

BEFORE THE  
OFFICE OF ADMINISTRATIVE HEARINGS  
STATE OF CALIFORNIA

PARENT ON BEHALF OF STUDENT,

V.

CHULA VISTA ELEMENTARY SCHOOL DISTRICT.

CASE NO. 2023050586

DECISION

NOVEMBER 29, 2023

On May 12, 2023, the Office of Administrative Hearings, called OAH, received a due process hearing request from Parent on behalf of Student, naming Chula Vista Elementary School District. Student's complaint was amended on August 23, 2023. Administrative Law Judge Brian H. Krikorian heard this matter by Zoom videoconference on October 10, 11 and 12, 2023.

Attorneys Marymichelle Lotano, Jennifer Holzman, and Matthew Storey represented Student. Parent attended all hearing days on Student's behalf. Attorneys Pamela Townsend and Megan Resnik represented Chula Vista. Sharon Casey, Assistant Superintendent of Student Services attended all hearing days on Chula Vista's behalf.

At the parties' request, the matter was continued to November 7, 2023, for written closing briefs. On November 3, 2023, the parties requested an extension to file written closing briefs on November 13, 2023, which was granted. The record was closed, and the matter submitted on November 13, 2023.

## ISSUES

A free appropriate public education is referred to as a FAPE. An individualized education program is referred to as an IEP.

1. Did Chula Vista deny Student a FAPE in the 2021-2022 school year by failing to:
  - a. offer appropriate services or supports to address Student's lack of progress in reading, writing, math, and behavior in the IEPs dated March 14, and 16, 2022;
  - b. offer a one-to-one behavior aide in the IEPs dated March 14, and 16, 2022;
  - c. offer appropriate accommodations in the IEPs dated March 14, and 16, 2022; and
  - d. conduct further psychoeducational assessments after Student filed the complaint in this matter to examine and explain Student's unexpected underachievement in the cognitive testing done via the Comprehensive Test of Nonverbal Intelligence, Second Edition, referred to as the CTONI-2, which was completed by March 11, 2022?

2. Did Chula Vista deny Student a FAPE in the 2022-2023 school year by failing to offer the following in the IEP dated February 27, 2023:
  - a. appropriate services or supports to address Student's lack of progress in reading, writing, math, and behavior;
  - b. a one-to-one behavior aide; and
  - c. appropriate accommodations?

## JURISDICTION

This hearing was held under the Individuals with Disabilities Education Act, called the IDEA, 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 IDEA, are to ensure:

- all children with disabilities have available to them a FAPE that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment and independent living, and
- the rights of children with disabilities and their parents are protected.  
(20 U.S.C. § 1400(d)(1); See Ed. Code, § 56000, subd. (a).)

The IDEA affords parents and local educational agencies the procedural protection of an impartial due process hearing with respect to any matter relating to the identification, assessment, or educational placement of the child, or the provision of

a FAPE to the child. (20 U.S.C. § 1415(b)(6) & (f); 34 C.F.R. § 300.511; 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).) In this case, Student has the burden of proof. The factual statements in this Decision constitute the written findings of fact required by the IDEA and state law. (20 U.S.C. § 1415(h)(4); Ed. Code, § 56505, subd. (e)(5).)

Student was 12 years and three months old and beginning seventh grade at the time of hearing. Student resided within Chula Vista's geographic boundaries at all relevant times. Student was eligible for special education under the category of autism and hard of hearing. Student presented concerns in academics, communication, social interaction, and behavior.

## ISSUE 1: DID CHULA VISTA DENY STUDENT A FAPE IN THE 2021-2022 SCHOOL YEAR?

Student contends that Chula Vista denied Student a FAPE in the 2021-2022 school year by failing to:

- offer appropriate services or supports to address Student's lack of progress in reading, writing, math, and behavior in the IEPs dated March 14, and 16, 2022;

- offer a one-to-one behavior aide in the IEPs dated March 14, and 16, 2022;
- failing to offer appropriate accommodations in the IEPs dated March 14, and 16, 2022; and,
- failing to conduct further psychoeducational assessments after Student filed the complaint in this matter to examine and explain Student's unexpected underachievement in the cognitive testing done via the Comprehensive Test of Nonverbal Intelligence, Second Edition, referred to as the CTONI-2, which was completed by March 11, 2022?

Chula Vista contends that it offered Student a FAPE from May 5, 2021, two years prior to the date of filing the due process complaint, through June 3, 2022, the end of the 2021-2022 school year.

A FAPE means special education and related services that are available to an eligible child that meets state educational standards at no charge to the parent or guardian. (20 U.S.C. § 1401(9); 34 C.F.R. § 300.17.) Parents and school personnel develop an individualized education program, referred to as an IEP, for an eligible student based upon state law and the IDEA. (20 U.S.C. §§ 1401(14), 1414(d)(1); and see Ed. Code, §§ 56031, 56032, 56341, 56345, subd. (a) and 56363 subd. (a); 34 C.F.R. §§ 300.320, 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. ex rel. Joseph F. v. Douglas Cnty. Sch. Dist. RE-1*, (2017) 580 U.S. 386, 137 S. Ct. 988, 1000, 197 L. Ed. 2d 335)

Student suffered from a congenital deficit called Connexin 26, a gene mutation which resulted in bilateral hearing loss. Student used hearing aids since the age of 8 weeks old, and began learning American Sign Language, referred to as ASL, since the age of 8 months of age. Student enjoyed learning about dinosaurs and other animals. He played on his iPad and with his toys. He enjoyed writing and drawing.

## THE FEBRUARY 2021 BASELINES

In February 2021, Student was in fourth grade. At the February 2021, IEP meeting, Parent expressed concerns that Student was behind in his academic learning, due in part to the Covid-19 school shutdowns. Parent noted Student had difficulty attending over four hours of school, and the longer periods resulted in maladaptive behaviors. Parent also contended that Chula Vista was not implementing Student's existing IEP, and not modifying the curriculum to meet Student's unique needs. Parent pointed out that the current curriculum being given to Student had him adding single-digit numbers, such as two plus two, when he could do three-digit addition and subtraction, and basic multiplication. Student read at the kindergarten level, although Parent believed he was capable of reading at a higher level.

Parent also complained that Student should have more ASL services and instruction. Student was being provided a system known as FM, which amplified the sound of words spoken by his peers, teachers, and aides. Parent testified at hearing that

the system merely made the sounds louder and did not necessarily address Student's comprehension of the words and phrases being used. Parent asserted that the failure to address Student's learning needs resulted in maladaptive behaviors, including refusing to work, behavior meltdowns, spitting at screens, and kicking objects.

## READING

Student's present levels of performance in reading were assessed at the beginning of the school year in September of 2020. Student was assessed using the reading program Achieve 3000 which is a computer-based program where students read a text and then answer comprehension questions about it. Achieve 3000 generates a "Lexile" score, or level, for each student. Student started the year at a Lexile level of BR15, which equated to kindergarten level reading. By the time of the February 2021 IEP meeting, Student had increased five points to BR10, which was still at kindergarten level.

At the time of the IEP, Student was working through first-grade activity lessons and understood word building, rhyming, word matching, and story games. Student could comprehend stories at the middle first-grade level with some supports.

## WRITING

Student demonstrated developing writing skills and used a combination of writing, dictation, and typing to compose written pieces. Student was capable of writing simple grammatically correct sentences with a subject and a predicate. Student could only independently write a five-sentence paragraph if he was provided instructions beforehand, along with sentence frames to fill in words.

## MATHEMATICS

Student took a Math i-Ready assessment in September 2020 for the purpose of assessing his overall math ability. i-Ready is an online program for reading and/or mathematics that helps teachers determine student's needs, personalize their learning, and monitor progress throughout the school year. Student's overall ability was equivalent to a first-grade level. He was achieving understanding in kindergarten concepts in numbers and operations, and second-grade concepts in algebra and measurements and data. By January 2021, Student was at a consistent first-grade level in math.

## BEHAVIOR

The IEP reflected that Chula Vista team members did not have new data on Student's behaviors. The team explained in the notes that Parent requested Student complete asynchronous work packets instead. At hearing, Chula Vista failed to explain why it did not collect behavioral baselines for the 2021 IEP. Instead, Chula Vista used baselines from the 2020 IEP. In 2020, Student refused to enter class, sit at his desk, follow instructions, and eloped.

## THE MARCH 14, 2022, IEP BASELINES

The IEP team met on March 14, 2022, for Student's annual IEP meeting. Student was in fifth grade. The team had several continuation meetings during the 2022 calendar year, including March 16, April 4, April 11, April 18, May 9, May 26, August 9, and November 18, 2022, meetings. The team discussed Student's present levels of performance, and his progress on the February 18, 2021, IEP goals.

## READING

Student completed a Lexile assessment through Achieve 3000 in February of 2022. This assessment required Student to read short texts, comprehension questions and then answer on his own. Student's Lexile level at the commencement of the 2021-2022 school year was a BR40, which was equivalent to kindergarten. His Lexile level as of March 2022 was listed at 170, which was equivalent to first grade. Student was also assessed using the Running Record reading program. A Running Record is an assessment tool which provides an insight into a student's reading as it is happening. He scored at the level "K," which placed him at a mid-second grade reading level. Student was known to carry his favorite books around school and often chose to read from them as a preferred activity.

## WRITING

As of March 2022, Student continued to write simple grammatically correct sentences with a subject and predicate and showed "emerging" skills to add detail to his writing. He gained benefits from using organizers and independent leveled worksheets. For example, he was provided "sentence frames," which contain blanks for missing words, and was able to finish those sentences. However, he still could not independently complete a five-sentence paragraph.

## MATHEMATICS

Chula Vista did not conduct any new assessments to determine Student's current baseline in mathematics. Instead, the March IEP team relied upon Student's Math i-Ready assessment from September 2020, which showed Student was overall at a first-

grade level. No updated data from direct math work was included in his present levels of performance. Student continued to work at a first-grade level throughout the 2021-2022 school year, and a required adult aide to present a word problem in a "pictorial" display. The IEP noted that the most recent psychoeducational assessment conducted by school psychologist Annette Jones showed Student doing addition problems of three two-digit numbers, two-digit subtraction and single-digit multiplication problems.

## BEHAVIOR

The March 2022 IEP indicated that Student was "sought out" by peers and was considered a leader in his class. He showed preferences to certain peers, would lead games, and expect his peers to follow. However, Student also threw objects at peers and adults under extreme escalation and would remove his hearing aids when moderately escalated. Student's behavior tended to escalate when he did not understand the instructions or was frustrated with his inability to understand the material.

## THE MARCH 11, 2022, PSYCHOEDUCATIONAL ASSESSMENT

From January through April of 2022, Student was assessed in the area of psychoeducation by school psychologist Annette Jones. The assessment report was discussed at the March 14, March 16, April 4, April 11, and April 18, 2022, meetings. Jones administered several standardized tests to Student. Student's overall ability was assessed using the cognitive ability subtests Kaufman Assessment Battery for

Children, Second Edition, referred to as KABC-II; the Comprehensive Test of Nonverbal Intelligence, Second Edition, referred to as CTONI-2; and, the Woodcock-Johnson Cognitive Tests of Cognitive Ability, Fourth Edition, referred to as the WJ-IV.

In the KABC-II, Student's overall ability fell below the average range with a score of 73. Student scored within the average range for short-term memory, and in the below average range for long-term memory skills, the ability to apply previously learned information to new learning, and Student's knowledge about his world. Student also fell into the below average range for the Nonverbal Index, which was recommended for children who were deaf or hard of hearing. Student also fell below average in the measures of Pattern Reasoning-Students and Hand Movement-Students. Pattern Reasoning-Students require Student to understand a pattern and supply the missing item. Student scored a below average score of six. Hand Movements-Students requires Student to watch the assessor perform select hand movements and repeat the movements in order. Student scored below average with a standard score of five.

In the WJ-IV, Student performed below average in the measures of Comprehension-Knowledge Composite which involved naming antonyms of objects and synonyms of objects, Fluid Reasoning, and Cognitive Processing Speed. Jones' Assessment report opined that Student appeared motivated but often stopped when fatigued or if he didn't know an answer.

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Jones administered the WJ-IV Tests of Oral Language, which was a standardized achievement test that assigns standard scores, percentiles, and grade/age equivalents to an array of oral language and academic subtests. The report placed Student's current academic assessment at below average for

- broad oral language, including picture vocabulary, oral comprehension, and understanding directions;
- oral expression, including picture vocabulary and sentence repetition; and
- listening comprehension, including oral comprehension, and understanding directions; and broad reading.

Using the WJ-IV Tests of Achievement, Student scored below average in the categories of

- broad reading,
- basic reading,
- reading comprehension,
- reading fluency,
- broad mathematics,
- math calculation skills,
- math problem solving, and
- written language.

Student scored in the average range in only two out of 18 subtests.

In the area of behavior, based upon data received from Parent and Student's sixth-grade teacher, Bill Roder, Student was rated as being very likely to be in the Autism range. Using the Behavior Assessment System for Children, Third Edition,

referred to as the BASC-3, Student scored in the “significant” to “at risk” range. This placed Student at a high level of maladaptive behavior, and suggested there may exist a significant problem that may not be severe enough to require formal treatment.

Student’s areas of need included self-regulation and sustained engagement. Student demonstrated a deficit in sustaining attention, as well as in auditory discrimination and memory skills. He had weaknesses in

- conceptual knowledge,
- fluid reasoning,
- long-term memory,
- listening comprehension,
- auditory memory, and
- phonological processing.

His deficits in these areas were amplified by his inability to hear, and his inability to understand the instructions due to his hearing loss.

## THE FUNCTIONAL ANALYSIS ASSESSMENT

From January of 2022 through February 2022, Chula Vista personnel conducted a functional analysis assessment. The report addressed Student’s elopement and frustration, employing antecedent strategies to address maladaptive behavior, replacement behaviors and interventions, and consequences for maladaptive behavior and actions. The assessment was discussed at the April 11, 2022, continuation meeting. After the IEP team reviewed the report, they implemented the recommendations including increasing counseling by 30 minutes per week and implementing replacement

strategies to avoid Student from acting out. Parent also agreed to an Educationally Related Mental Health Assessment, referred to as an ERMHS assessment. This was reviewed at the August 9, 2022, continuation IEP meeting.

THE MARCH 14, 2022, IEP DENIED STUDENT A FAPE BY FAILING TO  
OFFER SUFFICIENT SERVICES IN THE AREA OF ACADEMICS TO ALLOW  
STUDENT TO MAKE MEANINGFULLY PROGRESS

Student contends that under Issue 1(a), Chula Vista denied Student a FAPE by failing to provide appropriate services to Student in reading, mathematics and behavior in the March 14, 2022, IEP. As a point of reference, the February 2021, IEP proposed the following services for Student:

1. Specialized academic instruction within a group session, for 1,380 minutes per week, or 4.6 hours per day. The services were to be provided in a mild to moderate special day class program.
2. Speech and language services 285 minutes per month.
3. Occupational therapy within a group session, 60 minutes per week.
4. Audiological services 60 minutes yearly.
5. Specialized deaf and hard of hearing services 30 minutes per week.
6. Counseling and guidance 30 minutes per week.
7. Intensive Individual services 1,380 minutes weekly.
8. Curb-to-curb transportation.
9. Extended school year services.

The March 14, 2022, IEP offered the same exact services, except for increasing Item 5 to 60 minutes per week. Chula Vista argues it did not deny Student a FAPE.

The IEP must include a statement of the program modifications or supports that will be provided to the student, to allow the student to advance appropriately toward attaining the annual goals; to be involved in, and make progress in the general education curriculum, and to participate in extracurricular activities and other nonacademic activities. (34 C.F.R. § 300.320(a)(4)(i)-(ii); Ed. Code, § 56345, subds. (a)(4)(A), and (B).)

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 considering the child's circumstances. (*Rowley*, supra, 458 U.S. 176, 201-204; *Endrew supra*, at [137 S.Ct. 988, 1000].).

Chula Vista argues that Student was progressing from year to year and meeting or working towards meeting many of his goals. Accordingly, Chula Vista claims that the March 14, 2022, IEP, and amendments, provided Student a FAPE. For example, as of March 2022, Student was progressing in the areas of semantics, synonyms and antonyms, articulation, and inferences. In his annual goal for writing, Student had progressed from reading at a kindergarten level to the first-grade level and met his writing goal. In comprehension, Student had increased his reading level from beginning first grade to mid-second grade and met his goal. In decoding, Student had increased from a beginning reading level to a mid-second grade level and met his goal. However, in the goal for language conventions, Student began at a beginning reading to a first-grade level and did not meet his goal during the year. In mathematics, Student did not meet his goals for multiplication and calculation/reasoning. Student's fourth-grade report card showed that in the areas of Reading, Writing, and Math he was scoring primarily "ones," meaning "minimal mastery of standards", in all areas throughout the year.

The purpose of goals is to permit the IEP team to determine whether the pupil is making progress in an area of need. (Ed. Code, § 56345.) In developing the IEP, the IEP team shall consider the strengths of the child, the concerns of the parents for enhancing the education of their child, the results of the initial evaluation or most recent evaluation of the child, and the academic, functional, and developmental needs of the child. (20 U.S.C. § 1414(d)(3)(A).)

Chula Vista is theoretically correct that Student made “progress” from May 12, 2021, through March of 2022, in that he was increasing his reading, writing and math abilities from kindergarten levels to first or second-grade levels. However, as of March 14, 2022, Student was in the fourth grade. As the Supreme Court stated in *Endrew*, *supra*,

“We will not attempt to elaborate on what ‘appropriate’ progress will look like from case to case. It is in the nature of the Act and the standard we adopt to resist such an effort: The adequacy of a given IEP turns on the unique circumstances of the child for whom it was created.” (*Id.* at 403-404).

“When all is said and done, a student offered an educational program providing ‘merely more than de minimis’ progress from year to year can hardly be said to have been offered an education at all... . The IDEA demands more. It requires an educational program reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances.” (*Id.*)

Ashley Parmley was Student's fourth and fifth-grade teacher and was absent for maternity leave during a portion of that period. Parmley testified at the hearing. Parmley opined that the Achieve 3000 score was known to be troublesome because Student has to read everything on the screen in order to respond. Parmley believed that Running Records was a more accurate test because Student was able to read material directly in front of him, one-on-one, without reading from a computer screen. This enabled the teacher or aide to understand if Student was making mistakes or needed clarification. At the time Student began fifth grade, he was still reading at a beginning first-grade level and doing math at a first to second-grade level. Parmley opined that Student was capable of reading at higher grade levels if given the appropriate services and accommodations, and that his disabilities did not limit his aptitude.

At the time of the March 14, 2022, IEP meeting, and the subsequent meetings from April through November 2022, Chula Vista had ample data showing Student was not progressing beyond the "de minimis." While Student did progress one-half to one full grade in the 2021-2022 school year, he was in fifth grade and reading and doing mathematics three grade levels below. In addition to Student's lack of "meaningful" progress on several of his goals, his reading and mathematics levels being two to three grade levels below his current grade level, and his fourth-grade report card showing "minimal mastery" of his academic subjects, the IEP team also had school psychologist Jones' Assessment Report which demonstrated Student was below average in all academically related areas, although his cognitive skills showed the ability to achieve higher results. This information should have raised a red flag to the IEP team that

Student was not progressing in a significantly meaningful manner and should have adjusted his services accordingly. Despite having this knowledge, the IEP team made no changes to Student's services which would have challenged him to make progress appropriate in light of his circumstances.

In the area of behavior, however, Chula Vista developed appropriate services and supports. Based upon Chula Vista's comprehensive analysis assessment and report, Chula Vista offered increased counseling services and an ERMHS assessment.

In the April 18, 2022, IEP notes, Parmley indicated that since she had returned from maternity leave, she had not seen any maladaptive behaviors occurring with Student, and that he was making progress in the area of behavior. Parmley testified that she saw no "big behavior" issues during her tenure. Moreover, the evidence demonstrated that much of Student's behavior stemmed from his frustration and anxiety of not being able to complete higher level reading and math problems when asked. For example, during his psychological assessment, Student became frustrated doing academic problems and stated: "Oh, come on!" and "You know I'm not good at this!". This indicated that Student's lack of academic progress was a root cause of his acting out, as other reports indicated Student was well liked by peers and adults, social, took leadership roles, and engaged in play.

Finally, during one of the follow-up IEP meetings, Parent raised concern about school staff not being properly trained in behavior. Mother testified she was called to school because Student was having a "meltdown" when he brought walkie-talkies to school, which were taken by an adult. In response, Chula Vista had a Board-Certified Behavior Analyst, referred to as a BCBA, observe the classroom, and provided a verbal report to Parent along with suggestions of behavioral improvement.

Student proved by a preponderance of the evidence that Chula Vista failed to offer sufficient academic services to allow Student to meaningfully progress in the 2021-2022 school year, which denied Student a FAPE. Student did not prove that Chula Vista failed to properly address Student's behavior, and the evidence demonstrated Student had adequately progressed. Student partially prevailed on Issue 1(a).

### STUDENT DID NOT PROVE THAT CHULA VISTA DENIED STUDENT A FAPE BY FAILING TO OFFER A ONE-TO-ONE BEHAVIOR AIDE

Student contends that under Issue 1(b), Chula Vista denied Student a FAPE by failing to offer Student a one-to-one behavior aide. Chula Vista contends that it was not required to offer a one-to-one behavior aide to Student.

During the hearing, scant testimony was presented establishing the need for a one-to-one behavior aide in the March 14, 2022, IEP. The only evidence suggesting the need for an "aide" concerned additional ASL support, and Parent testified that during the subsequent meetings she had requested a certified ASL interpreter. Parent contended that Student needed an assortment of communication offerings beyond the FM amplification system, and that Student would comprehend more with an ASL interpreter. The evidence showed that Student was provided an "itinerant" aide who would provide some support during the day with sign language and interpretation. However, this aide was not there all day, nor was he qualified as an ASL interpreter. Parent also requested that Chula Vista hire a non-public agency provided BCBA aide. Parent contended that when she visited Student's classroom, no one implemented the behavior intervention plan. Chula Vista declined Parent's request and affirmed it had appropriately trained behavior personnel to assist Student. In the applicable IEPs,

Student had a one-to-one aide, noted as "Intensive Individual Services," present with Student and providing Student with support in the classroom during the relevant time period.

Beyond the foregoing, there was little to no evidence which demonstrated Student needed additional one-to-one aide support during the entire school day. In Student's closing argument, he does not request a one-on-one aide as a remedy. Student did not prove by a preponderance of the evidence that Chula Vista denied Student a FAPE in the March 14, 2022, IEP by not offering a one-to-one aide. Chula Vista prevailed on Issue 1(b).

## STUDENT DID NOT PROVE THAT CHULA VISTA DENIED STUDENT A FAPE BY FAILING TO OFFER STUDENT APPROPRIATE ACCOMMODATIONS

Student contends that under Issue 1(c), Chula Vista denied Student a FAPE by failing to offer Student appropriate accommodations in the March 14 and 16, 2022, IEPs. Chula Vista argues that the accommodations offered were appropriate and provided a FAPE.

The March 14 and 16, 2022, IEPs, each list 20 program accommodations, and six program modifications. The ALJ notes that on the March 14, 2022, version of the IEP, the first box is checked above program modifications, which indicates the accommodations are "not" needed in general education or other educational placements. However, in subsequent written amendments the second box is checked, indicating the accommodations are needed. As such, for purposes of this decision, the ALJ finds that these accommodations were intended to be offered to Student from the outset. Again, there was no testimony on this issue.

There also was little testimony at the hearing as to which accommodations or modifications were requested, or needed, and not provided to Student. Parent testified that these accommodations were ineffective with Student, and that she had requested a separate ASL interpreter to allow him to understand instructions, but Chula Vista declined that. See *J.G. ex rel. Jimenez v. Baldwin Park Unified Sch. Dist.*, 78 F. Supp. 3d 1268, 1288 (C.D. Cal. 2015), noting that “if sign language is the only way that J.G. can access the curriculum, his inability to communicate that way (through ASL, finger spelling, or otherwise) indicates that this program cannot possibly confer much, if any, educational benefit.” Each deaf or hard-of-hearing pupil should receive an education that allows him or her to master a primary language. (Cal. Ed. Code § 59001.2(F) (West))

The San Diego County Office of Education provided an ASL itinerant aide, identified as “Mr. Mark,” who was present the last three school years. Parent indicated that Mr. Mark was not always with Student, however, and did not serve the roll of an interpreter because he too was deaf. Mother opined that an appropriate interpreter would be non-deaf. The accommodations in that regard provided including

- use of the FM system,
- text to speech reading,
- visual schedules and supports,
- closed captioning on videos, and
- alternatives if Student was unable to wear a hearing aid for health reasons.

Under the modification section, Chula Vista staff was to be trained on hearing loss, personal amplification, and use of the FM system. An audiologist from the Special Education Local Plan Area, referred to as a SELPA, was present during the IEP meetings.

Aside from the ASL issue, there was little to no evidence which demonstrated Student needed further accommodations and modifications in the FAPE offer. With regard to adding an ASL interpreter, Student was able to access the curriculum using multiple modes of communication, including both ASL and the FM system. The evidence did not establish that Student's primary, and only, means of communication was sign language. As such, Student did not prove by a preponderance of the evidence that Chula Vista denied Student a FAPE in the March 14, 2022, IEP by not offering sufficient accommodations. Chula Vista prevailed on Issue 1(c).

## STUDENT DID NOT PROVE THAT CHULA VISTA DENIED STUDENT A FAPE BY FAILING TO OFFER STUDENT ADDITIONAL PSYCHOEDUCATIONAL TESTING

Student contends that under Issue 1(d), Chula Vista denied Student a FAPE by failing to conduct additional psychoeducational testing after preparing the March 14, 2022, IEP. Student bases this claim on Chula Vista's failure "to examine and explain Student's unexpected underachievement in the cognitive testing" in Jones' results of the CTONI-2 subtest. Chula Vista argues that the Assessment was complete, that it was not challenged in this case, and that no additional testing was required.

A district must conduct a reassessment if it "determines that the educational or related service needs, including improved academic achievement and functional performance, of the child warrant a reevaluation," or if the student's parents or teacher request a reassessment. (20 U.S.C. § 1414(a)(2)(A)(i); see also Ed. Code, § 56381, subd. (a)(1).) A school district's failure to conduct appropriate assessments, or to assess in all areas of suspected disability, may constitute a procedural denial of a FAPE. (*Park v. Anaheim Union High School District* (9th Cir. 2006), 464 F.3d 1025, 1031-1033.) In *D.O.*

*By and Through Walker v. Escondido Union School District*, 59 F.4th 394, 409 (2023), the Ninth Circuit recently held that a district does not procedurally violate the IDEA or California law by failing to assess when it has not received a written request by Parent or Student for further testing.

School psychologist Jones prepared a March 11, 2022, psychoeducational assessment report, and testified at the hearing. In the report's "Summary and Eligibility" section, Jones indicated there was "[u]nexpected underachievement ... in the area(s) of written expression, basic reading skills, reading fluency, and reading comprehension." In the notes of the March 14, 2022, IEP meeting, Jones explained that Student scored below average for verbal and nonverbal cognitive ability on the KABC-II cognitive test, and within the average range on the CTONI-2 cognitive test. There was no further discussion at the IEP team meeting regarding the results of the subtests. Jones' presentation continued on March 16, 2022, and there was no discussion regarding the unexpected underachievement on the CTONI-2. Parent raised no concerns related to the report. At no time did Parent make a written request for an independent psychoeducational evaluation from Chula Vista, or any follow-up tests from Jones.

Student did not prove by a preponderance of the evidence that Chula Vista denied Student a FAPE in the March 14, 2022, IEP by not offering additional psychological testing. There was no affirmative request from Parent for further testing. Chula Vista prevailed on Issue 1(d).

## ISSUE 2: DID CHULA VISTA DENY STUDENT A FAPE IN THE 2022-2023 SCHOOL YEAR?

Student was in sixth grade in the 2022-2023 school year. Student contends that Chula Vista denied Student a FAPE in the 2022-2023 school year by failing to:

- offer appropriate services or supports to address Student's lack of progress in reading, math, writing, and behavior in the IEP dated February 27, 2023;
- offer a one-to-one behavior aide in the February 27, 2023, IEP;
- offer appropriate accommodations in the February 27, 2023, IEP.

### THE FEBRUARY 27, 2023, BASELINES

#### READING

Student's Lexile score by the beginning of sixth grade was 135, equivalent to a first-grade level. By December 2022, Student scored a 315, which was equivalent to a second-grade level. Student's decoding skills were assessed in February of 2023, and he read 120 fourth-grade words aloud, with 80 percent being multi-syllabic words. He independently read 90 percent of the fourth-grade sight words out loud correctly. Student met five goals related to his reading skills. The IEP notes reflect that Student could read sixth-grade text with the help from peers, who corrected words he misread or did not understand. Student willingly accepted their assistance.

## WRITING

By the February 27, 2023, IEP, Student was able to participate in class-wide literature talks, which included “brainstorming” on a whiteboard. Student was able to write sentences that had a subject, verb, and details. Student was able to complete grammar and sentence writing worksheets in both small group settings and class-wide settings.

## MATHEMATICS

Student took a Math i-Ready assessment in July of 2022, and scored at an equivalent to the first-grade level in the areas of numbers and operations, algebra and algebraic thinking, measurement and data, and geometry. In December of 2022, Chula Vista assessed Student again, and he continued to score at the first-grade level in all areas, except Geometry, where he scored at the second-grade level. Student met his math goals. The IEP notes indicated he continued to perform at the second-grade level, and that he knew multiplication tables one to four.

## BEHAVIOR

Student’s behavior continued to improve. He was reflective on his own actions and was improving at processing an unmet or delayed desire. He would willingly join a non-preferred activity after a minor discussion with an adult. He was well-liked and demonstrated leadership qualities with his peers, who would follow his instructions most of the time. He was willing to express his perspective and engage in self-advocacy. Overall, Student was taking “ownership” of his behavior by self-advocating for a goal and working towards it. The IEP notes reflected that Student was considered a leader in his class and was showing more frequent occasions of self-reflection.

THE FEBRUARY 27, 2023, IEP DENIED STUDENT A FAPE BY FAILING TO  
OFFER SUFFICIENT SERVICES IN THE AREA OF ACADEMICS TO ALLOW  
STUDENT TO MAKE MEANINGFULLY PROGRESS

Student contends that under Issue 2(a), Chula Vista denied Student a FAPE by failing to provide appropriate services to Student in reading, mathematics, and behavior in the February 27, 2023, IEP. The March 14, 2022, IEP offered the following services:

1. Specialized academic instruction within a group session for 1,380 minutes per week, or 4.6 hours per day in a mild to moderate special day class setting.
2. Speech and language services 285 minutes per month.
3. Occupational therapy within a group session 60 minutes per week.
4. Audiological services 60 minutes yearly.
5. Specialized deaf and hard of hearing services 60 minutes per week.
6. Counseling and guidance 30 minutes per week.
7. Intensive Individual services 1,380 minutes weekly.
8. Curb-to-curb transportation.
9. Extended school year services.

The February 27, 2023, IEP offered the same exact services, except it added individual counseling for 30 minutes per week and removed curb-to-curb transportation.

In the area of reading, Student showed some progress. He rose from a beginning reader, or kindergarten, level to a second-grade level. He was capable of reading words at higher levels with assistance. However, once again, by the end of the year he was still four grade levels behind. Student's fifth-grade report card reflected that he was

consistently scoring a “two” in reading and writing, which meant “progressing toward mastery of standards.” In writing, Student was also improving. Again, he was scoring “twos” on his report card in that area. Finally, Student showed only minimal progress in mathematics, and scored “twos” in Math.

In the area of behavior, however, Chula Vista sufficiently addressed and continued Student’s services to address his issues. Student showed significant behavioral improvement and was capable of controlling his own actions and being self-reflective of issues. With some assistance, he was able to de-escalate. The IEP continued the behavioral supports including providing a behavior intervention plan and BCBA support.

Again, Student showed some progress, but it was not significant. By the end of sixth grade, Student was still two to five grade levels behind in his academics. At the time of hearing, he was in the seventh grade. Student proved by a preponderance of the evidence that Chula Vista failed to offer sufficient academic services to allow Student to meaningfully progress in the 2022-2023 school year, which denied Student a FAPE. Student did not prove that Chula Vista failed to properly address Student’s behavior. Student partially prevailed on Issue 2(a).

## **STUDENT DID NOT PROVE THAT CHULA VISTA DENIED STUDENT A FAPE BY FAILING TO OFFER STUDENT WITH A ONE-TO-ONE BEHAVIOR AIDE**

Student contends that under Issue 2(b), Chula Vista denied Student a FAPE by failing to offer Student a one-to-one behavior aide because Student continued to exhibit behavioral issues during the 2022-2023 school year. Chula Vista contends that it

was not required to offer a one-to-one behavior aide to Student, that it had sufficient behavioral accommodations and services in place, and that Student's behavior improved from year to year.

Again, scant testimony was presented establishing the need for a one-to-one behavior aide in the February 27, 2023, IEP. There was little to no evidence which demonstrated Student needed a one-to-one aide during the entire school day, and by all accounts, Student was showing progress in the areas of behavior and socialization. As such, Student did not prove by a preponderance of the evidence that Chula Vista denied Student a FAPE in the February 27, 2023, IEP by not offering a one-to-one behavior aide. Chula Vista prevailed on Issue 2(b).

## STUDENT DID NOT PROVE THAT CHULA VISTA DENIED STUDENT A FAPE BY FAILING TO OFFER STUDENT APPROPRIATE ACCOMMODATIONS

Student contends that under Issue 2(c), Chula Vista denied Student a FAPE by failing to offer Student appropriate accommodations in the February 27, 2023, IEP. Chula Vista argues that the accommodations offered were appropriate and provided a FAPE.

The February 27, 2023, IEP lists 21 program accommodations, and seven program modifications. Again, there was little testimony at the hearing as to which accommodations or modifications were requested, or needed, and not provided to Student. Parent did testify that she had requested further ASL support. However, the IEP notes and subsequent meetings show that Chula Vista continued to employ ASL as needed and provided training and consultation. A SELPA audiologist was present at many of the meetings and offered consultation and recommendations to ensure

Student was understanding the curriculum. The team was attentive to Parent's concerns and agreed to continue monitoring Student's ASL progress. Again, while it was not disputed that Student could optimally benefit from further ASL interpretation, he could also communicate using other modalities and was capable of comprehending his instruction. See *Rowley* and *J.G ex rel. Jimenez*, supra.

There was no evidence which demonstrated Student needed further accommodations and modifications in the FAPE offer. Student did not prove by a preponderance of the evidence that Chula Vista denied Student a FAPE in the February 27, 2023, IEP by not offering sufficient accommodations. Chula Vista prevailed on Issue 2(c).

## CONCLUSIONS AND PREVAILING PARTY

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

### ISSUE 1(a):

Chula Vista denied Student a FAPE by failing to provide sufficient services to allow Student to make meaningful progress in the area of reading, mathematics, and writing in the March 14, 2022, IEP. Chula Vista provided sufficient behavioral supports and services in the IEP.

Student partially prevailed on Issue 1(a).

### ISSUES 1(b), (c), AND (d):

Chula Vista did not deny Student a FAPE by failing to offer a one-to-one behavior aide, offering further accommodations and modifications, or offering to conduct additional psychoeducational assessments.

Chula Vista prevailed on Issues 1(b), (c), and (d).

### ISSUE 2(a):

Chula Vista denied Student a FAPE by failing to provide sufficient services to allow Student to make meaningful progress in the area of reading, mathematics, and writing in the February 27, 2023, IEP. Chula Vista provided sufficient behavioral supports and services in the IEP.

Student partially prevailed on Issue 2(a).

### ISSUES 2(b) AND (c):

Chula Vista did not deny Student a FAPE by failing to offer a one-to-one aide and offering further accommodations and modifications.

Chula Vista prevailed on Issues 2(b) and (c).

## REMEDIES

Student partially prevailed on Issue 1(a) and 2(a). Student is entitled to a remedy for the denial of a FAPE.

ALJ's have broad latitude to fashion appropriate equitable remedies for FAPE denials. (*School Comm. of Burlington v. Department of Educ.* (1985) 471 U.S. 359, 370 [105 S.Ct. 1996, 85 L.Ed.2d 385] (*Burlington*); *Parent of Student W. v. Puyallup Sch. Dist., No. 3* (9th Cir. 1994) 31 F.3d 1489, 1496 (*Puyallup*).) In remedying a FAPE denial, the student is entitled to relief that is "appropriate" in light of the purposes of the IDEA. (20 U.S.C. § 1415(i)(2)(C)(iii); 34 C.F.R. § 300.516(c)(3)(2006).) Appropriate relief means "relief designed to ensure that the student is appropriately educated within the meaning of the IDEA." (*Puyallup, supra*, 31 F.3d. at p. 1497.)

Compensatory education is an equitable remedy that depends upon a fact-specific and individualized assessment of a student's current needs. (*Puyallup, supra*, 31 F.3d at p. 1496; *Reid v. District of Columbia* (D.C.Cir. 2005) 401 F.3d 516, 524 (*Reid*).) The award must be "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." (*Reid, supra*, 401 F.3d at p. 524; *R.P. ex rel. C.P. v. Prescott Unified Sch. Dist.*, 631 F.3d 1117, 1125 (9th Cir. 2011).) However, hour-for-hour relief for a denial of FAPE is not required by law. (*Puyallup, supra*, 31 F.3d at p. 1497.) "[E]quitable considerations are relevant in fashioning relief." (*Burlington, supra*, 471 U.S. at p. 374.)

Student is entitled to additional services to bring his reading, writing, and mathematics to ensure he receives more than "de minimus" progress. Student is currently three to four grades behind in reading and mathematics, as well as his writing skills. In his closing brief, Student has requested compensatory education for five hours per week for 80 weeks, comprised of 72 school weeks, and eight weeks of extended school year for the 2021-2022 and 2022-2023 regular and extended school years. This

totals 400 hours of compensatory education. Regrettably, Student provided little to no evidence on the appropriate number of hours of compensatory education required by Student to bring his reading to the appropriate level. Parent testified that she believed Student needed two years of services to bring him to grade level in reading, writing, and mathematics. She also believed the services should be given through an ASL interpreter. However, Parent had no training or expertise in this area other than her personal, one-to-one relationship with Student, and was unable to provide a reasonable basis for her opinion, such as consultation with non-public agencies on the appropriate number of services. No other evidence or witnesses were presented providing the ALJ with opinions as to the appropriate services required to remediate Chula Vista's FAPE denials. Student's fourth and fifth-grade teacher, Parmley, did confirm that Student was capable of reading and doing math at higher levels, and the data showed that Student could read some words at a sixth-grade level. Jones' Assessment Report, as well as her testimony, indicated that Student's cognitive abilities were higher than the results she was seeing. Accordingly, there was sufficient evidence establishing that Student's limitations were not based upon his disabilities alone, and that he had the capacity to show significant progression.

In determining the appropriate remedy, the ALJ relied on the school calendars for the 2021-2022 and 2022-2023 regular school years. Student's 2022 and 2023, IEPs provided Student would receive 4.6 hours of specialized academic instruction weekly in a special day class setting. There were three weeks at the end of the 2020-2021 school year within the two-year statute of limitations. There were 38 school weeks in the 2021-2022 school year, and 38 school weeks for the 2022-2023 school year. Student was offered extended school year instruction in the 2020-2021 and 2021-2022 school years. There was no testimony on the length of Chula Vista's extended school year, and the

school calendars did not reflect the length of the extended school year. Assuming a minimum of 20 instructional days for each year (Cal. Code Regs., tit. 5, § 3043(d)), there were four additional weeks for 2021 and 2022. Taken together, the 79 weeks of normal school year, plus the eight weeks of the two extended school years, equals 87 weeks.

Although Student's request for 400 hours is excessive, Student is entitled to compensatory services in reading, writing, and math. The ALJ concludes that an additional one and one-half hours per week of academic instruction, totaling 131 hours of academic instruction is a suitable remedy. This instruction shall be evenly split between reading/writing and math. These services shall be provided outside of the regular school day. Parent may choose whether to have these services delivered afterschool, during the summer or a combination of both. These services shall be provided by a properly credentialed special education teacher provided by Chula Vista, or through a non-public agency chosen by Chula Vista. Compensatory academic services shall be available to Student to use until September 1, 2026.

Parent's request to include instruction by an ASL tutor is denied.

## ORDER

1. Consistent with the analysis above, Chula Vista shall provide Student with 131 hours of academic instruction by a properly credentialed special education teacher. Chula Vista shall provide 65.5 hours of instruction in reading and writing and 65.5 hours of math instruction. This instruction should be primarily remedial but may also be used to assist Student with his classwork during the school year.

2. These services shall be available to Student until September 1, 2026.
3. Student's 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.

Brian H. Krikorian

Administrative Law Judge

Office of Administrative Hearings