples from Student because she had not participated in distance learning the prior school year. San Bernardino City relied upon a single assessment, which makes the goal unreliable.

The new reading goal was not appropriate because San Bernardino City did not have sufficient information to determine if Student could likely attain the goal within one year.

The new reading goal was not appropriate because it was not measurable by grade level.

These procedural violations resulted in a loss of educational opportunity to Student because the evidence showed that the goals were made without sufficient evaluative information about her individual capabilities. The failure to develop an appropriate reading goal also seriously infringed on Parents' opportunity to participate in the IEP process because they were deprived of vital information necessary for them to

meaningfully participate in the IEP process. Parents were not represented by counsel at the IEP team meeting, and had no reason to question the goals. (*Target Range, supra*, 960 F.2d 1479, 1484; *Timothy O., supra*, 822 F.3d 1105.)

ISSUE 3: DID SAN BERNARDINO CITY UNIFIED SCHOOL DISTRICT DENY STUDENT A FAPE AT THE SEPTEMBER 15, 2020, IEP TEAM MEETING BY SIGNIFICANTLY IMPEDING PARENT'S ABILITY TO PARTICIPATE IN THE DECISION-MAKING PROCESS BY FAILING TO PRODUCE ALL EDUCATIONAL RECORDS?

ISSUE 3a: FAILING TO PRODUCE EDUCATIONAL RECORDS

Student alleges San Bernardino City failed to produce all of Student's educational records when Parents requested them in writing on an undisclosed date.

San Bernardino City asserts student did not present evidence that she sent a request for all of student's records prior to the September 15, 2020 IEP team meeting.

Student also alleges her counsel requested educational records and that San Bernardino City did not produce them, therefore preventing Parents and Student's counsel from addressing all potential issues that could be raised in the due process complaint, in preparation for litigation. Those claims exceed the scope of the issues presented in this case and will not be addressed in this Decision. (See *Lake Elsinore, supra*, 678 Fed.Appx. 543; 20 U.S.C. § 1415(f)(3)(B).)

The parent shall have the right and opportunity to examine all school records of the student and receive complete copies within five business days after making an oral or written request and before an IEP team meeting. (Ed. Code § 56043, subd. (n).)

"[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. (*Winkelman v. Parma City School Dist.* (2007) 550 U.S. 516, 524 [127 S. Ct. 1994].) (*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.*)

Student failed to establish Parents made a written request for her educational records prior to the September 15, 2020 IEP team meeting and that San Bernardino City did not comply.

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 1a:

San Bernardino City did not Student a FAPE from August 16, 2020, to September 14, 2020, by failing to assess in the area of psychoeducation. San Bernardino City denied Student a FAPE from September 15, 2020, to September 13, 2021, by failing to assess in the area of psychoeducation. San Bernardino City denied Student a FAPE from September 14, 2021, to February 21, 2022, by failing to assess in the area of psychoeducation.

Both parties prevailed on this issue.

ISSUE 1b:

San Bernardino City did not deny Student a FAPE from August 16, 2020, to September 14, 2020, by failing to assess in the area of educationally related mental health services. San Bernardino City denied Student a FAPE from September 15, 2020, to September 13, 2021, by failing to assess in the area of mental health services. San Bernardino City denied Student a FAPE from September 14, 2021, to February 21, 2022, by failing to assess in the area of mental health services.

Both parties prevailed on this issue.

ISSUE 1c:

San Bernardino City did not deny Student a FAPE from August 16, 2020, to September 14, 2020, by failing to assess in the area of health. San Bernardino City did not deny Student a FAPE from September 15, 2020 to September 13, 2021, by failing to assess in the area of health. San Bernardino City did not deny Student a FAPE from September 14, 2021 to February 21, 2022, by failing to assess in the area of health.

San Bernardino City prevailed on this issue.

ISSUE 1d:

San Bernardino City did not deny Student a FAPE from August 16, 2020, to September 14, 2020, by failing to assess in the area of assistive technology. San Bernardino City did not deny Student a FAPE from September 15, 2020, to September 13, 2021, by failing to assess in the area of assistive technology.

San Bernardino City did not deny Student a FAPE from September 14, 2021, to February 21, 2022, by failing to assess in the area of assistive technology.

San Bernardino City prevailed on this issue.

ISSUE 2a:

San Bernardino City denied Student a FAPE at the September 15, 2020, IEP by failing to design an appropriate program in the area of social-emotional goals. San Bernardino City denied Student a FAPE at the September 14, 2021 IEP by failing to design an appropriate program in the area of social-emotional goals.

Student prevailed on this issue.

ISSUE 2b:

San Bernardino City denied Student a FAPE at the September 15, 2020, IEP by failing to design an appropriate program in the area of math goals. San Bernardino City denied Student a FAPE at the September 14, 2021 IEP by failing to design an appropriate program in the area of math goals.

Student prevailed on this issue.

ISSUE 2c:

San Bernardino City denied Student a FAPE at the September 15, 2020, IEP by failing to design an appropriate program in the area of reading goals. San Bernardino City denied Student a FAPE at the September 14, 2021, IEP by failing to design an appropriate program in the area of reading goals.

Student prevailed on this issue.

ISSUE 3a:

San Bernardino City did not deny Student a FAPE at the September 15, 2020 IEP by significantly impeding Parent's ability to participate in the decision-making process by failing to produce all educational records.

San Bernardino City prevailed on this issue.

ISSUE 3b:

This issue was duplicative and was addressed in Issue 1A.

Student prevailed on Issue 1A.

REMEDIES

Courts have broad equitable powers to remedy the failure of a school district to provide FAPE to a disabled child. (20 U.S.C. § 1415(i)(2)(C)(iii); see also, *School Committee of the Town of Burlington, Massachusetts v. Dept. of Education* (1985) 471 U.S. 359, 369 [105 S.Ct. 1996, 85 L.Ed.2d 385].) This broad equitable authority extends to an ALJ who hears and decides a special education administrative due process matter. (*Forest Grove School Dist. v. T.A.* (2009) 557 U.S. 230, 244, n. 11 [129 S.Ct. 2484, 174 L.Ed.2d 168] ("*Forest Grove*").) An ALJ can award compensatory education as a form of equitable relief. (*Park, supra*, 464 F.3d 1025, 1033.)

School districts may be ordered to provide compensatory education or additional services to a student who has been denied a FAPE. (*Parents of Student W. v. Puyallup School Dist., No. 3* (9th Cir. 1994) 31 F.3d 1489, 1496.) These are equitable remedies that courts may employ to craft "appropriate relief" for a party. An award of compensatory

education need not provide a “day-for-day compensation.” (*Id.* at p. 1497.) The conduct of both parties must be reviewed and considered to determine whether equitable relief is appropriate. (*Id.* at p. 1496.) Compensatory education is a prospective award of educational services designed to catch-up the student to where he should have been absent the denial of a FAPE. (*Brennan v. Regional School Dist. No. 1* (D. Conn. 2008) 531 F.Supp.2d 245, 265.) An award to compensate for past violations must rely on an individualized assessment, just as an IEP focuses on the individual student’s needs. (*Reid ex rel. Reid v. Dist. of Columbia* (D.D.C. Cir. 2005) 401 F.3d 516, 524.) The award must be fact-specific and “reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place.” (*Ibid.*)

The prehearing conference order mandates that any party seeking reimbursement for expenditures shall present admissible evidence of these expenditures, or a stipulation to the amount of the expenditures. It further mandates that a party seeking compensatory education should provide evidence regarding the type, amount, duration, and need for any requested compensatory education. Finally, it requires that documents offered as evidence to support a request for reimbursement must be separated by vendor.

Student established several violations of FAPE, but did not provide any expenditures, stipulations, or credible evidence regarding the type, amount, duration, and need for any requested compensatory education. Student showed academic losses and failed classes. Student established she and her Parents were deprived of important assessment information during the development of her IEP which is a significant procedural violation. Student had at least one qualifying disability, and compensatory education may provide a benefit to Student. Therefore, the ALJ who hears and decides

a special education administrative due process matter has broad equitable authority. (*Forest Grove*, *supra*, 557 U.S. 230, 244, n. 11.) An ALJ can award compensatory education as a form of equitable relief. (*Park*, *supra*, 464 F.3d 1025, 1033.)

Student requested an order for compensatory education in all areas of need, with a non-public agency with transportation. Student requested reimbursement for private tutoring and psychological counseling, including transportation. Student requested an order for independent educational evaluations. Student requested staff training. Student also requested attorney's fees.

As to Issue 1a and 1b, Student established she required assessments and San Bernardino City failed to assess Student between September 15, 2020 and February 21, 2022, in the areas of psychoeducation and mental health. However, Student did not provide evidence of the type, amount, duration, and need for compensatory education. Student did not establish a reasonable estimated cost of those assessments.

Student did not establish how long she could attend to tasks and whether she had sufficient attention and focus to work on her goals.

The weight of the evidence supports an order for equitable remedies, considering the Student's psychoeducational, academic, and mental health history. Compensatory education will be in the form of an independent educational evaluation in the areas of psychoeducation and educationally related mental health services if they have not already been conducted by Student's new school district of attendance. The licensed and qualified assessors will be chosen by Student and will not exceed the rate established by the special education local plan area, known as SELPA, because Student did not establish a reasonable estimated cost for those assessments.

If either assessment has already been conducted by Student's new local educational agency of attendance, then a fund will be established for Student to use the balance of the fund for compensatory academic instruction and/or mental health counseling based upon SELPA rate for these assessments. The educational therapies will be provided by a certified non-public agency, and the hourly rate shall not exceed the hourly rate established by the SELPA because Student did not establish a reasonable estimated cost for those services.

As to Issue 2a and 2b, Student established San Bernardino City failed to develop appropriate goals for Student between September 15, 2020, and February 21, 2022, in the areas of social-emotional skills, math, and reading. While the remedy for a procedural violation for failing to develop appropriate goals would logically be to award assessments, such assessments are awarded above. The weight of the evidence supports an award of compensatory education, instead of an award of duplicative assessments.

Compensatory academic instruction is calculated at one hour per week, from September 15, 2020 to May 28, 2021, the end of the school year; excluding vacation, for 30 full weeks. Compensatory education is calculated from August 2, 2021, the first day of school up to the September 14, 2021 IEP; for six full weeks. Compensatory education is calculated from the September 14, 2021 IEP to February 21, 2022, when Student withdrew from San Bernardino City, for 18 full weeks.

The compensatory education is therefore calculated at 54 weeks, with one hour per week awarded for a total of 54 hours. The educational therapies will be provided by

a certified non-public agency, and the hourly rate shall not exceed the hourly rate established by the SELPA because Student did not establish a reasonable estimated cost for those services.

ORDER

1. San Bernardino City shall fund an independent psychoeducational educational evaluation and an independent educationally related mental health services evaluation not to exceed the SELPA guidelines, by a qualified and licensed evaluator of Student's choice. If either or both evaluations were already conducted by Student's current local educational agency, Student may use the fund for specialized academic instruction, not to exceed the hourly rate established by the SELPA, by a certified non-public agency of Parent's choosing.
2. San Bernardino City shall fund up to 54 hours of compensatory academic instruction and/or mental health counseling, by a certified non-public agency or licensed provider, at a rate not to exceed not to exceed the hourly rate established by the SELPA for academic instruction and mental health counseling. The duration and frequency shall be determined by the provider.
3. San Bernardino City shall contract with the licensed qualified assessors and certified non-public agency selected by Parent within 45 days of Parent's notifying it in writing of the assessor and agency to provide the service.

4. Any compensatory service time awarded by this Decision must be used by September 15, 2025. All unused hours remaining on September 16, 2025, shall be forfeited.
5. All other requests for relief are denied.

RIGHT TO APPEAL THIS DECISION

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

/s/

Deborah Myers-Cregar

Administrative Law Judge

Office of Administrative Hearings