

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

CASE NO. 2023060498

PARENT ON BEHALF OF STUDENT,

v.

ALPINE UNION SCHOOL DISTRICT.

DECISION

NOVEMBER 6, 2023

On June 14, 2023, the Office of Administrative Hearings, called OAH, received a due process hearing request from Student, naming Alpine Union School District. On July 14, 2023, Student filed an amended complaint, referred to herein as complaint, after granting Alpine's notice of insufficiency. Administrative Law Judge Cole Dalton heard this matter by videoconference on September 6, 7, 12, 13, 14, 19, 20, and 21, 2023.

Cecelia Rutherford and Megan Nunez, Attorneys at Law, represented Student, and was assisted by law clerk Peter Cuevas. Mother attended all hearing days on Student's behalf. Deborah Cesario, Attorney at Law, represented Alpine, assisted by

Attorney Katrina Russo. Yvette Maier, Executive Director of Human Resources and Student Services, and Erica Abramson, Dean of Special Education, attended all days of hearing on Alpine's behalf.

At the parties' request the matter was continued to October 23, 2023, for written closing briefs. The record was closed, and the matter was submitted on October 23, 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 Alpine deny Student a FAPE during the 2021-2022 school year and extended school year, by:
 - A. failing to materially implement Student's educational placement, specialized academic instruction, speech and language, occupational therapy, and accommodations as offered in the January 15, 2021, IEP as amended?
 - B. failing to offer an appropriate general and special educational placement?
 - C. failing to assess Student in all areas of suspected disability, specifically in the areas of academics, speech and language,

occupational therapy, adapted physical education, assistive technology; and for special circumstance instructional assistance?

- D. failing to consider Dr. Robert Gray's December 1, 2021, independent psychoeducational evaluation report and recommendations at the March 7, 2022 IEP team meeting?
- E. failing to develop any appropriate goals in the March 7, 2022, IEP, and by failing to develop goals in the areas of articulation, behavior, and self-care to address needs in bathroom use and Student's ability to access food from her lunch box?
- F. failing to revise the January 2021 and/or March 2022 IEPs to address Student's lack of progress?
- G. failing to provide a safe educational environment in that Alpine did not appropriately address bullying of Student and classroom disruption, which prevented Student from accessing her education?
- H. failing to offer appropriate services and supports in the form of a one-to-one aide and adapted physical education?

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2. Did Alpine deny Student a FAPE during the 2022-2023 school year, by:
 - A. failing to materially implement Student's specialized academic instruction, speech and language, occupational therapy, and accommodations as offered in the March 7, 2022 IEP through November 3, 2022, when Parent withdrew Student from school?
 - B. failing to assess Student in all areas of suspected disability, specifically in the areas of academics, speech and language, occupational therapy, adapted physical education, assistive technology; and for special circumstance instructional assistance?
 - C. failing to provide a safe educational environment in that Alpine did not appropriately address bullying of Student and classroom disruption, which prevented Student from accessing her education?
 - D. failing to offer an aide at school or during transportation, and failing to offer individual and increased frequency and duration for speech and language services in the March 7, 2022 IEP?
 - E. failing to develop any appropriate goals?
 - F. failing to obtain Parent consent before conducting the March 28, 2023 speech and language and May 15, 2023 academic assessments of Student?

- G. denying meaningful parental participation at the May 18, 2023 IEP team meeting by refusing to answer Parent questions regarding the March 28, 2023, and May 15, 2023 assessments?
- H. failing to offer an appropriate special day class in the March 9, 2023 and May 18, 2023 IEPs?
- I. failing to consider Christie Himstreet's independent speech and language evaluation report and recommendations at the March 9, 2023 and May 2023 IEP team meetings?
- J. failing to offer placement at any school other than Shadow Hills Elementary School in the May 2023 IEP?

JURISDICTION

This hearing was held under the Individuals with Disabilities Education Act, referred to as the IDEA, its regulations, and California statutes and regulations. (20 U.S.C. § 1400 et. seq.; 34 C.F.R. § 300.1 et seq. (2006); Ed. Code, § 56000 et seq.; Cal. Code Regs., tit. 5, § 3000 et seq.) All subsequent citations to the Code of Federal Regulations are to the 2006 version, unless otherwise stated. The main purposes of 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).) Here, Student had the burden of proof on all issues. The factual statements in this Decision constitute the written findings of fact required by the IDEA and state law. (20 U.S.C. § 1415(h)(4); Ed. Code, § 56505, subd. (e)(5).)

Student was eight years old and in third grade at the time of hearing. Student resided with her Parents within Alpine's geographic boundaries at all relevant times. Student was found eligible for special education in 2018, while attending an Alpine school. Student's January 15, 2021 IEP, held during Student's kindergarten year, found Student eligible for special education under the eligibility category of orthopedic impairment due to cerebral palsy and left sided hemiplegia due to a stroke on the right side of her brain. Hemiplegia means that Student had poor muscle control, muscle stiffness, and weakness on the left side of her body. Because of this, Student often wore orthotics or a brace on her left leg and sometimes on the right. She exhibited developmental delays in all areas of development.

Student attended Shadow Hills Elementary School for first grade during the 2021-2022 school year. She continued there for second grade during the 2022-2023 school year through November 2, 2022 when Parents withdrew her from school. Parents privately placed Student at Sierra School, a nonpublic school, beginning on November 3, 2022, seeking reimbursement from Alpine.

Alpine held numerous IEP team meetings before the beginning of the 2021-2022 school year. Student did not submit all of them into evidence. Some of the IEPs have multiple dates of meeting or various amendment dates. This Decision refers to IEPs by the first date of meeting after noting amendment dates where the IEP amendments were submitted into evidence.

After reviewing comprehensive reassessments, Alpine added speech and language impairment as a secondary eligibility in the May 7, 2021 and May 11, 2021 IEP amendments. Alpine also offered 2022 extended school year placement and services. These amendment IEPs are referred to as the May 2021 IEP amendments. On June 11, 2021, Parents sent Alpine correspondence consenting only to the extended school year program offered in the May 2021 IEP amendments.

At Student's next annual IEP held on March 7, 2022, Alpine continued the secondary eligibility of speech and language impairment and 2022 extended school year services. Dr. Robert Gray reviewed his independent neuropsychological evaluation at the March 7, 2022 IEP team meeting. Alpine did not receive a copy of the evaluation report until sometime after the meeting. Dr. Gray held board certification in clinical neuropsychology and a subspecialty in pediatric neuropsychology. Dr. Gray diagnosed Student with cerebral palsy, mild intellectual disability, and attention deficit hyperactivity disorder, combined type. Dr. Gray's report recommended considering additional eligibility

categories of intellectual disability and other health impairment. He recommended increased time in a small, structured setting due to Student's slow learning process requiring repetition and one-to-one and small group learning. For socialization purposes, he also recommended some time in a general education setting. Alpine increased its offer of specialized academic instruction while maintaining some participation in general education.

Student's April 20, 2022 IEP amendment added transportation at Mother's request as she could no longer transport Student. Parents consented to the March 7, 2022 annual IEP and April 20, 2022 IEP amendment, at the latter IEP team meeting. The annual offer of FAPE is referred to as the March 7, 2022 IEP.

By the March 9, 2023 IEP amendment team meeting held to review Christy Himstreet's independent speech and language evaluation, Student had been attending Sierra School, a nonpublic school, for approximately five months. Student continued her enrollment at Sierra School while Alpine held her next annual IEP team meeting on May 18, 2023. Alpine obtained some baseline information at Sierra School to help determine Student's progress toward Alpine's annual goals. Student did not indicate any interest in re-enrolling in Alpine through the time of the May 18, 2023 annual IEP team meeting.

Despite her challenges, Alpine providers described Student in assessments, IEP team meetings, and during hearing, as a loving, kind, and determined girl, who self-advocated and enjoyed engaging in physical activities such as climbing playground apparatus, playing soccer, and running around the playground with other children. Student also participated in tumbling class, and jujitsu. She participated in a rock wall climbing competition, modified to account for limited use of her left arm and leg.

STATUTE OF LIMITATIONS REGARDING ISSUES 1B AND 1H

Student alleges, in Issues 1B and 1H, that Alpine denied Student a FAPE during the 2021-2022 school year and extended school year by failing to offer an appropriate general and special education placement and failing to offer appropriate services and supports in the form of a one-to-one aide and adapted physical education, respectively.

A parent is required to request a due process hearing within two years of the date the parent knew or should have known about the alleged action that forms the basis of the complaint, or in such time as the State law allows. (20 U.S.C. § 1415(f)(3)(C).) In California, a request for a due process hearing "shall be filed within two years from the date the party initiating the request knew or had reason to know of the facts underlying the basis for the request." (Ed. Code, § 56505, subd. (l).) The two-year limitations period does not apply to a parent if the parent was prevented from requesting the due process hearing due to either:

- specific misrepresentations by the local educational agency that it had solved the problem forming the basis of the due process hearing request; or
- the withholding of information by the local educational agency from the parent that was required to be provided to the parent under special education law. (Ibid; 20 U.S.C. § 1415(f)(3)(C)(D).)

For purposes of the statute of limitations, California's discovery rule is consistent with the IDEA. In California, a claim accrues when a parent learns of the underlying facts that form a basis for the action. (Ed. Code, § 56505, subd. (l).) A parent's knowledge

that a student's education is inadequate is sufficient for the statute of limitations to begin to accrue. (*M.M. & E.M. v. Lafayette School Dist.* (N.D.Cal., Feb. 7, 2012, Nos. CV 09– 4624, 10–04223 SI) 2012 WL 398773, at pp.**17–19 (*M.M.*), *affd.* in part & *revd.* in part (9th Cir. 2014) 767 F.3d 842, 858-859; see also *M.D. v. Southington Board of Ed.* (2d Cir. 2003) 334 F.3d 217, 221.) The statute of limitations begins to run when a party is aware of underlying facts that would support a legal claim, not when a party learns that the action was wrong. (*M.M., supra*, at p. *18; see also *Bell v. Board. of Ed. of the Albuquerque Public Schools* (D.N.M. 2008) 2008 WL 4104070, at p.*17; *Avila v. Spokane School Dist. 81* (9th Cir. 2017) 852 F.3d 936, 937, 945 [the IDEA's statute of limitations barred claims that were filed more than two years after the time parents "knew or should have known" about the actions forming the basis for their complaint].) Congress did not intend to authorize the filing of claims under the IDEA many years after the alleged wrongdoing occurred. (*Alexopolous v. San Francisco Unified School Dist.* (9th Cir. 1987) 817 F.2d 551, 555.)

This case was filed on June 14, 2023. The two year statute of limitations would limit any issues arising before June 14, 2022. The next question is whether an exception would apply. Student's first amended complaint did not allege any facts supporting an exception to the two year statute of limitations. Student put on no evidence at hearing that Alpine made specific representations that it had solved the problem forming the basis of any part of her due process hearing request regarding her general or special education placement during the 2021-2022 school year and extended school year or her need for a one-to-one aide or adaptive physical education. Likewise, Student did not allege or prove that Alpine withheld information required to be provided to Parents regarding these claims. (Ed. Code, § 56505, subd. (I); 20 U.S.C. § 1415(f)(3)(C)(D).)

Here, the evidence demonstrated that Student had filed other requests for due process hearing with OAH before the instant matter. The ALJ, sua sponte, took official notice of Student's complaint filed on June 16, 2022, identified as OAH case number 2022060546. (Gov. Code, § 11515.) That complaint alleged a substantially similar background to the instant matter regarding the 2021-2022 school year and alleged an issue regarding failing to offer Student appropriate services and supports. The facts alleged in the complaint demonstrate that Parents knew of the underlying facts forming the basis for this action at a time when the statute of limitations would not have precluded Issues 1B or 1H.

Here, Parents filed a due process complaint challenging the appropriateness of the placement, services, and supports of the January 2021 IEP as amended by the consented to portion of the May IEP amendments. The January 2021 IEP as amended was implemented by Alpine during the 2021-2022 school year until Student consented, on April 20, 2022, to the next annual IEP dated March 7, 2022.

The law prevents parents from filing a due process complaint challenging the appropriateness of an IEP created outside the statute of limitations, even though the IEP was in effect within the statute of limitations. (*K.P., etc., v. Salinas Union High School Dist.* (N.D. Cal., April 8, 2016 No. 5:08-cv-03076-HRL) 2016 WL 1394377, ** 10-11.) An offer of FAPE is specific to an IEP developed for that purpose. An IEP is evaluated in light of information available at the time it was developed; it is not judged in hindsight. An IEP is "a snapshot, not a retrospective." (*Adams v. State of Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149 (*Adams*), citing *Fuhrmann v. East Hanover Bd. of Ed.* (3d Cir.1993) 993 F.2d 1031, 1041 (*Fuhrmann*).) ("an IEP must take into account what was, and what was not, objectively reasonable ... at the time the IEP was drafted").)

At the time Student's May 2021 IEP amendments were drafted, Alpine had provided Parents with all reports from its comprehensive reassessments, including the psychoeducational evaluation which tested Student's cognition, academics, social emotional development, behavior, and adaptive behavior, among other things. Parents participated in the assessments by sharing information about Student's strengths and weaknesses. Alpine provided Parents with a complete picture of Student's educational functioning by the time of the May 11, 2021 IEP amendment meeting, which reviewed the reports with assessors. Parents attended the meeting with their special education advocate Christy Scadden. Parents and their advocate participated in the meeting by sharing information and asking questions.

Parents actively participated in the development of Student's IEPs and in the assessment process. The evidence demonstrated that Parents had knowledge of Student's performance more than two years prior to filing the complaint in this matter. (*Fernandez v. Elk Grove Unified School Dist.*, E.D.Cal., March 31, 2020, No. 2:19-cv-00082-MCE-AC) 2020 WL 1532229.) Alpine's May 10, 2021 psychoeducational assessment indicated that Student had involvement with various therapeutic modalities due to her cerebral palsy and developmental delays. Parents were well aware of the IEP process and had knowledge of Student's needs based upon her prior educational experience and her experience with private treatment providers. Student participated in preschool in a self contained special education classroom for five days a week, two-and-one-half hours daily. She received special education services during kindergarten, before transitioning to Shadow Hills. Student received specialized academic instruction, occupational therapy, adapted physical education, and speech and language therapy, with consultation from an orthopedic impairment program teacher. Student had also received occupational and physical therapy services, weekly, through California Children's Services. Student received early intervention services through a local regional center due to developmental delays.

Alpine's 2021 psychoeducational evaluation provided information on Student's

- inattention,
- learning problems,
- executive functioning,
- peer relations,
- adaptive skills, and
- ability to communicate with her peers.

In conjunction with Alpine's May 5, 2021 speech and language assessment and March 18, 2021 occupational therapy assessment, the assessment provided a clear picture of Student's

- functional communication,
- expressive and receptive language,
- fine and gross motor development,
- functional mobility, and
- ability to participate in recess and physical education.

Moreover, Parents attended the January 2021 annual IEP and May 2021 amendment IEPs with an advocate and received notice of parent rights and procedural safeguards. Where the evidence shows that the parents were fully aware of their procedural options, they cannot excuse a late filing by pointing to the school's failure to formally notify them of those options. (*D.K. v. Abington School Dist.* (3rd Cir. 2012) 696 F.3d 233, 246-247.)

Special education law does not recognize the doctrine of continuing violations as an exception to the two-year statute of limitations. (20 U.S.C. § § 1415(b)(6)(B), (f)(3)(D); see also *E.F. v. Newport Mesa Unified School Dist.* (C.D. Cal., June 23, 2015, No. SACV 14-

00455-CJC (RNBx) 2015 WL 3867982, * 8, fn. 6, affd. on remand *E.F. by and through Fulsang v. Newport Mesa Unified School Dist.* (9th Cir. 2018) 726 Fed.Appx. 535; *J.L. v. Ambridge Area School Dist.* (W.D. Pa. 2008) 622 F.Supp.2d 257, 268-269 [finding that IDEA claims are not tolled under a continuing violation theory as the two exceptions specifically set forth in the statute are the exclusive exceptions to the statute of limitations.]

For the foregoing reasons, Student's claims regarding the offer of FAPE contained in the January 2021 annual IEP as amended cannot be challenged as FAPE violations. The annual IEP and all of the amendments fall outside of the two year statute of limitations and no exceptions were pled or proven. Therefore, District prevails on Issues 1B and 1H.

In contrast, Issue 1F challenges Alpine's failure to revise the January 2021 and/or March 2022 IEPs to address Student's lack of progress. To the extent this Issue requires an analysis of Alpine's offer of FAPE for January 2021, this Issue was not barred by the statute of limitations.

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ISSUE 1A: DID ALPINE DENY STUDENT A FAPE DURING THE 2021-2022 SCHOOL YEAR AND EXTENDED SCHOOL YEAR, BY FAILING TO MATERIALLY IMPLEMENT STUDENT'S EDUCATIONAL PLACEMENT, SPECIALIZED ACADEMIC INSTRUCTION, SPEECH AND LANGUAGE, OCCUPATIONAL THERAPY, AND ACCOMMODATIONS AS OFFERED IN THE JANUARY 15, 2021 IEP AS AMENDED?

ISSUE 2A: DID ALPINE DENY STUDENT A FAPE DURING THE 2022-2023 SCHOOL YEAR AND EXTENDED SCHOOL YEAR, BY FAILING TO MATERIALLY IMPLEMENT STUDENT'S EDUCATIONAL PLACEMENT, SPECIALIZED ACADEMIC INSTRUCTION, SPEECH AND LANGUAGE, OCCUPATIONAL THERAPY, AND ACCOMMODATIONS AS OFFERED IN THE MARCH 7, 2022 IEP THROUGH NOVEMBER 3, 2022, WHEN PARENT WITHDREW STUDENT FROM SCHOOL?

Student argues that Alpine failed to implement numerous portions of her IEPs, resulting in a loss of educational benefit. Alpine argues that Student failed to produce evidence supporting her claims.

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

In general, a child eligible for special education must be provided access to specialized instruction and related services which are individually designed to provide educational benefit through an IEP reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances. (*Board of Education of the Hendrick Hudson Central School Dist. v. Rowley* (1982) 458 U.S. 176, 201-204 (*Rowley*); *Endrew F. v. Douglas County School Dist. RE-1* (2017) 580 U.S. 386, 403 [137 S.Ct. 988, 1000] (*Endrew F.*).

A school district must implement all components of a student's IEP. (20 U.S.C. § 1414(d)(2)(A); 34 C.F.R. § 300.323(c).) When a student alleges the denial of a FAPE based on the failure to implement an IEP, to prevail, the student must prove that any failure to implement the IEP was "material," which means that the services provided to a disabled child fell "significantly short of the services required by the child's IEP." (*Van Duyn v. Baker School Dist. 5J* (9th Cir. 2007) 502 F.3d 811, 822 (*Van Duyn*).

A minor discrepancy between the services provided and the services required in the IEP is not enough to amount to a denial of a FAPE. (*Van Duyn*, supra, 502 F.3d at p. 822.) "There is no statutory requirement of perfect adherence to the IEP, nor any reason rooted in the statutory text to view minor implementation failures as denials of a free appropriate public education." (*Ibid.*) A brief gap in the delivery of services, for

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example, may not be a material failure to implement a student's IEP. (*Sarah Z. v. Menlo Park City School Dist.* (N.D.Cal., May 30, 2007, No. C 06-4098 PJH) 2007 WL 1574569 at *7.)

"[T]he materiality standard does not require that the child suffer demonstrable educational harm in order to prevail. However, the child's educational progress, or lack of it, may be probative of whether there has been more than a minor shortfall in the services provided." (*Van Duyn, supra*, 502 F.3d at p. 822.)

Student here established that Alpine materially failed to implement occupational therapy during the 2021 school year. Student did not establish that Alpine materially failed to implement occupational therapy during the extended school year. Nor did Student establish that Alpine materially failed to implement her educational placement, specialized academic instruction, speech and language, or accommodations during the 2021-2022 school year and extended school year. Similarly, Student failed to prove any material failure by Alpine to implement Student's IEP during the 2022-2023 school year, until her last day of school, on November 2, 2022.

Alpine demonstrated, through attendance records and logs from speech and language therapy, and testimony of speech language pathologist Jillian Schneiders, general education teacher Brianna Watson, special education teacher Cora Long, and dean of special education Abramson that Alpine provided the general and special education placement, related services, and accommodations to Student required under Student's operative IEPs during the two school years at issue. Attendance records and logs from occupational therapy and testimony from Powell demonstrated that Alpine provided occupational therapy services required under Student's IEPs during the

2022 extended school year and 2022-2023 school year. Earlier exhibits identify Abramson as Lyle, her former last name. This Decision refers to Abramson solely as Abramson.

Student's January 15, 2021 IEP, with the agreed upon amendments through June 1, 2021, is referred to collectively as the January 2021 IEP. The January 2021 IEP offered Student placement at Shadow Hills Elementary School with specialized academic instruction in a mild to moderate special day class for 21,600 minutes annually, with participation in general education classes, extracurricular, and nonacademic activities for 57 percent of her school day. Alpine offered group speech and language pull out services for 1,020 minutes yearly, and group occupational therapy pull out services for 700 minutes yearly. Alpine also offered 2022 extended school year placement with 1,620 minutes of specialized academic instruction, 30 minutes of weekly speech and language, and 20 minutes of weekly occupational therapy services.

Alpine offered the following accommodations in the January 2021 IEP:

- preferential seating, visual supports, extra processing or response time, alternative response modes, reminders to use the left upper extremity, adaptive scissors;
- staff and peer support to assist with fine motor tasks such as cutting, opening materials and containers, assistance with clothing items;
- staff support for self-help routines such as snack, lunch time, and toileting;

- alternative assignments: student may complete paper and pencil assignments instead of computer assignments;
- reduction of work at the discretion of teacher and Parents; and
- use of Chromebook or iPad in class and at home.

Student's March 7, 2022 IEP offered 6,268 minutes per month of specialized academic instruction in a special day class, and the same amount of speech and language and occupational therapy as provided during the 2021-2022 school year. Alpine offered hours of specialized academic instruction in the January 2021 IEP compared to its offer of minutes in the March 2022 IEP. No one at hearing explained how many hours were available in either school year, although school calendars were provided as evidence. For purposes of comparison, Alpine offered Student 43 percent of her time in her special day class and related services and 57 percent of her time in regular classes and extracurricular and nonacademic activities under the January 2021 IEP. Alpine offered 87 percent participation in special day class and related services and 13 percent in regular classes and extracurricular and nonacademic activities under the March 2022 IEP. Since Student's related service minutes remained the same between the 2021-2022 and 2022-2023 school years, Alpine offered an increase of specialized academic instruction of 44 percent.

Alpine offered increased specialized academic instruction and less time in a general education setting, based upon a review of Dr. Robert Gray's independent neuropsychological evaluation at the March 7, 2022 IEP. Alpine also offered a 2023 extended school year program, which Student did not attend as she disenrolled in November 2022. Alpine began offering transportation, at Mother's request, in the

April 20, 2022 IEP amendment. Alpine made no other changes to Student's program during that meeting. The annual IEP as amended is referred to as the March 2022 IEP.

The March 2022 IEP offered the same accommodations as the 2021-2022 school year, with the addition of a positive behavior reward system. The evidence demonstrated that Beyoghlou implemented a positive behavior reward system as a part of his classroom structure during the 2021-2022 school year.

OCCUPATIONAL THERAPY SERVICES DURING THE 2021-2022 SCHOOL YEAR

Mother believed that Student was not receiving any occupational therapy services during the 2021-2022 school year because Student told her as much and because Student did not come home with worksheets from the occupational therapist or flash cards from speech like she usually did. The types of papers Student allegedly came home with remained unclear.

Occupational therapist Powell provided services to Student during the 2021-2022 school year, Student's first grade year. Powell was experienced and well qualified as an occupational therapist. Powell's demeanor and candor established her credibility as a witness. Powell typically provided services to Student on Thursdays. Student entered occupational therapy service logs for the 2021-2022 and 2022-2023 school years into evidence. Service logs reflected that Powell provided services on Thursdays and made note of Student's absences, a field trip, holidays, and school breaks longer than five days.

Powell and Schneiders both described a practice regarding not having to make up sessions missed due to Student absences. Neither party cited legal authority supporting

or refuting this general position. Two of Student's absences fell during the time period that Student missed school due to breaking her foot, outside of school and obtaining medical treatment, including a cast, for that incident. However, Alpine can reasonably consider that Student waived sessions for other absences here, where the evidence did not demonstrate absences due to medical appointments, home hospital instruction, or another reasonable excuse, as opposed to Parent not bringing Student to school for personal reasons.

Powell recorded her sessions by handwriting notes in her occupational therapy logs, which had been transcribed by someone else into an electronic form in Alpine's computerized system. Student submitted Powell's handwritten logs dated October 1, 2021 through August 1, 2022 and computerized logs dated January 27, 2022 through November 16, 2022 into evidence. Alpine did not submit any additional logs into evidence. The evidence demonstrated that Powell's handwritten May 2022 service log was missing for reasons no one could explain. However, Powell credibly testified that she had provided sessions to Student in May of 2022. June 9, 2022 was Alpine's last day of school before extended school year services began on June 13, 2022.

Powell's handwritten logs, not counting two of Student's absences after breaking her foot, demonstrated that she provided Student with 7 hours and five minutes of the 11 hours and 40 minutes of occupational therapy services required for the 2021-2022 school year, counting Student absences. In other words, Alpine provided 420 of the 700 minutes required by the January 2021 and March 2022 IEPs. This computes to a total of approximately 60 percent of the services required under the IEP. The undersigned ALJ made this determination by adding all of Powell's entries for service, a single field trip, and Student absences, but only if they fell on a Thursday, Student's typical service day, with the exception of absences on December 16, 2021 and January 6, 2022. The ALJ did

not add in 30 minutes of service for June 13 2022, the first day of the extended school year. Extended school year services were offered under a different section of Student's IEP. The ALJ also counted two 30-minute sessions for May 2022 based upon Powell's testimony that she provided service and her customary amount of service minutes provided to Student every other month during the 2021-2022 school year.

Providing only 60 percent of Student's offered services constituted a significant shortfall of the occupational therapy services required in Student's IEP. (*Van Duyn*, 502 F.3d 811, 822 (a shortfall of 50 percent of student's services constituted a material failure to implement the IEP)). Alpine did not present evidence regarding the lack of services on various service days or during various weeks, or why the deficit in services was not made up by the end of the school year. The evidence demonstrated that Student made progress toward but did not meet her occupational therapy goals. Student was a child who learned slowly with repetition over time. Regardless of these factors, missing 40 percent of her occupational therapy services, standing alone, constituted a material failure to implement the occupational therapy services offered in the relevant IEPs during the 2021-2022 school year.

Student established that Alpine materially failed to implement her occupational therapy services during the 2021-2022 school year. Student prevailed on Issue 1A regarding occupational therapy services.

OCCUPATIONAL THERAPY SERVICES DURING THE 2022-2023 SCHOOL YEAR

During the 2022-2023 school year, occupational therapist Kerry Canning provided Student with services on Wednesdays. Canning did not testify at hearing. According to

service logs, Student attended eight of the 12 weekly occupational therapy sessions held each Wednesday during the period from August 2022 to November 2, 2022 when Parents withdrew her from Shadow Hills. On the other four Wednesdays she missed prior to her withdrawal, Student had four absences. Student did not demonstrate that absences were related to a medical or other reason requiring Alpine to make up sessions. Moreover, since Student withdrew from school after her last day on November 2, 2022, Alpine could not have provided make up sessions.

Student did not demonstrate that Alpine materially failed to implement the March 2022 IEP as amended for the 2022-2023 school year regarding provision of occupational therapy services. Student did not prevail on Issue 2A regarding occupational therapy services.

SPEECH AND LANGUAGE SERVICES DURING THE 2021-2022 SCHOOL YEAR

The January 2021 IEP and March 2022 IEP required Alpine to provide Student with 1,020 minutes, or a total of 17 hours, of speech and language services during the 2021-2022 school year. Speech and language pathologist Schneiders' testimony and therapy logs demonstrated Schneiders provided Student with all required amounts of speech and language therapy. Schneiders was experienced and qualified to provide Student with speech and language services. Schneiders demonstrated extensive knowledge about Student, having worked with her over a period of years, and demonstrated skill, knowledge, and experience in her field. For these reasons and because of her demeanor and forthrightness while testifying, Schneiders was determined to be a credible witness. Schneiders provided Student with make-up sessions when Schneiders was absent, but no makeup sessions were provided when

Student was absent with the exception of 70 minutes being provided after Student returned to school after breaking her foot. Each absence counted as a 30-minute session, the usual length of Schneider's sessions. Schneiders generally held sessions for Student on Tuesdays except during November and December, when she held sessions on Thursdays.

Alpine produced Schneiders logs, one showing only dates of service and the other also showing minutes of service. Adding all other dates of service and using 30 minutes to calculate time accounted for by each of Student's three unaccounted for absences, Schneiders provided 980 minutes of the 1,020 of speech and language services required during the 2021-2022 school year. Alpine provided 96 percent of the services required under her operative IEPs during the 2021-2022 school year. This constitutes material implementation of Student's speech and language services.

Student's progress in speech and language is probative of whether there was more than a minor shortfall in services required. (*Van Duyn, supra*, 502 F.3d at p. 822.). By January 12, 2022, Student met her receptive language goal for understanding quantitative (one, more, most, less) and spatial concepts (in, on, out, off, under). She met her expressive language goal for producing grammatically correct sentences with the correct pronoun (I, we, they), auxiliary verb (am, are), and present progressive verb tense (ing). She made good progress on her second expressive language goal for describing familiar objects by naming the category associated and two to three attributes, when given a picture or word. Alpine demonstrated progress on speech and language goals by showing the difference between Student's baselines in January 2021 compared to her new baselines in January 2022.

Student did not prove that Alpine materially failed to implement speech and language therapy required in her January 2021 and March 2022 IEPs. Student did not prevail on the speech and language services portion of Issue 1A.

SPEECH AND LANGUAGE DURING THE 2022-2023 SCHOOL YEAR

Schneiders regularly provided weekly speech and language sessions while Student attended Alpine during the 2022-2023 school year. Except for the first day of speech, on September 7, 2022, Schneiders provided speech on Tuesdays. In all, Student attended eight of the nine available speech and language sessions between the beginning of the 2022-2023 school year and November 2, 2022. Student had one absence on a Tuesday during that time frame. Student failed to demonstrate that speech and language services provided to Student fell significantly short of what Alpine was required to deliver in the March 2022 IEP by the time she left Alpine. Given that Student's last day of school fell on November 2, 2022, the middle of the school year, Alpine could no longer provide services to Student. Student could not provide a material failure to implement her IEP. Student did not prevail on the speech and language portion of Issue 2A.

ACCOMMODATIONS DURING THE 2021-2022 SCHOOL YEAR

Student's complaint alleges that Alpine failed to implement the accommodation regarding staff support for self-help routines such as snack, lunch time, and toileting. Student contends Alpine did not implement the accommodation for use of a Chromebook or iPad. The complaint alleges that Alpine failed to use or properly use Student's slant board to assist her with writing, although that is not identified in the IEP as an accommodation and Student did not identify failing to use the slant board as an issue at hearing.

Parents, at hearing, asserted that Student could not open her own lunch box or the containers in it. Parents theorized, at hearing, that staff threw Student's lunch away, daily, after failing to help her eat. In support of this theory Parents asserted that Student came home hungry all the time, which she would not have done if she had eaten her lunch. Parents observed Student at Shadow Hills only once. The observation occurred during the 2021-2022 school year. They testified that no aides provided help to Student during the site visit. But Parents described the visit in vague terms.

Executive Director of Human Resources and Student Services Maier described attending the site visit with Parents in more detail. Parents observed –Special education teacher Jeff Beyoghlou's classroom for a good duration, and they stayed during circle time. They observed Student in her general education setting where Student followed directions but needed some extra prompting. Then Parents observed Student walking out to the playground with general education peers. According to Maier, both Parents were very pleased to see Student partner up with friends and go to lunch. Maier did not observe Student struggling at lunch, nor did Parents say anything to her about Student not having help.

Abramson, the dean of special education, acted as Beyoghlou's site mentor during the 2021-2022 school year. That meant that Beyoghlou brought any concerns or requests for support to Abramson. Abramson also supported general education teachers working with special education students and acted as Student's case manager. She provided support to Student's general education teacher Watson during the school year.

Abramson observed Beyoghlou's class two to three times per week during the 2021-2022 school year. She described how the aides helped Student during snack,

lunch, and playtime. The two classroom aides took snacks out to recess in a wagon helped the children open packages, including Student. The aides supervised their students on the playground. During lunch, the aides helped the children eat before they went out to play. Abramson did not remember any specific times when Student asked for help to open containers but did recall Student being a strong advocate for herself and having the ability to ask for help when needed. When Parents sought more general education participation for Student at the January 15, 2021 IEP team meeting, they too described Student as one who could advocate for herself.

Regarding restroom use, Parents asserted at hearing that Student came home with urine on her clothes or with clothing not fully pulled up, straightened, or buttoned after using the toilet. Mother believed that Alpine staff failed to appropriately help Student with toileting, including aiding with straightening her clothing, and allowed Student to soil herself and return home soiled.

Both Maier and Abramson explained that when Student transitioned from kindergarten to first grade in 2021, Parents expressed concern about the height of the toilets and whether Student would be able to access them. Maier and Abramson measured all the toilets at the school and determined that the toilet outside Beyoghlow's room was the appropriate height and had an access bar on the right side, a side suitable for Student to use.

Student advocated for herself when she needed to use the restroom. She wanted to be independent and did not want aides walking her to the restroom. At some point, the classroom aides began watching Student from just outside the classroom to monitor her and make sure her clothing was in order when she returned to class. No one from the school ever reported that Student smelled of urine when they sent her home.

Student did have two to three accidents during the school year, but nothing out of the ordinary for a first grader. Beyoghlou and his aides had extra children's clothing and diapers to address accidents by all students precisely because this was so common. Student failed to persuasively demonstrate that Alpine materially failed to implement the accommodation for staff support for toileting.

Student did not persuasively demonstrate that Alpine materially failed to implement her accommodation for use of a Chromebook or iPad. Rather, Mother testified that Alpine provided Student with a Chromebook and iPad beginning in kindergarten.

Student did not present evidence on the remaining accommodations. Accordingly, the evidence does not support a finding of material failure to

- implement preferential seating,
- visual supports,
- extra processing or response time,
- using adaptive scissors,
- alternative response modes,
- reminders to use the left upper extremity, or
- reduction of work at the discretion of teachers and Parents.

To the extent that Student's witnesses may have made generalized comments about any of these accommodations, such statements did not establish a material failure to implement Student's accommodations during the 2021-2022 school year. Student did not meet her burden of proof that Alpine provided Student's accommodations in a manner that fell significantly short of what was required by her January 15, 2021 and March 7, 2022 IEPs.

The weight of the evidence demonstrated that Alpine consistently implemented accommodations to assist Student with fine motor tasks such as

- cutting,
- opening materials and containers,
- assistance with clothing items,
- support for self-help routines such as snack,
- lunch time, and
- toileting, and
- use of Chromebook or iPad in class during the 2021-2022 school year.

Accordingly, Student did not prevail on the accommodations portion of Issue 1A.

ACCOMMODATIONS DURING THE 2022-2023 SCHOOL YEAR

Special education teacher Cora Long taught Student's special day class for the 2022-2023 school year. At hearing, Long explained that the iPad and Chromebook were available for Student's daily use during the 2022-2023 school year. Long checked out a Chromebook for Student's use at the beginning of the school year and stored the slip pad and iPad in the same location on Long's table in the front of the room, next to Student's desk and within direct view of Student or anyone helping her at her desk. Student sat at the front of the room, just behind Long's table, in accord with an accommodation for preferential seating. Emails with photographs exchanged between Mother and Long between September 30, 2022 and October 3, 2022 corroborated Long's testimony regarding the location of Student's iPad, as did emails between Long and Maier.

Abramson, Long, and Maier described how aides and teachers implemented Student's accommodations regarding support with toileting, over the second grade school year. At the same time, they observed Student's growing ability to self-advocate. Student made it clear when she did not want help getting to the restroom.

Parent believed staff did not implement the accommodation for supporting Student with toileting. Email exchanges demonstrated an August 25, 2022 incident when Student was on her way to the restroom but did not make it in time and wet herself. Student related the incident to Long at the time, who had an aide take Student to the nurse's office to obtain a change of clothes. Mother dropped off an extra change of clothes to keep in the classroom.

An August 31, 2022 email exchange between Long and Mother indicated that Student had been doing well with restroom trips. Long checked Student after almost every trip during the 2022-2023 school year to make sure her clothing was neat and Student did not have any further accidents. Mother testified, generally, she believed aides did not help Student with toileting because otherwise she would not have urinated on herself or come home with her underwear around her thighs. No exhibits or any other testimony corroborated Student coming home with underwear around her thighs. Neither did they corroborate more than a couple of incidents of Student not making it to the restroom in time. Student simply did not meet her burden of proving that Alpine materially failed to implement the toileting accommodation.

Student supported allegations regarding Alpine's failure to implement support for snack or lunch time with the same unpersuasive testimony Mother provided regarding the 2021-2022 school year. No other evidence supported this allegation.

The fact that a second grader came home from school hungry is insufficient to prove a material failure to implement accommodations for staff support during snack or lunch time.

Regarding the remaining accommodations, as with the 2021-2022 school year, Student presented scant, if any evidence, regarding implementation of accommodations. For the foregoing reasons, Student failed to meet her burden of proving that Alpine materially failed to implement the accommodations in her March 7, 2022 IEP. Student failed to meet her burden of proof on the accommodations portion of Issue 2A.

SPECIALIZED AND GENERAL EDUCATION DURING THE 2021-2022 SCHOOL YEAR

Student argues that she did not meet goals and regressed because of being in classrooms that were disorganized and chaotic. She argues she did not receive the specialized academic instruction or general education instruction offered in her January 2021 or March 2022 IEPs. Alpine argues that Student presented no evidence in support of her contentions and that it materially implemented Student's IEPs.

Student's January 2021 IEP required her to receive 21,600 minutes of yearly specialized academic instruction and to spend 57 percent of her time in general education and extracurricular and non-academic activities. Her March 2022 IEP, consented to on April 20, 2022, increased specialized academic instruction to 6,268 minutes monthly with 13 percent of her time in general education and extracurricular and non-academic activities. Student attended Beyoghlou's mild to moderate special day class, which had approximately eight children and two instructional aides.

Student relied on testimony from two former employees to support their contention that Beyoghlw's classroom was so chaotic that Student could not access her specialized academic instruction.

Student subpoenaed former general education teacher Watson to support her theory of a chaotic classroom. Watson taught Student's 2021-2022 general education class. Watson testified that she could have used more help in her classroom and did not have enough time to collaborate with colleagues regarding modifying or accommodating Student's needs.

On the other hand, Watson testified that Beyoghlw often shared techniques for working with Student. Abramson testified that she was always available to Watson, that she answered many questions Watson had in the beginning of the school year, demonstrated teaching techniques, and that Watson, no longer came in to ask questions. Abramson described Watson as having an organized, structured classroom. Abramson explained staff collaboration days when teachers could share instructional techniques. Teacher collaboration and planning days occurred on Wednesday, twice monthly, unless Wednesday fell on a holiday or extended school break.

Maribel Valdez, a former classroom aide, testified about Beyoghlw's teaching methods. Valdez claimed that Beyoghlw physically and verbally abused students by yelling at them and throwing them outside of the classroom. Valdez's testimony, discussed more fully regarding Issue G, lacked credibility and was not corroborated by any other evidence. Valdez was terminated before the end of the school year, which she initially lied about, and offered no testimony regarding Student's progress or establishing a material failure to implement Student's IEP. Her testimony focused more on the classroom in general, not Student specifically.

Mother provided vague testimony regarding the alleged material failure to implement specialized academic instruction. She testified that she thought Beyoghlaw admitted at an IEP team meeting that Student regressed in some area or was not meeting her goals. She said Student was not recognizing letters at home. She then said she, honestly, wasn't sure. Regarding Valdez' testimony that Beyoghlaw was physically and verbally abusive to students, Mother testified that she did not know what to believe. She agreed that she complimented Beyoghlaw before but could not recall why.

Dr. Gray's independent neuropsychological evaluation, also discussed more thoroughly below, shed some light on Student's general and special education classrooms. During Dr. Gray's November 8, 2021 observation of Student in general education, he observed Watson leading the class in a writing activity with Student sitting on a rug in the front of the class. Watson frequently checked in with her students and often stood or sat next to Student to help her with the assignment. Student required prompting to discuss class topics with a peer when asked to do so and required redirection. Dr. Gray described an organized classroom with a responsive teacher addressing Student's needs.

Dr. Gray observed Beyoghlaw's classroom on November 8, 2021. Dr. Gray described an organized classroom using positive reinforcement with children actively participating in instruction. Dr. Gray observed Beyoghlaw's use of small group rotational instruction. Beyoghlaw and the two classroom aides rotated around small groups of children engaging in different aspects of academic instruction. Dr. Gray observed instruction in

- foundational pre-reading skills or letter sounds and pre-reading,
- phonological skill development tasks using vowels and consonant sounds,

- arm tapping, and
- blending phonemes.

Student remained on task even with the noise of other children working elsewhere in the classroom. After working on phonological skill development, children watched a short video to reinforce the lesson. After the video, Student participated in instruction but began looking around the room and playing with her hair. The children transitioned to a worksheet activity involving sounding out a three letter word such as cat and drawing a line to the associated picture. Student used a modified pencil with her paper on a clipboard. The teacher also helped to anchor her paper. Student remained compliant and engaged in learning.

Abramson, who worked with Beyoghlaw frequently, described him as having instructional control, being organized, using positive reinforcement, being a teacher that students enjoyed. Beyoghlaw used, as a standard technique, rotational academic skill building, described above. Beyoghlaw implemented a positive behavior reinforcement system. Beyoghlaw used positive behavior techniques to keep Student on task. Student was easily redirected.

Beyoghlaw also had support from a San Diego County Office of Education mentor, Shadow Hills principal Meghan Meris, and a social worker. The latter worked on behavior techniques with children in the classroom as some children had social emotional goals. Significantly, no one, including other parents, reported Beyoghlaw as being abusive, throwing children out of the classroom, or not having instructional control.

Significantly, Student failed to make any connection between allegations of a disorganized classroom and Student's receipt of her special and general education

instruction during the 2021-2022 school year. Student simply failed to prove that the services delivered during the 2021-2022 school year fell significantly short of the services required in her January 2021 or March 2022 IEP.

2022 EXTENDED SCHOOL YEAR

Student attended 2022 extended school year for one day, on June 13, 2022. Alpine's offer of an extended school year placement consisted of 1,620 minutes of weekly specialized academic instruction in a special day class, with 30 minutes of weekly speech and language and 20 minutes of weekly occupational therapy. Occupational therapy logs show that Powell provided one 20 minute session of occupational therapy but marked the time on Tuesday June 14, 2022 rather than Monday. The weekly log began with Tuesdays, suggesting Powell inadvertently marked that as the first day of extended school year. No one asked Powell about the discrepancy during hearing and this ultimately had no impact on whether Alpine materially failed to implement Student's IEP.

On June 14, 2022 at 10:50 a.m., Mother sent an email to Abramson and Maier indicating that Student was having a meltdown, missed the bus, and it was not worth trying to get her to school. Student told Mother that Student fell on the playground and had to have ice, that she had a lot of free time and was bored, and that there was a noisy student in class, making hard for her to do her work. Mother asked for communication from the school, said she wanted Student to attend extended school year to prevent learning loss and because of academics, and said that Student enjoyed Mr. Schwear's class during spring break.

Maier responded to Mother's email 13 minutes later and Abramson responded later that day. Maier and Abramson advised Mother that Student had access to an adjoining quieter room where she could study with an aide and could use headphones as needed. Maier offered to ask Student's teacher to send home a daily report so Mother knew what had happened during each school day. During hearing, Maier explained that it had only so many classes to pull students from for extended school year services. Alpine had only two elementary schools. Maier explained to Mother that summer school always had mixed grade levels and students and that teachers continued goal work during extended school year. Abramson explained that Schwear's classroom would not be appropriate for Student as it had children four to seven grade levels ahead of her.

Student did not attend any other days of extended school year. Parents had no further conversation with Alpine about changes to Student's extended school year classroom or program. Parents simply did not return Student to school.

Parents' refusal to have Student attend the extended school year program made the claim for a material failure to implement impossible to prove. Student did not demonstrate that having a combined extended school year classroom meant that Alpine did not implement Student's IEP during the day she attended extended school year. Alpine provided Student with placement consistent with her IEP for the one day Student opted to attend. Alpine offered to work with Parents to adapt Student's program, to no avail. This can hardly be said to amount to a material failure to implement an extended school year placement.

Accordingly, Student did not prove a material failure to implement her IEP regarding the special education and general education portion of Issue 1A. Because

Student did not meet her burden of proof on establishing a material failure to implement any of the specified components of the January 2021 and March 2022 IEPs, Student did not prevail on Issue 1A.

SPECIALIZED AND GENERAL EDUCATION DURING THE 2022-2023 SCHOOL YEAR

Student's complaint does not allege facts regarding a failure to materially implement educational instruction during the 2022-2023 school year. The allegations pertain only to alleged bullying or an unsafe environment, which is addressed regarding Issues 1G and 2C, below.

Student's March 2022 IEP required her to receive 6,268 minutes per month of specialized academic instruction, or 87 percent of her time in special education and 13 percent of her time in general education and extracurricular and non-academic activities. Parents did not testify that Alpine materially failed to implement Student's special or general education programming. Mother testified that Student demonstrated more behaviors, including meltdowns and school refusal. However, Alpine established, through Maier, Long, and Abramson, that Student did not exhibit those behaviors at school.

Student failed to present any evidence that she did not receive the designated instructional minutes in special or general education during the 2022-2023 school year. Accordingly, Student did not prove that Alpine materially failed to implement these portions of her IEP. Student did not prevail on the special education and general education instruction portion of Issue 2A.

Student failed to meet her burden of proving that Alpine materially failed to implement the January 2021 IEP during the 2021-2022 school year or the March 2022 IEP while Student attended during the 2021-2022 or 2022-2023 school years.

Accordingly, Student did not prevail on Issues 1A or 2A.

ISSUE 1B: DID ALPINE DENY STUDENT A FAPE DURING THE 2021-2022 SCHOOL YEAR AND EXTENDED SCHOOL YEAR, BY FAILING TO OFFER AN APPROPRIATE GENERAL AND SPECIAL EDUCATIONAL PLACEMENT?

ISSUE 2H & 2J: DID ALPINE DENY STUDENT A FAPE DURING THE 2022-2023 SCHOOL YEAR BY 2H: FAILING TO OFFER AN APPROPRIATE SPECIAL DAY CLASS IN THE MARCH 9, 2023 AND MAY 18, 2023 IEPs; AND BY 2J: FAILING TO OFFER PLACEMENT AT ANY SCHOOL OTHER THAN SHADOW HILLS ELEMENTARY SCHOOL IN THE MAY 18, 2023 IEP?

Parents requested Student be placed in general education for as much time as possible at the January 15, 2021 IEP team meeting. Parents later requested placement at Boulder Oaks, though the record was unclear as to when the request was made. Placement options at Boulder Oaks was discussed at the May 7, 2021 IEP team meeting. Parents requested a different placement at the March 9, 2023 IEP amendment and May 18, 2023 annual IEP, because they believed Student was falling behind and did not feel safe at school. Alpine argues that Student presented no evidence on the appropriateness of her placement during any relevant time period and that it offered her an appropriate placement throughout each time period at issue.

Based upon the analysis regarding the statute of limitations, above, Student's Issue 1B is time barred.

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

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

Federal and state laws require school districts to provide a program in the least restrictive environment to each special education student. (Ed. Code, §§56031; 56033.5; 34 C.F.R. § 300.114.) A special education student must be educated with non-disabled peers to the maximum extent appropriate and may be removed from the regular education environment only when the use of supplementary aids and services cannot be achieved satisfactorily. (20 U.S.C. § 1412 (a)(5)(A); 34 C.F.R. § 300.114(a)(2); Ed. Code, § 56031.)

When determining whether a placement is the least restrictive environment for a child with a disability, four factors must be evaluated and balanced:

- the educational benefits of full-time placement in a regular classroom,
- the non-academic benefits of full-time placement in a regular classroom,
- the effects the presence of the child with a disability has on the teacher and children in a regular classroom, and
- the cost of placing the child with a disability full-time in a regular classroom. (*Sacramento City Unified School Dist. v. Rachel H.* (9th Cir. 1994) 14 F.3d 1398, 1404 (*Rachel H.*) ([adopting factors identified in *Daniel R.R. v. State Board of Education* (5th Cir. 1989) 874 F.2d 1036, 1048-1050 (*Daniel R.R.*.)

Here, the parties did not dispute that Student could not be educated satisfactorily in a regular education environment. Accordingly, discussion of the *Rachel H.* factors balancing the benefits and costs of placing a child in a regular education environment need not be discussed. (*Rachel H.*, *supra*, 14 F.3d 1398, 1404.)

If a school district determines that a child cannot be educated in a general education environment, then the least restrictive environment analysis requires determining whether the child has been mainstreamed to the maximum extent appropriate in light of the continuum of program options. (*Daniel R.R.*, *supra*, 874 F.2d 1036, 1050.) Each local educational agency must ensure that a continuum of alternative placements is available to meet the needs of children with disabilities for special education and related services. (34 C.F.R. § 300.115(a).)

The continuum of program options includes but is not limited to, in increasing order of restrictiveness:

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

If a child with a disability is not fully integrated into a regular classroom, the special education and related services in the student's IEP must be reasonably calculated to enable the student to make progress appropriate in light of their circumstances. (*Endrew F.*, *supra*, 137 S.Ct. at p. 1001.)

A school district's determinations regarding special education are based on what was objectively reasonable for the district to conclude given the information the district had at the time of making the determination. A district cannot "be judged exclusively in hindsight" but instead, "an IEP must take into account what was, and what was not, objectively reasonable ... at the time the IEP was drafted." (*Adams*, 195 F.3d 1141, 1149, citing *Fuhrmann v. East Hanover Bd. of Education* (3d Cir. 1993) 993 F.2d 1031, 1041.)

In resolving the question of whether a school district has offered a FAPE, the focus must be on the adequacy of the school district's proposed program. (*Gregory K. v. Longview School Dist.* (9th Cir. 1987) 811 F.2d 1307, 1313-1314.) Parents' preferred placement does not trump a school district's placement offer, even where the preferred program would have resulted in greater educational benefit. (*Ibid.*) Parents do not have veto power over any individual IEP provision. (*M.S. v. Vashon Island School Dist.* (9th Cir. 2003) 337 F.3d 1115, 1131-1132.)

2021-2022 SCHOOL YEAR PLACEMENT

Student's Issue 1B, from the beginning of the 2021-2022 school year through the March 7, 2022 IEP, is precluded by the statute of limitations, as analyzed beginning on page 7 of this Decision. The following analysis regarding Alpine's offer of placement for the 2021-2022 school year, below, sets the stage for Alpine's March 7, 2022 IEP, offering placement through the next annual IEP.

Student's January 2021 IEP offered Student placement in a mild to moderate special day class for 21,600 minutes, yearly, with general education classroom and extracurricular activities and nonacademic activities for 57 percent of her school day.

The 2021-2022 school year placement decision was by a group of persons, including the Parents, knowledgeable about Student, the meaning of the evaluation data, and the placement options, and considered the requirement that children be educated in the least restrictive environment. The IEP team made the placement decision at Student's annual review meeting and any amendments to that meeting.

Parents attended the January 15, 2021 IEP team meeting and January 22, 2021 IEP amendment meeting with their lay advocate. Maier, Abramson, orthopedic impairment specialist Cindy Campbell, Student's related services providers and general education teacher also attended both meetings. Abramson attended as a specialized academic instruction teacher, who was also Student's case manager. Abramson held a special education teaching credential, a masters in special education, and an administrative services credential. Before becoming the dean of special education, Abramson taught special day classes for students from kindergarten through twelfth grade. Each of the team members were knowledgeable about Student, the meaning of evaluation data, placement options, and considered the least restrictive environment appropriate for Student. The IEP team reviewed placement options including continued general education placement in Brit Montalbano's classroom on the early learning center campus, which was across a walking bridge from Shadow Hills. The team also discussed a 225 minute increase in the offer of specialized academic instruction from what Student had in kindergarten. That IEP was not offered into evidence. The team also discussed the option of placement to a kindergarten first grade classroom at Shadow Hills.

At the May 7, 2021 IEP amendment, Parents, their advocate, and Alpine team members reviewed assessments conducted in the areas of psychoeducation, which

included academics, social emotional development, and behavior. They also reviewed the speech and language, occupational therapy, and health and development reassessments.

Parents did not consent to the May 7, 2021 IEP but the meeting notes prove instructive on Alpine's offer of placement. Montalbano opined that Student would benefit from more time in small groups. Parents shared the difference between Student's behavior at home and school, and noted they had difficulty working with Student at home at times. Maier discussed a resource specialist program at Alpine's Boulder Oaks compared to a special day class program at Shadow Hills. The notes corroborate Maier's testimony that Alpine's IEP team considered a Boulder Oak placement and discussed that option with Parents.

Maier and Abramson explained at hearing, consistent with IEP team meeting notes regarding the discussion held on May 7, 2021, that both of Alpine's elementary schools, Boulder Oaks and Shadow Hills, offered special education programs and that Student could have attended either. However, Alpine offered Shadow Hills mild to moderate special day class which provided more small group instruction, which Alpine's team believed at the time, Student required.

Student did not produce any evidence that Shadow Hills was not as close as possible to the child's home, was not the school Student would have attended if not disabled, that the placement offered was not based on Student's IEP, or that Student was removed from general education classrooms solely because of needed modifications in the general education curriculum.

General education teacher Watson testified regarding her experience with Student and at Alpine, as noted regarding Issue 1A, above. She taught for 11 years, worked at Alpine during the 2021-2022 school year, and resigned in June 2022. She subsequently taught at a charter school. Watson proclaimed she had never seen a school where children attended a special day class with inclusion, or mainstreaming, in general education. She believed all schools were like the charter school in which she taught, where she claimed without foundation, that all children with special needs were fully included in general education classes. She opined that Student attended Shadow Hills as that was the only campus that contained special day classes.

Watson's opinion on this subject was given little weight as it bore no relation to the facts or the law. Here, the evidence demonstrated that more than one Alpine elementary school had special education programs. Maier testified that special day classes were held on three different campuses. Even if Shadow Hills was the only elementary school with special day classes, Alpine had no legal requirement to create more special day classes on other campuses or offer a nonpublic school placement since they determined the Shadow Hills placement appropriate to meet Student's needs. Watson's opinion carries no legal weight as the law, extensively cited above, does not require that all children be educated in the same classroom. The appropriate mix of general and special education placement varies from child to child. (*Daniel R.R.*, *supra*, 874 F.2d 1036, 1050.) That mix varies as appropriate for each child, for example, placing the child in regular education for some academic classes and in special education for others, mainstreaming a child in nonacademic classes only, or providing interaction with typically developing peers during lunch and recess. (*Ibid.*)

Student argues she should have been placed at Boulder Oaks instead of Shadow Hills beginning with the 2021-2022 school year. However, the standard does not

require consideration of Parent's preferred placement but whether Alpine offered Student an appropriate placement. (See, *J.W. v. Fresno Unified School Dist.* (9th Cir. 2010) 626 F.3d 421.)

Parents privately obtained neuropsychological evaluation by Dr. Gray proved instructive on the type of placement appropriate to address Student's needs during the 2021-2022 school year, more specifically from the March 7, 2022 IEP through the end of the 2022 extended school year. Dr. Gray examined Student just after the beginning of the school year on August 25, 2021, October 13, 2021, and November 8, 2021, resulting in a report dated December 1, 2021. Alpine did not receive copies of the report until after the IEP team review meeting held on March 7, 2022.

Dr. Gray observed both the general and special education placements, as described in detail with regard to Issue 1A above. In rating scales for behavior, Watson described Student's strengths, including being very social and well-liked by peers, communicating clearly, and completing classwork with teacher assistance and accommodations as needed. Student struggled to remain focused during whole class lessons. Beyoghlou described Student as trying to do her best but struggling with inattentiveness and communication.

Ultimately, Dr. Gray determined that Student had below to well below average performance in measures of reasoning, receptive language, and visual-motor functioning, combined with attention deficit hyperactivity related difficulties. Dr. Gray's classroom observations confirmed that Student had limited capacity to access instruction in a typical classroom.

Dr. Gray opined, in agreement with Alpine witnesses, that Student demonstrated slow progress. "Optimal" outcomes for Student would evolve through one-to-one or

small group instruction with modifications and accommodations to address language, attention, motor, and behavioral needs. He further opined that periodic, supplementary participation in general education activities with support and supervision may help Student with applied skills and social skill development. Dr. Gray did not recommend full inclusion placement or placement in a resource specialist program.

Dr. Gray's report supports Alpine's offer of a mild to moderate special day class with general education inclusion. Dr. Gray did not criticize Alpine's offer of placement for the 2021-2022 school year including the March 7, 2022 IEP, which he attended. Mother seemed to agree because she testified that while she earlier sought more time for Student in a general education, she came to realize that her child required more intervention, which is why she elected to place Student at Sierra School. Sierra School provided no access to typically developing peers.

The March 7, 2022 IEP offered an increase in specialized academic instruction in Student's mild to moderate special day class for 6,268 minutes yearly, or 87 percent, with general education inclusion 13 percent of Student's school day.

Student did not argue the least restrictive environment analysis required determining whether she had been mainstreamed to the maximum extent appropriate in light of her circumstances. In fact, Student presented no specific evidence that she should not be mainstreamed at all or that Alpine offered too much mainstreaming at the time of the development of the March 2022 IEPs.

The evidence demonstrated that Student made progress in her Shadow Hills special education and general education placement during the 2021-2022 school year, appropriate in light of her circumstances. Maier, Abramson, Powell, and Schneiders persuasively demonstrated that Student made academic progress, made appropriate

progress on her goals, and enjoyed socializing with students in special and general education. Student benefited socially from exposure to typically developing peers in general education classes and enjoyed playing with special education and typically developing peers on the playground.

Goal reporting for the 2021-2022 school demonstrated that overall, Student made progress appropriate in light of her circumstances. Goal reporting occurred in January 2022 in preparation for the new annual IEP, which was postponed at Parents' request. Alpine and Dr. Gray agreed that Student made slow progress requiring repetition to learn. Progress reporting in January 2022 demonstrated that Student met two of her academic goals, in comprehension and math, made minimal progress on a phonemic awareness goal, and made good progress on a second math goal. Student made progress on her occupational therapy goals for penmanship and good progress toward her attention to large group instruction goal. Student's academic phonemic awareness goal required her to determine a reasonable spelling of 15 words using pre-phonetic knowledge, letter sounds, and knowledge of letter names, with 90 percent accuracy over three trials. When the goal was written, Student could recognize nine of 26 letters of the alphabet. Progress reporting demonstrated that Student had been working on mastering her letter sounds and had difficulty with this goal. Student made progress on a second phonemic awareness goal for identifying upper and lower case letters.

Student demonstrated progress in speech and language by meeting her goals for both receptive and expressive language and making progress toward another expressive language goal.

In summary, Student presented no persuasive evidence demonstrating that Alpine denied her a FAPE in the March 7, 2022 IEP by offering her placement on the Shadow Hills campus in a mild to moderate special day class for 87 percent of her time, with 13 percent of her time spent with typically developing peers in class, at recess and lunch, and in other nonstructured activities. On the other hand, Student's progress in the placement provided corroborating evidence that the placement offered her a FAPE.

2022 EXTENDED SCHOOL YEAR PLACEMENT

Student argues her 2022 extended school year placement was not appropriate because her extended school year class contained children who were typically educated in a moderate to severe classroom. Student also argues the classroom was too noisy for her to concentrate. Alpine argues that it offered an appropriate extended school year placement and that, since Student only attended for two days, she could not demonstrate that the placement was not appropriate for her.

A school district is required to offer extended school year program if necessary to provide the student with a FAPE. (34 C.F.R. § 300.106(a).) However, the standard for determining what program offers a student FAPE are different in the extended school year than in the regular school year. Extended school year services are required where necessary to prevent serious regression over the summer months. (*Hoelt v. Tucson Unified School Dist.* (9th Cir. 1992) 967 F.2d 1298, 1301; 5 C.C.R. § 3043 (providing California standards for determining whether a child requires extended year programming.)

California requires that an extended school year program be developed by a child's IEP team and be comparable in standards, scope, and quality to the special education program offered during the regular academic year. (5 C.C.R. § 3043(f)(2).)

Student's March 7, 2022 IEP offered 2022 extended school year placement consisting of 1,620 minutes of specialized academic instruction in a special day class, with 30 minutes of weekly speech and language and 20 minutes of weekly occupational therapy. Parents consented to the IEP on June 11, 2022. The extended school year began on June 13, 2022 and ended July 1, 2022, according to the IEP document. Witnesses were unclear on the start date. Mother testified that for the two days that Student attended extended school year during the summer of 2022, Student could not focus on academics because of the noise level in her classroom. Mother opined the noise level was caused by having a mixture of special day classes with mild to moderate and moderate to severe special needs children and that the more severe children had behaviors that interfered with Student's learning. Mother also believed the placement was not safe for Student as she fell on the playground on June 14, 2022, had to apply ice to her injury, and Alpine did not notify Mother about the incident.

Mother's concerns were related to Alpine in a June 14, 2022 email to Abramson and Maier. In the email, Mother stated that Student enjoyed special education teacher Shwear's classroom. Within minutes, Maier responded indicating that extended school year always has mixed grade levels and students. She advised Mother that Student's classroom had two rooms, that Student could work on her assignments in the other room with an aide. She advised Mother that extended school year teachers continued to work on Student's goals. Abramson also responded, indicating that they could

provide Student with headphones and a quiet place to work. She indicated that Shwear's class had fifth to eighth grade level students and would not be an age-appropriate placement for Student.

At hearing, Mother testified that Student experienced a meltdown and did not want to go to school, so Parents did not have Student continue with extended school year after the first two days of attendance. None of the Alpine witnesses observed Student having any such meltdowns at school or express school refusal or anxiety when they worked with Student.

The evidence, including Dr. Gray's report, demonstrated the difference between Student's behaviors at home versus her behaviors at school. For example, Parents reported difficulty working with Student at home. Alpine did not experience this same difficulty while working with Student at school. In addition, Parents reported that Student exhibited school refusal and did not want to go to school. Again, Alpine witnesses never experienced this behavior while working with Student at school. Student participated in classes and related services and did not express such difficulties or act out on such feelings in general education, special day class, at recess, lunch, or on the playground.

The evidence, including Student's experience over a two-day period during 2022 extended school year failed to establish that Alpine denied her a FAPE by offering extended school year placement in a classroom comprised of students typically attending mild to moderate and moderate to severe special day classes. Student did meet her burden of proof on Issue 1B regarding her extended school year placement.

ISSUE 1H & 1J: APPROPRIATE SPECIAL DAY CLASS OFFER IN THE MARCH 9, 2023 AND MAY 18, 2023 IEPS AND SCHOOL OTHER THAN SHADOW HILLS IN MAY 2023 IEP

Student argues that Alpine failed to offer an appropriate special day class in the March 9, 2023 and May 18, 2023 IEPs and that it should have offered placement on a campus other than Shadow Hills in the May 18, 2023 IEP. Alpine argues that it offered an appropriate placement in both IEPs.

The March 9, 2023 IEP amendment meeting did not change the offer of placement from the March 7, 2022 annual IEP, which offered Student 87 percent placement in special education and 13 percent in general education settings. Specifically, Alpine offered specialized academic instruction for 6,268 minutes monthly in a mild to moderate special day class. Student did not raise a specific issue regarding the appropriateness of Alpine's placement offer in the March 7, 2022 IEP for the period between August 2022 and March 9, 2023. Moreover, Dr. Gray's report, delivered to Alpine on March 7, 2022 supports Alpine's offer of increased time in a mild to moderate special day class for the 2022-2023 school year made at the March 7, 2022 IEP team meeting, while maintaining general education inclusion for socialization.

Mother, Beyoghlaw, school principal Meghan Meris, Abramson, speech and language therapist Schneiders, occupational therapist Powell, school nurse Heather McIntosh, orthopedic impairment teacher Campbell, neuropsychologist Dr. Robert Gray, neuropsychologist fellow Lauren Poth, and executive director of human resources and student services Maier attended the March 7, 2022 IEP team meeting. At the time, the evidence demonstrated that Student would continue to struggle learning and need high

levels of support. Dr. Gray opined that the best recommendation for Student was small group setting with some time in the general education environment for social exposure.

In the March 7, 2022 IEP, Alpine offered Student 6,268 minutes of monthly specialized academic instruction with continued speech and language, occupational therapy, orthopedic impairment support, and extended school year services. Alpine offered transportation in the April 20, 2022 IEP amendment. Placement was offered at Shadow Hills.

Mother, special education teacher Cora Long, general education teacher Lisa Stone, Schneiders, Alpine's occupational therapist Kerry Canning, Abramson, independent speech language pathologist Himstreet, Campbell, Maier, and Alpine counsel Cesario met on March 9, 2023 for an amendment meeting to review Himstreet's independent speech and language evaluation, address placement concerns, and schedule a new annual review date.

After reviewing Himstreet's evaluation, the team discussed Student's progress. Lisa Stone became Student's general education teacher during the 2022-2023 school year. She noted Student missed several days of school before withdrawing from Alpine on November 2, 2022, but in her observations, Student worked well with classmates, participated in class, and required some prompting. Special education teacher Long also noted Student's numerous absences between August and November 2, 2022. Long described Student as actively participating verbally in the classroom and being very social. Schneiders, who worked with Student since kindergarten, found her speech to be very intelligible, noted she made great progress over the years, and was a social butterfly during speech groups.

Mother did not believe Shadow Hills was a good fit for Student, she believed Student was falling behind, didn't feel safe, and she could not get Student on the bus. In contrast, Parent found that Student was speaking and advocating for herself at Sierra School, her placement since November 2022. Again, Student's complaint does not allege facts regarding how the special day class offered in the March 9, 2023 IEP was not appropriate. At hearing, Student did not offer any specific persuasive evidence regarding least restrictive environment deficiencies, the continuum of placement options, or the inappropriateness of Alpine's offer of a mild to moderate special day class at Shadow Hills as of the March 9, 2023 IEP, or the May 18, 2023 IEP which is discussed below. Instead, Student's complaints center around the safety of the educational environment, which is addressed in Issues 1G and 2C below.

The evidence demonstrated that Student made progress during the 2022-2023 school year in light of her circumstances and as of the March 9, 2023 IEP. Student continued to grow in self-advocacy, demonstrated increased ability to use her slip pad independently, and made progress toward her goals. Alpine developed the 2022-2023 school year goals at the March 2022 IEP to be reviewed in March 2023. However, Student attended Sierra School by then and Alpine providers had little access to trial Student's progress. Based on the information contained in the goal reports, supported by the testimony of Long, Abramson, Schneiders, and Powell, Student made progress anticipated in light of her circumstances and given the limitation of being pulled out of school on November 2, 2023 with numerous prior absences during the fall of the 2022-2023 school year.

By March 2023, Student made progress toward

- three goals in reading,
- one goal in math,
- one goal for behavior or maintaining attention to instruction,
- one goal for receptive language,
- one goal for expressive language,
- one goal for fine motor in writing, and
- met her goal for behavior for providing her safety information card.

The May 18, 2023 annual IEP offered Student specialized academic instruction for 45,103 minutes yearly, an average of 250 minutes daily, along with

- occupational therapy,
- speech and language,
- orthopedic impairment consultation and
- extended school year services.

Mother, Abramson, Stone, Schneiders, occupational therapist Canning, Maier, Campbell, and Alpine's attorneys Cesario and Rutherford attended. The offer of placement consisted of 71 percent special education and 29 percent inclusion in general education and extracurricular and nonacademic activities. This included one hour of daily inclusion in a general education classroom. Maier compared the offer to Student's placement at Sierra School, in which Student had no access to typically developing peers.

The evidence established that Student was a slower learner requiring repetition, a small teacher to student ratio, and a small structured learning environment. The

May 18, 2023 IEP offered what Dr. Gray called the best learning environment for Student, which included a small structured setting with exposure to typically developing peers to address Student's social skills.

Mother opined, at the meeting and at hearing, that Student was so far behind, and changed her mind about being included with general education peers, after reading Dr. Gray's report. She believed Student should stay at Sierra School. Mother reiterated concerns about Student skinning her knees and safety concerns regarding the playground at Shadow Hills. Maier, Campbell, and Abramson discussed Student's progress at Shadow Hills, safety concerns, and the importance of inclusion. Parents did not consent to the IEP as they wanted to keep Student at Sierra School.

Student presented no persuasive evidence regarding the inappropriateness of Alpine's offer of a special day class in either the March 9, 2023 or May 18, 2023 IEPs. Student did not meet her burden of proof on Issues 2H and 2J.

ISSUES 1C AND 2B: DID ALPINE DENY STUDENT A FAPE DURING THE 2021-2022 SCHOOL YEAR AND EXTENDED SCHOOL YEAR AND THE 2022-2023 SCHOOL YEAR BY FAILING TO ASSESS STUDENT IN THE AREAS OF ACADEMICS, SPEECH AND LANGUAGE, OCCUPATIONAL THERAPY, ADPATED PHYSICAL EDUCATION, ASSISTIVE TECHNOLOGY, AND FOR SPECIAL CIRCUMSTANCE INSTRUCTIONAL ASSISTANCE?

Student argues that Alpine failed to assess her in all areas of suspected disability during the 2021-2022 and 2022-2023 school year, including 2022 extended school year. Alpine argues that it assessed Student prior to the 2021-2022 school year in academics,

speech and language, and occupational therapy. Alpine further argues that Student did not require assessments in adapted physical education or assistive technology and that it offered Student a special circumstance instructional assistance assessment which it could not complete as Student left Alpine.

A district must ensure that a child is assessed in all areas related to a suspected disability. (20 U.S.C. § 1414(b)(3)(B); Ed. Code § 56320, subd. (f).) In California, a school district is not required to reassess more often than every three years unless one of the following occurs:

- parent requested reassessment;
- teacher requested reassessment; or
- school district or local educational agency determined the educational agency or related services needs of the child, including improved academic achievement and functional performance, warrant a reassessment. (20 U.S.C. § 1414(a)(2)(A)(i) & (ii); 34 C.F.R. § 300.303(a)(1) & (2); Ed. Code, § 56381, subd. (a)(1): *M.S. v. Lake Elsinore Unified School District* (9th Cir. 2017) 678 Fed. Appx. 543, 544 (*Lake Elsinore*) (nonpub. opn.).)

ALPINE WAS NOT REQUIRED TO REASSESS IN ACADEMICS, SPEECH AND LANGUAGE OR OCCUPATIONAL THERAPY FROM THE 2021-2022 SCHOOL YEAR THROUGH THE 2022-2023 SCHOOL YEAR

Alpine conducted Student's assessments in academics, speech and language and occupational therapy between March 2021 and May 2021 and reviewed the assessments

at the May 7, 2021 IEP amendment team meeting. The assessments were conducted to aid Student's transition into first grade for the 2021-2022 school year. Neither Parents nor Student's teachers requested reassessments in the areas of academics, speech and language, or occupational therapy during the 2021-2022 school year and extended school year or the 2022-2023 school year. Nor did the evidence establish that Alpine determined that Student's educational or related services needs warranted a reassessment during this period. Accordingly, Alpine was not required to reevaluate Student prior to her three-year review which was not due until May 10, 2024, as evidence in the May 18, 2023 IEP.

The Ninth Circuit considered the reassessment issue in *Lake Elsinore*, which concerned a student who brought an action challenging the school district's failure to identify all the student's disabilities or suspected disabilities, where the student's behaviors had become progressively more aggressive and posed a threat to her health and safety. At a 2011 IEP team meeting, the parents expressed their concern the student had become more aggressive at home and with tutors, and she sometimes attacked strangers in public. She had also begun ripping off her toenails and fingernails, had a one-inch bald spot on her scalp from pulling out her own hair, manipulated her fingers, and violently scratched, pinched, and grabbed people's necks. She also screamed and cursed at random intervals. At a May 2012 IEP team meeting, the parents further noted student exhibited significant echolalia and perseveration and had developed other troubling behavior such as swiping objects off a table and breaking them. At a July 2012 IEP team meeting even the school district concluded the student's behaviors had worsened and were not being addressed sufficiently by the behavior plan that had been in place up until that time. (*M.S. v. Lake Elsinore Unified School Dist.* (C.D. Cal., July 24, 2015, No. 13CV01484CASSPX) 2015 WL 4511947, at *7, rev'd sub nom. *M.S. by and through Sartin v. Lake Elsinore Unified School District* (9th Cir. 2017) 678

Fed.Appx. 543.) The district court held that the school district denied Student a FAPE by failing to assess Student's behavior during the period at issue, because Student's functional performance warranted a reevaluation. (*Id.* at *8.)

The Ninth Circuit reversed. It held that the school district had no duty to conduct a reevaluation of the student because the local educational agency did not determine that reevaluation was necessary, the student's parents had not requested a reevaluation, the student's teacher had not requested a reevaluation, and fewer than three years had elapsed since the student's last evaluation. The court held the district court erred in holding that the school district had a duty to reevaluate the student under these circumstances, and the school district had not procedurally violated the IDEA by failing to do so. (*M.S. v. Lake Elsinore Unified Sch. Dist.*, (9th Cir. 2017) 678 Fed. Appx. 543, 544.)

Here, for the time period beginning with the 2021-2022 school year and ending with the 2022-2023 school year, Student did not prove Parents or teachers requested reassessments or that Alpine determined Student's educational or related services needs warranted reevaluation. Fewer than three years had elapsed since Student's last evaluations in the areas of academics, speech and language, and occupational therapy. Accordingly, Student failed to provide that Alpine should have reassessed her in the areas of academics, speech and language and occupational therapy.

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STUDENT WAS NOT ENTITLED TO AN ADAPTED PHYSICAL EDUCATION ASSESSMENT FROM THE 2021-2022 THROUGH THE 2022-2023 SCHOOL YEAR

Parent signed an assessment plan on March 15, 2021, consenting to Alpine assessments in

- academic achievement,
- health,
- intellectual development,
- speech and language and communication development,
- motor development,
- social emotional development and behavior, and
- adaptive behavior.

Alpine completed the assessments and reviewed them, with Parents at the May 7, 2021 IEP team meeting. Parents, according to meeting notes, reviewed the assessments before the meeting and requested summaries so the team could focus on development of Student's IEP.

There was no evidence that a teacher or Student request an assessment for adapted physical education or assistive technology either before or after the May 7, 2021 IEP amendment meeting. Student did not request an assessment during the 2021-2022 or 2022-2023 school years or the 2022 extended school year. Nor did Student present any evidence that Alpine determined that the educational or related services needs of Student warranted a reassessment during this period. Accordingly, Alpine was not required to reevaluate Student prior to her three-year review due in

2024. (20 U.S.C. § 1414(a)(2)(A)(i) & (ii); 34 C.F.R. § 300.303(a)(1) & (2); Ed. Code, § 56381, subd. (a)(1); *M.S. v. Lake Elsinore Unified School District*, *supra*, 678 Fed. Appx. at p. 544.

Student put on no evidence at hearing demonstrating the need for additional assessments. The weight of the evidence demonstrated that Student did not require adapted physical education during the 2021-2022 school year. Maier, Abramson, Long, and Schneiders all described Student as an independent, capable, happy child, who advocated for herself when she needed help. Student walked independently around the campus, up and down slopes, ramps, and curbs, climbed on the playground apparatus, and ran around with other children.

As part of Alpine's psychoeducational assessment interviews in 2021, Mother indicated that Student tried to do things typically developing children do and adapted very well. Alpine staff shared this sentiment. Powell's March 18, 2021 occupational therapy assessment reported that Student enjoyed dance parties, music, playing at recess, and being with her friends at school. Student demonstrated independence in functional mobility. She opened and closed doors, depending on the weight. She had range of motion and strength within normal limits on her right side with decreased tone and function on the left.

Outside of school, Student participated in the challenged athletics competition in rope climbing, receiving help as she had very limited use of her left arm. She attended jujitsu and tumbling classes. Parent indicated jujitsu movements were modified for Student. At hearing, witnesses from both sides described Student as being rough in her play at times during first and second grade. She enjoyed physical activity.

California defines “adapted physical education” only as follows, by referring to other categories of physical education:

Adapted physical education is for individuals with exceptional needs who require developmental or corrective instruction and who are precluded from participation in the activities of the general physical education program, modified general physical education program, or in a specially designed physical education program in a special class. Consultative services may be provided to pupils, parents, teachers, or other school personnel for the purpose of identifying supplementary aids and services or modifications necessary for successful participation in the regular ‘D’ Physical education program or specially designed physical education programs. (Cal. Code. Regs., tit. 5, § 3051.5(a).)

Student presented no evidence regarding her participation in regular physical education. IEP team meeting notes from either the 2021-2022 or 2022-2023 school years do not describe Student as having difficulties accessing her regular physical education program. Student may well require adapted physical education later in her educational career, as children get bigger and stronger and her ability to keep pace may grow wider. However, the evidence simply did not demonstrate that she required such services in either first or second grade.

Dr. Gray, in his report reviewed at the March 7, 2022 IEP team meeting, recommended an assessment in adaptive physical education. Dr. Gray held no credentials as an adapted physical education specialist and never observed Student in her regular physical education program. He explained, at hearing, his understanding of

how adapted physical education works by saying that a school needed to adapt physical education standards for a child who cannot participate in regular physical education without injury or some adaptations to participate in a safe manner.

As discussed in Issue 1C and 2B, above, Student had modifications to her regular physical education program. Student engaged successfully in play with her peers during general physical education. She did not have a history of injuries sustained while participating in general physical education. By all accounts, Student actively participated in a number of physically challenging activities, including

- modified rock climbing,
- tumbling class,
- soccer,
- jujitsu, and
- swimming.

The evidence demonstrated that Student participated appropriately in her general physical education environment. Of note, Student participated on the football team at Sierra School. Student did not have adapted physical education at Sierra School, where Parents contend Student made progress.

Dr. Gray did not understand the requirements for qualifying for adapted physical education. He had no knowledge of what modifications Alpine already provided Student for her to attend a regular physical education program. He did not demonstrate education, training, or other expertise in adapted physical education.

His testimony demonstrated that he could not distinguish between adapted physical education and a modified regular physical education program. For these reasons, his testimony did not carry as much weight as it did in other Issues.

Student did not receive adapted physical education at Sierra School. She participated in general physical education with her special education peers.

Students with disabilities “must be afforded the opportunity to participate in the regular physical education program available to nondisabled children unless ... the child needs specially designed physical education, as prescribed in the child’s IEP.” (34 C.F.R. § 300.108(b)(2).)

Student attended the school’s regular physical education program. Student presented no evidence that she had difficulties participating in the regular physical education program, however modified. Accordingly, Student did not prove she was denied a FAPE because Alpine did not assess her in the area of adapted physical education.

STUDENT WAS NOT ENTITLED TO AN ASSISTIVE TECHNOLOGY ASSESSMENT IN EITHER THE 2021-2022 OR 2022-2023 SCHOOL YEARS OR 2022 EXTENDED SCHOOL YEAR

In her complaint, Student contends that the slant board could be used to assist her with proper paper positioning and that it was not being consistently offered to her or used correctly. Student argues that, at the March 9, 2022 IEP team meeting, Mother expressed concern over inconsistent and improper use of Student’s slant board. Since Alpine team members said they would look into different types of devices to find the

right fit, Student argues, they should have conducted an assistive technology assessment. Other than the stated issue, Student's complaint has no specific allegations about an assistive technology assessment regarding the 2022-2023 school year.

For the period between the beginning of the 2021-2022 school year through the end of the 2022-2023 school year, Student did not prove there was a request for an assistive technology assessment by a Parent or teacher, or that Alpine determined Student's educational or related services needs warranted reevaluation before Student's three-year review due in 2024. In fact, the evidence established none of those events occurred. (20 U.S.C. § 1414(a)(2)(A)(i) & (ii); 34 C.F.R. § 300.303(a)(1) & (2); Ed. Code, § 56381, subd. (a)(1); *M.S. v. Lake Elsinore Unified School District*, *supra*, 678 Fed. Appx. at p. 544.

Accordingly, Student was not entitled to an assistive technology assessment. Alpine did not deny Student a FAPE by failing to conduct an assistive technology assessment during the 2021-2022 and 2022-2023 school years or the 2022 extended school year.

In developing a child's IEP, the IEP team must consider:

- the strengths of the child;
- the concerns of parents for enhancing the education of their child;
- the results of the initial or most recent evaluation of the child; and
- the academic, developmental, and functional needs of the child. (34 C.F.R. § 300.324(a).)

The IEP team must also consider whether the child needs assistive technology devices and services. (34 C.F.R. § 300.324(a)(2)(v).) An assistive technology device

means any item, piece of equipment, or product system, whether acquired commercially off the shelf, modified, or customized, that is used to increase, maintain, or improve the functional capabilities of a child with a disability. (34 C.F.R. § 300.5.)

The January 15, 2021 IEP notes that Student sometimes uses a slant board with a clip or her teacher tapes her assignment to her desk so that she can write without depending on her left hand or arm. The IEP notes that Student did not require access to assistive technology devices or services. It also notes that Student does require low incidence services, equipment and/or materials to meet educational goals. In this category, the IEP states that Student needs access to specialized or adapted equipment such as a slant board and adaptive scissors. To meet this need, Alpine offered consultation services by an orthopedic impairment teacher, Campbell.

Alpine sent Student an assessment plan for comprehensive reassessments on March 11, 2021. The assessments were meant to inform Student's transition from kindergarten to first grade. Alpine completed the assessments and reviewed them with Parents and their advocate at the May 7, 2021 IEP team meeting. Student continued to be eligible for special education as a child with orthopedic impairment and speech and language impairment. Neither Parents, their advocate, nor Alpine IEP team members voiced a concern regarding the need for an assistive technology assessment.

At the March 7, 2022 IEP team meeting, Mother expressed concern with how the stay put mat was being used in the classroom. Providers or Student used the stay put mat or slip pad to hold paper so it did not move while Student wrote. Alpine noted again that Student did not require assistive technology. The IEP identified an iPad used by Student which was readily available in the school setting and comparable to what her peers accessed. Student continued to need low incidence services, equipment, and/or

materials to meet educational needs. At this time, the equipment consisted of a slant board, adaptive scissors, specialized writing implements such as a Rocket Pencil, and grab rails in restrooms. The orthopedic impairment teacher continued to provide consultative services on the use of such devices and Student's needs.

Mother attended the meeting, which included a review of Dr. Gray's independent neuropsychological evaluation. Dr. Gray recommend that Alpine conduct an assistive technology assessment because of difficulty with attention, motor skills, and learning. He suggested that Student may benefit from use of an iPad, laptop, electronic skill remediation programs, safety information, and visual checklists. Mother did not ask about assistive technology or request an assessment in this area. Alpine's IEP team members did not recommend the assessment. Dr. Gray did not mention assistive technology at hearing.

Mother attended the March 9, 2023 IEP amendment meeting and May 18, 2023 annual IEP team meeting. She did not request an assistive technology assessment and did not ask any questions regarding assistive technology or the special circumstances page identifying the equipment and materials Student required to make progress toward her educational goals. Alpine continued to offer services of an orthopedic impairment teacher and equipment identified in the special circumstances section of the IEP.

Student attended Sierra School since the middle of November 2021. Sierra School did not have an orthopedic impairment specialist to address Student's needs in the area of special equipment and materials. There was no evidence Parents requested

an assistive technology assessment through Sierra School. In fact, Sierra School's February 2, 2023 IEP stated, under Parent concerns that Student did not require assistive technology and did not have behavior impeding learning.

Here, the evidence did not demonstrate that Student required an assistive technology assessment. Rather, Alpine had previously conducted assessments in all areas related to Student's suspected disability in 2021. (20 U.S.C. § 1414(b)(3)(B); Ed. Code § 56320, subd. (f).) Specifically, Alpine conducted an occupational therapy assessment reviewed at the May 7, 2021 IEP amendment meeting. As part of that assessment, Powell determined Student's gross and fine motor needs leading to her need for specialized writing equipment. The law did not require Alpine to conduct multiple assessments regarding the same area of need.

In summary, of the many IEP team meetings held for Student throughout the 2021-2022 and 2022-2023 school years, Parents never requested and none of Student's providers or assessors suggested that she required an assistive technology assessment. Student failed to meet her burden of proving that she required an assistive technology assessment during either the 2021-2022 and 2022-2023 school years.

SPECIAL CIRCUMSTANCES INSTRUCTIONAL ASSISTANCE ASSESSMENT

The evidence demonstrated that neither Parents nor Student's teachers requested a special circumstances instructional assistance assessment during the 2021-2022 and 2022-2023 school years. There was also no evidence that Alpine determined Student's educational or related services needs warranted reevaluation to determine Student's need for special circumstances instructional assistance until September 6, 2022 when it sent an assessment plan for an assessment in this area, as

further discussed below. (20 U.S.C. § 1414(a)(2)(A)(i) & (ii); 34 C.F.R. § 300.303(a)(1) & (2); Ed. Code, § 56381, subd. (a)(1); *M.S. v. Lake Elsinore Unified School District*, *supra*, 678 Fed. Appx. at p. 544. Accordingly, Student was not entitled to an assessment in this area during the period from the beginning of the 2021-2022 school year through September 6, 2022.

In the spring of 2021, while developing Student's 2021-2022 IEP, Parents requested that Student be included in more general education classes. Moreover, Parents did not report any school incidents during the 2021-2022 school year. The first incident reported happened in the 2022 extended school year, involving Student falling on the playground, requiring ice. Standing alone, this incident seems like something typical for a first grader.

At hearing, Alpine provided evidence that the special circumstance instructional assistance assessment provided information on whether Student required additional assistance on campus or in the classroom, not solely on whether a child required an aide. Dr. Gray's assessment, analyzed more thoroughly regarding Issue 1D, recommended one-to-one or small group instruction, was not provided to Alpine until the March 7, 2022 IEP team meeting.

Alpine offered, for Student's 2022-2023 school year, placement that provided anywhere from a one-to-one to a two-to-nine teacher-student ratio. Student had a two-to-nine ratio during classroom calendar review, lunch, and recess. She had a two-to-eight ratio during general physical education and science or social studies. She had a one-to-two ratio during English language arts rotation, morning goal work, and math rotation. She had a one-to-one ratio during afternoon goal work in two sessions,

one before, and one after, recess. Staff remained between 10 and 20 feet of children during lunch and recess. Alpine provided Student with small group instruction in her special day class.

On August 19, 2022, Mother began email correspondence with Long regarding Student coming back to school for the 2022-2023 school year. On the first day of school, Student had a restroom accident where Student came home wearing shorts that were under her skirt as she could not pull her skirt back up after using the restroom. Student did not tell Long or the aides at school that she needed help. Long spoke with Student afterwards to reassure her she could tell them anything and they would help. Mother also told Long about a boy in Student's classroom who grabbed Student by the arm, pushed her to the ground, and pretended to punch her in the face. He also pushed another girl down. Mother expressed concern about Student's safety and risk for injury.

Alpine sent an assessment plan for special circumstance instructional assistance on September 6, 2022. Alpine followed up on the assessment plan on September 16, 2022 with meet and confer correspondence between the parties' counsel, as Parents had not signed the assessment plan.

Mother signed the assessment plan on October 1, 2022, about five weeks before withdrawing Student from Alpine and placing her at Sierra School. The assessment had not been completed by that time. Alpine began the assessment but could not be completed after Student withdrew from Alpine and privately placed Student. The assessor had by that time interviewed various providers but did not have an opportunity to observe Student in her various school settings at Alpine.

Student did not meet her burden of proof on Issues 1C and 2C, that she was entitled to a special circumstances instructional assistance assessment prior to September 6, 2022, and Alpine failed to offer one after that date, and denied Student a FAPE during the 2022-2023 school year by failing to conduct such assessment.

ISSUE 1D FAILING TO CONSIDER DR. ROBERT GRAY'S DECEMBER 1, 2021 INDEPENDENT NEUROPSYCHOLOGICAL EVALUATION REPORT AND RECOMMENDATIONS AT THE MARCH 7, 2022 IEP TEAM MEETING

Student argues that Alpine failed to adopt many of Dr. Gray's recommendations, which reflected its unwillingness to consider Dr. Gray's input on Student's educational program at the March 7, 2022 IEP team meeting. Alpine argues that it did consider Dr. Gray's evaluation as evidenced by increasing the offer of specialized academic instruction in the March 7, 2022 IEP.

When a parent obtains an independent educational evaluation and gives it to a school district, or when the school district funds the independent educational evaluation, the school district must consider the evaluation in any decision made with respect to the provision of a FAPE to the child, so long as the evaluation meets agency criteria. (34 C.F.R. § 300.502(c); Ed. Code, § 56329, subds. (b) & (c).)

While a school district must consider the results of an independent educational evaluation, once presented to it, it has no obligation to adopt the evaluator's recommendations unless the student needs the recommended component to access their education. (*T.S. v. Long Beach Unified School Dist.* (C.D.Cal., July 13, 2023, No. 222CV01491ODWDFMX) 2023 WL 4542517, at *6, (citation omitted).)

Alpine reviewed Dr. Gray's independent neuropsychological evaluation at an IEP team meeting held on March 7, 2022. Mother attended, along with

- Beyoghlou,
- Watson,
- school principal Meghan Meris,
- Abramson;
- Schneiders,
- Powell,
- school nurse McIntosh,
- Campbell,
- neuropsychology fellow Poth, and
- Maier.

Dr. Gray explained, both at the meeting and at hearing, that Student would continue to struggle and need high levels of support. He opined that her need for a special education team was very important. Though his report recommended one-to-one or small group instruction, he explained at the IEP team meeting that small group setting would be the best recommendation with some time in general education for social exposure.

As a result of Dr. Gray's evaluation and recommendation for small group instruction, Alpine offered Student increased participation in a mild-to-moderate special day class with participation in general education for socialization. Mother consented to implementation of the March 2022 IEP on April 20, 2022.

Dr. Gray's evaluation report also recommended that Student work on safety skills such as being able to provide her address and Parents' telephone numbers. Alpine drafted a goal to address safety skills requiring Student to retrieve a card containing information including her address and Parent telephone numbers.

Dr. Gray indicated both in an email to Parents and in his testimony that he believed that Alpine's IEP team did consider his recommendations at the March 7, 2022 IEP team meeting.

The weight of the evidence demonstrated that Alpine considered Dr. Gray's report and responded by implementing recommendations regarding increased small group instruction. The law did not require Alpine to adopt each of Dr. Gray's recommendations. Student did meet her burden of proof on Issue 1D.

ISSUE 2I: FAILING TO CONSIDER CHRISTIE HIMSTREET'S INDEPENDENT SPEECH AND LANGUAGE EVALUATION REPORT AND RECOMMENDATIONS AT THE MARCH 9, 2023 AND MAY 2023 IEP TEAM MEETINGS

Student argues that Alpine failed to consider Himstreet's independent speech and language evaluation at the March 9, 2023 and May 18, 2023 IEP team meetings, and thereby denied her a FAPE. Alpine contends it considered Himstreet's evaluation but that did not obligate it to incorporate her recommendations.

Alpine considered Himstreet's March 8, 2023 independent speech and language evaluation at the IEP amendment team meeting held on March 9, 2023. (34 C.F.R. § 300.502(c); Ed. Code, § 56329, subds. (b)-(c).) For example, Schneiders discussed her disagreement regarding articulation issues identified in Himstreet's report at the meeting which she described at hearing.

Himstreet's report notes Parents' concerns, among other things, as Student having difficulty verbalizing and explaining her thoughts and feelings and people sometimes having trouble understanding her. Himstreet did not include Alpine staff's input in her revised assessment analysis, nor had she observed Student at Alpine. Himstreet opined, in her report, that Student's speech was mostly intelligible. In a small setting her speech was 100 percent intelligible, but Himstreet worried about intelligibility with unknown listeners. She also opined, in her report and at hearing, that Student's phonological errors would impact her literacy development. She did not indicate how many phonemic errors one would need to have for their literacy to be impacted. Student had difficulty with the "r" phoneme. She never observed Student in her educational setting at Shadow Hills so she could not say whether the articulation error negatively impacted Student's education there. Moreover, while she observed Student in her Sierra School placement, she did not observe Student's articulation error impacting her education there either.

Despite Himstreet's observations that Student had no difficulty communicating with staff or peers at Sierra School, she recommended individual and group speech and language therapy to remediate and accommodate Student's communication deficits. She recommended a specific type of literacy instruction, science of reading,

and goals targeting communication development. The Alpine IEP team considered Himstreet's recommendations but disagreed with some of them and had already been implementing others, e.g. a structured literacy program and communication goals.

Alpine did not dispute that Student had an articulation error but disagreed with Himstreet as to the extent to which that error impacted Student's education and how it should be addressed. The disagreement was based, in part on Schnediers' familiarity with Student and her May 6, 2021, assessment. Schneiders conducted observations of Student in her special and general education classrooms and obtained input from her general and special education teacher, conducted standardized and non-standardized assessments, including tests of articulation.

Schneiders found no deficits with Student's

- voice,
- fluency, or
- prosody, meaning rhythm and intonation.

She conducted an oral examination, showing nothing interfering with Student's ability to speak or articulate. She obtained language samples. Based on her testing, observations, education, training, and experience, Schneiders credibly determined Student did not have any articulation deficits that impacted her education. Similarly, both the general and special education teachers found Student to be intelligible in her learning environments. Student was understood by teachers and peers without difficulty.

Schneiders determined that the "r" phoneme, or distinct category of sound, was the only phoneme that Student used incorrectly, consistently, throughout the

assessment. Schneiders opined, both in her assessment and at hearing, that Student's errors were considered developmentally and age appropriate in that the "r" phoneme was typically mastered at 8 years of age. Himstreet testified that the error should have been mastered by age 5. More importantly, the articulation error did not negatively impact Student in the academic setting or in Student's peer interactions. Powell's March 18, 2021 occupational therapy assessment reported that Student was very articulate and had no difficulty expressing her needs and wants.

Schneiders determined that Student did not demonstrate a significant need related to articulation in the educational setting, in comparison to Himstreet's evaluation. At hearing, Schneiders persuasively demonstrated that she could and did address Student's articulation error in a small group setting during speech and language sessions, as she did with all children in her small group settings.

Alpine also provided Student with literacy instruction using Orton Gillingham, a structured literacy program, which used multisensory teaching strategies paired with a focus on phonics techniques for reading instruction. Himstreet did not articulate any reason to believe that Alpine's use of an Orton Gillingham program, coupled with Student's speech and language instruction, would not provide Student with educational benefit or would not allow Student to make progress in speech and language therapy appropriate in light of her circumstances.

Generally, as long as a school district provides an appropriate education, methodology is left up to the school district's discretion. (*Rowley, supra*, 458 U.S. at p. 208.) Alpine was not required to adopt Parent's preferred methodology of individual versus small group speech and language therapy. (*Carlson v San Diego Unified School Dist.* (9th Cir. 2010) 380 F.App'x 595 (unpublished)).

The fact that Alpine did not adopt Himstreet's recommendation regarding individual speech and language therapy did not prove that Alpine failed to consider her report. Rather the involved comparison made by Schneiders demonstrates that she considered Himstreet's report extensively.

Himstreet did not attend the May 18, 2023 annual IEP and, in any event, the law did not require Alpine to consider the assessment twice. Nonetheless, the IEP present levels of performance section incorporated some information regarding Himstreet's evaluation. The meeting notes demonstrate that Alpine continued its discussion of Himstreet's report compared to Schneider's recommendations demonstrating that Alpine continued to consider the results and recommendations. Alpine agreed with Himstreet that Student had significant needs in receptive and expressive language skills.

Since consideration of an outside evaluation requires review and discussion, not adoption, Student failed to meet her burden of proof regarding consideration of Himstreet's evaluation at the March and May 2023 IEP team meetings. Student did not meet her burden of proof on Issue 2I.

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ISSUE 1E: DID ALPINE DENY STUDENT A FAPE DURING THE 2021-2022 SCHOOL YEAR AND EXTENDED SCHOOL YEAR BY FAILING TO OFFER ANY APPROPRIATE GOALS AT THE MARCH 7, 2022 IEP TEAM MEETING AND BY FAILING TO DEVELOP GOALS IN THE AREAS OF ARTICULATION, BEHAVIOR, AND SELF-CARE TO ADDRESS NEEDS IN BATHROOM USE AND STUDENT'S ABILITY TO ACCESS FOOD FROM HER LUNCH BOX?

ISSUE 2E: DID ALPINE DENY STUDENT A FAPE DURING THE 2022-2023 SCHOOL YEAR BY FAILING TO DEVELOP ANY APPROPRIATE GOALS?

Student argues that none of the goals offered by Alpine in the March 7, 2022 IEP were appropriate for her and that she required additional goals in articulation, behavior, and self-care based upon reported restroom incidents, Student not eating her lunch, and assessments by Dr. Gray and Himstreet.

Alpine argues that Student did not prove any offered goals were inappropriate, that Student made progress toward her goals which demonstrated they were appropriate, and that she did not require a specific goal for articulation, had goals to address attention or behavior, and did not require a self-care goal. Alpine also argues that its attempt to observe Student at Sierra school before the May 18, 2023 annual IEP were thwarted by Parents revoking consent for observations before Powell had an opportunity to probe Student's progress on prior goals.

An IEP must contain a statement of the child's present levels of academic achievement and functional performance and a statement of measurable annual goals related to "meeting the child's needs that result from the child's disability to enable the

child to be involved in and progress in the general curriculum” and “meeting each of the child’s other educational needs that result from the child’s disability.” (20 U.S.C. § 1414(d)(1)(A)(i) & (ii); Ed. Code, § 56345, subds. (a)(1) & (2).) The IEP must also contain a statement of how the child’s goals will be measured. (20 U.S.C. § 1414(d)(1)(A)(i)(III); Ed. Code, § 56345, subd. (a)(3).) The IEP must show a direct relationship between the present levels of performance, the goals, and the educational services to be provided. (Cal. Code Regs., tit. 5, § 3040, subd. (b).)

Failure to provide a statement of appropriate annual goals is a violation of the IDEA’s procedural requirements for the formulation and revision of IEPs. (See 20 U.S.C. § 1415(d)(1)(A)(i); Ed. Code 56345, subd. (a).)

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).) For each area in which a special education student has an identified need, the IEP team must develop measurable annual goals that are based upon the child’s present levels of academic achievement and functional performance, and which the child has a reasonable chance of attaining within a year. (Ed. Code, § 56345; *Letter to Butler* (OSERS March 25, 1998); Notice of Interpretation, Appendix A to 34 C.F.R., part 300, Question 4 (1999 regulations).)

An IEP is evaluated in light of information available at the time it was developed; it is not judged in hindsight. An IEP is “a snapshot, not a retrospective.” (*Adams v. State of Oregon*, 195 F.3d 1141, 1149, citing *Fuhrmann v. East Hanover Bd. of Ed.* (3d Cir.1993) 993 F.2d 1031, 1041.)

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

At issue are goals related to the March 7, 2022 annual IEP, which covered the time period between March 8, 2022 and May 17, 2023, and May 18, 2023 annual IEP, which covered the remainder of the 2022-2023 school year.

Abramson, Maier, Powell, and Schneiders provided evidence through their testimony at hearing that the goals offered in the March 7, 2022 IEP and May 18, 2023 IEP were appropriate. Taking their testimony as a whole, they demonstrated that Student’s IEPs provided accurate present levels of performance and a statement of appropriate measurable annual goals, including academic and functional goals. They demonstrated the goals were developed to address Student’s areas of need to enable Student to make progress toward the general education curriculum and meet each other area of educational need resulting from Student’s disability.

At the March 7, 2022 IEP team meeting, Dr. Gray reviewed his evaluation and the team developed nine goals based upon Student’s present levels of performance as noted in the IEP document. Alpine offered goals to address Student’s needs in

- reading to identify upper and lower case letters, reading letter sounds, reading identifying sight words,

- math for identifying numbers,
- receptive language for sequencing actions or events,
- expressive language for describing categories and attributes of objects,
- fine motor for writing Student's name appropriately, and
- safety for retrieving Student's Safety Information Card.

Student did not require articulation goals for reasons analyzed regarding Issue 2I. In summary, Student's articulation deficit in making the "r" sound did not prevent her from communicating with staff, peers, or typically developing peers at school, either at Shadow Hills or at Sierra School. Moreover, the evidence demonstrated that Schneiders worked on articulation with all students in Student's small group speech sessions.

Student did not demonstrate that she required behavior goals as her behaviors did not impede her learning or that of others. Student presented no evidence that she acted out, eloped, or otherwise had behaviors interfering with her learning other than attention, which had already been addressed in a goal.

Student did not demonstrate that she required goals for self care. Student had support for self care identified in her accommodations and implemented by her teachers and aides while she attended Shadow Hills. Student received help, as needed, by aides or teachers who attended lunch and recess with Student's class. She had help opening containers to access her lunch or snacks. She had supervision on the playground and, although not all accidents or incidents were preventable, the evidence did not demonstrate that she required any goals in this area. Student did not need a goal for toileting. She demonstrated the ability to use the restroom herself and occasionally received help from aides or teachers to button or adjust clothing

afterwards, and provide a change of clothing for the rare accident. By all accounts, Student also demonstrated the ability to seek out help as needed throughout the time she attended Shadow Hills.

At the May 18, 2023 IEP team meeting, the team discussed and Alpine offered eight goals consisting of

- reading decoding,
- math number sense,
- reading sight words,
- attention for individual and group activities,
- receptive language for sequencing events and actions,
- expressive language to compare and contrast nouns,
- name writing,
- group motor based activities to complete a three step activity.

Student did not meet her burden of proving that Alpine's goals in the March 7, 2022 IEP were not appropriate or that Alpine should have offered additional goals in behavior, articulation, and self-care. Student did not meet her burden of proving that Alpine failed to offer any appropriate goals in the May 18, 2023 IEP. Student did not prevail on Issues 1E and 2E.

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ISSUE 1F: DID ALPINE DENY STUDENT A FAPE DURING THE 2021-2022 SCHOOL YEAR AND EXTENDED SCHOOL YEAR BY FAILING TO REVISE THE JANUARY 2021 AND/OR MARCH 2022 IEPs TO ADDRESS STUDENT'S LACK OF PROGRESS?

Student failed to present evidence regarding a lack of progress during her 2021-2022 school year and extended school year. She argues, in her closing brief, that Parents testified about her being remarkably behind academically and socially. She also argues that her special education teacher told Mother that Student was regressing after Parent notified him about a concern in dyslexia. Alpine argues that Student put on no evidence regarding this contention and that, since Student made progress and received more than de minimus benefit, Alpine was not obligated to hold an IEP team meeting to revise the January 2021 or March 2022 IEPs.

An IEP team must review a student's IEP at least annually to review the pupil's progress, to determine whether the annual goals are being achieved, and revise the IEP as appropriate, taking into account among other matters, whether there is a lack of expected progress toward the annual goals. (34 C.F.R. § 300.324(b)(1)(ii)(a); Ed. Code, § 56341.1, subd. (d)(1).) The IEP team shall also meet whenever the student "demonstrates a lack of anticipated progress." (Ed. Code, § 56343, subd. (b).)

The evidence did not demonstrate that Student was markedly academically or socially behind her level of anticipated progress. Nor did the evidence demonstrate that Beyoghlou told Parent Student had regressed or that Parent told Beyoghlou that Student had dyslexia. Parent's testimony on this point was vague at best and clouded more by an inability or what appeared to be an unwillingness to recall any details

without looking at an email or other document. This made Parent's testimony, without corroborating documentation, unreliable. Nonetheless, Parents did not request an IEP team meeting or even send an email to Alpine notifying them of a concern regarding Student's regression during the 2021-2022 school year. The evidence contains numerous emails between Parents and Alpine demonstrating that there existed an open line of communication regarding issues as they arose at school. This was not one of them.

Moreover, Parents were the ones who reported noticing some regression with letter, numbers, and colors since the previous school year. Parents' concerns were noted in the January 15, 2021 annual IEP, relating to Student's kindergarten year, not her first or second grade year. The teacher at that time noted that children often mix up some letters and numbers as they learn new ones. This example underscores the unreliability of Parent's testimony.

Alpine developed progress reporting in January 2022 in preparation for Student's annual IEP. For reasons not important here, the annual IEP team meeting was not held until March 7, 2022. Progress reporting demonstrated that Student met academic goals for reading comprehension and math identifying numbers and made progress on goals for math identifying seven out of a goal of eight shapes. In attention, she met the portion of her goal requiring her to attend to 15 minutes of instruction but needed 4.3 cues rather than 3 cues. In penmanship, she was able to trace capital letters with improved letter formation, but the team continued to work on copying letters. She made progress on a second penmanship goal for tracing the letters of her name with improved legibility.

Student made good progress on a phonemic awareness goal from a baseline of identifying two lower case letters and five upper case letters to identifying 15 lower case and 16 upper case. Student made minimal progress on a second phonemic awareness goal for reasonable spelling using pre-phonetic knowledge, letter sounds, and knowledge of letter names.

In speech and language, Student met her annual goal for receptive language for understanding spatial and quantitative concepts. She met her expressive language goal for producing grammatically correct sentences with correct use of target subject pronouns. She made progress on a second expressive language goal by increasing from 20 percent to 60 percent in her ability to describe an object by naming a category and two or more attributes.

The IEP team developed new goals for Student's March 7, 2022 annual IEP. Alpine continued Student's goal for

- identifying upper and lower case letters,
- developed a goal for reading using correct letter sounds,
- reading by stating the first 10 of 100 sight words,
- mathematics for identifying numbers one through 50,
- behavior for attending to large group instruction,
- receptive language for picture sequencing,
- expressive language for describing familiar objects with categories and attributes,

- fine motor for independently copying or writing the letters of her name with good legibility, formation, and alignment, and
- behavior for retrieving her safety information card when asked to provide contact and safety information.

Student presented no evidence regarding lack of progress from the March 7, 2022 IEP through the extended school year. Student had an extended absence from mid December 2021 through mid January 2022. Parents reported she broke her foot and required a wheelchair when she returned to school. Aides helped Student around campus as needed. Notes from orthopedic impairment teacher Campbell on February 3, 2022 reflect that Student had been able to walk independently to the restroom, before breaking her foot, and could return to that when she no longer needed a wheelchair. The notes also demonstrate Student's social ability on the playground. Student, still in a wheelchair, played ball with a peer who walked the ball back over to her and placed it on her lap. Notes from March 29, 2022 demonstrate that Student learned how to independently lift the top frame of her stay put mat with her left wrist to position paper inside of it with her right hand.

The evidence demonstrated that Student made progress appropriate in light of her circumstances during the 2021-2022 school year and extended school year. Maier, Abramson, Long, Schneiders, and Powell testified regarding Student's progress socially, academically, and in related services. Consistent with Dr. Gray's assessment and conclusions, Alpine witnesses found Student to require rote learning, repetition, and use of multisensory teaching to learn over time. Dr. Gray described Student's learning process as being slow and she demonstrated slow progress while attending Shadow Hills.

But Student consistently tried to improve academically and socially, and the evidence proved that she did improve. Student became more independent initiating self-care during her first and second grade years. She told aides she did not want them accompanying her to the restroom. She asked her aides, teachers, or providers for assistance when she needed it, on most occasions.

Student failed to prove she had a lack of progress that Alpine should have addressed by revising the January 2021 or March 2022 IEPs. Student did not meet her burden of proof on Issue 1F.

ISSUE 1H: DID ALPINE DENY STUDENT A FAPE DURING THE 2021-2022 SCHOOL YEAR AND EXTENDED SCHOOL YEAR BY FAILING TO OFFER APPROPRIATE SERVICES AND SUPPORTS IN THE FORM OF A ONE-TO-ONE AIDE AND ADAPTED PHYSICAL EDUCATION?

ISSUE 2D: DID ALPINE DENY STUDENT A FAPE DURING THE 2022-2023 SCHOOL YEAR BY FAILING TO OFFER STUDENT AN AIDE AT SCHOOL OR DURING TRANSPORTATION, AND FAILING TO OFFER INDIVIDUAL AND INCREASED FREQUENCY AND DURATION FOR SPEECH AND LANGUAGE SERVICES IN THE MARCH 7, 2022 IEP?

STUDENT DID NOT REQUIRE A ONE-TO-ONE AIDE

Student argues that she required a one-to-one aide during both from the 2021-2022 through the 2022-2023 school years to address safety issues and because

she could not access her lunch, curriculum, and restroom without help. Alpine argues that Student made appropriate progress without an aide and that having an aide created a more restrictive environment.

For the reasons stated above, regarding the statute of limitations, Alpine's offer of FAPE governing the 2021-2022 school year was made more than two years before the filing of Student's original complaint on June 14, 2023, making Issue 1H time barred.

For the reasons set forth regarding Issues 1C and 2B and several subsequent Issues, Student failed to demonstrate she required a one-to-one aide during first grade or second grade. During both school years, Student attended a special day class with a low teacher to student ratio ranging from one-to-one goal work to two-to-nine whole class instruction. The evidence demonstrated that Student made progress during her 2021-2022 school year without an aide. During her 2022-2023 school year, Alpine offered, in the March 2022 IEP, an increase in specialized academic instruction with less time in the general education environment. Given the small class size of Student's special day class, the evidence did not demonstrate the need for a one-to-one aide in the special education environment. Student was a capable person described by Alpine providers and Mother, as someone who could self-advocate.

Moreover, because Alpine offered increased time in special education with minimal general education inclusion, the evidence did not demonstrate the need for aide in general education. To the extent Student argues she required an aide for safety reasons, she failed to establish that Shadow Hills provided an unsafe campus. For the same reasons as stated in Issue 1G and 2C, Student did not establish the need for a one-to-one aide.

Likewise, Student did not require an aide for bus transportation. A single alleged bus incident of alleged name-calling between August 17, 2022, when school began and November 2, 2022, when Student left Alpine did not warrant assigning a bus aide for Student.

STUDENT DID NOT REQUIRE ADDITIONAL SPEECH AND LANGUAGE SERVICES IN THE MARCH 7, 2022 IEP

Student argues that she required increased and individual speech and language services in light of Himstreet's evaluation. Alpine argues that Student did not require an increase in speech services as her speech was intelligible, she made good progress in speech, and more time in speech meant less time spent receiving specialized academic instruction and general education.

For the reasons set forth regarding Issues 1C, 1E, 2B, and 2I, the evidence demonstrated that Student did not require an increase in the frequency or duration of speech and language services to address articulation or other speech and language needs at the time of the March 7, 2022 IEP. Student made progress in speech and language in a small group setting with 1,020 minutes of yearly service. Student did not demonstrate that she required an increase in the frequency or duration of speech and language services or that she required individual services.

Notably, Himstreet's independent speech and language evaluation had not yet been completed at the time of the March 7, 2022 IEP team meeting. Student, in her closing brief, contends that Himstreet's March 8, 2023 evaluation should have somehow

had an impact on speech and language services offered in an IEP created one year earlier. But an IEP is a snapshot of what was appropriate at the time, not a retrospective. (*Adams*, 195 F.3d 1141, 1149.)

Student did not meet her burden of proving that she required individual or an increase in speech and language services in the March 7, 2022 IEP. Student did not prevail on Issue 2D.

ISSUE 2F: DID ALPINE DENY STUDENT A FAPE DURING THE 2022-2023 SCHOOL YEAR, BY FAILING TO OBTAIN PARENT CONSENT BEFORE CONDUCTING THE MARCH 28, 2023 SPEECH AND LANGUAGE AND MAY 15, 2023 ACADEMIC ASSESSMENTS OF STUDENT?

Student argues that Alpine speech language pathologist Schneiders and Dean of Special Education Abramson inappropriately went to Sierra School to conduct speech and academic assessments of Student in March and May 2023 without Parents' consent. Alpine argues that it did not conduct assessments at Sierra School. Rather, Alpine attempted to have providers obtain progress on Alpine's goals to prepare for Student's May 18, 2023 annual IEP team meeting.

A reassessment may not be conducted, unless the written consent of the parent is obtained prior to reassessment. (Ed. Code, § 56381, subd. (f)(1).)

Speech and language pathologist Schneiders observed Student at Sierra School on March 28, 2023. Schneiders observed Student on the playground socializing with other children and observed Student in her classroom. Schneiders then worked with Student to determine progress on goals and to probe for new goals. She did not use

any testing instruments. Maier toured the school in consideration of placing another there. She then observed Student in class. Abramson also observed Student and then worked with Student to probe her on academic goals. Abramson did not conduct an assessment of Student.

Alpine providers did not conduct tests or use other assessment materials with Student during their Sierra School visits. Rather, they conducted trials on Student's speech and academic goals to ascertain Student's present levels of performance for Student's annual IEP held on May 18, 2023. Alpine did not have access to Student since she began attending Sierra School on November 3, 2022. Since three year reassessments were not due until May 2024, Alpine sought input on Student's progress on goals to obtain present levels of performance, which may serve as baselines for new goals.

Although not required, Alpine obtained Parent's consent to conduct the goal reporting through a series of emails between the parties' counsel. Alpine contacted Sierra School to coordinate dates for provider site visits for this purpose. Student failed to establish that Alpine conducted a March 28, 2023 speech and language assessment or a May 15, 2023 academic assessment which required Parents' consent. Student did not meet her burden of proof on Issue 2F.

ISSUE 2G: DID ALPINE DENY STUDENT A FAPE DURING THE 2022-2023 SCHOOL YEAR, BY DENYING MEANINGFUL PARENTAL PARTICIPATION AT THE MAY 18, 2023 IEP TEAM MEETING BY REFUSING TO ANSWER PARENT QUESTIONS REGARDING THE MARCH 28, 2023 AND MAY 15, 2023 ASSESSMENTS?

Student argues that Alpine precluded Parents from asking questions about assessments they believe Alpine conducted in March and May 2023 while Student attended Sierra School. Alpine argues that it conducted observations, not assessments, and that Student's counsel Rutherford asked questions about the observations which were deferred to Alpine's counsel Cesario.

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(a); Ed. Code, § 56500.4.) 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 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 (*N.L.*); *Fuhrmann, supra*, 993 F.2d at p. 1036 [parent who has an opportunity to discuss a proposed IEP and whose concerns are considered by the IEP team has participated in the IEP process in a meaningful way].)

Here, Parents conflate goal reporting with assessments. To prepare for Student's next annual IEP team meeting, held on May 18, 2023, Cesario conferred with Rutherford and with Sierra School to obtain dates for Alpine providers to trial Student's progress on

her goals so that current information could be provided to the IEP team in the annual IEP. Since providers no longer had access to Student, they needed to observe her and probe her goals for progress. Providers did not administer assessment tools. They simply worked with her on goals.

In emails between the parties, the goal trials were sometimes inartfully referred to as assessments, which appeared to be the source of confusion. However, on multiple occasions before Alpine personnel went to Sierra School, Alpine assured Student that they were not trying to conduct assessments, but rather obtain progress on goals from Student's last agreed upon IEP with Alpine.

May 18, 2023 meeting notes establish that Rutherford asked about Student being removed from class for observations. Abramson explained the data collection for the IEP and goal baselines. Cesario asked that questions regarding the observations or data collection go through her so that the discussion could focus on the IEP, placement, services, and least restrictive environment.

Alpine did not prevent Parents from obtaining information regarding Student's progress, her present levels of performance, or the placement, services, goals, accommodations, or program modifications being offered during the May 18, 2023 IEP team meeting. Nor did Alpine prevent Parents from asking questions or providing input in these areas. The IEP meeting notes reflect Parent's meaningful participation.

Student failed to prove that Alpine denied Parents meaningful participation in the development of her May 18, 2023 IEP. Student did not meet her burden of proof on Issue 2G.

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:

Alpine did not deny Student a FAPE during the 2021-2022 school year and extended school year, by materially failing to implement Student's educational placement, specialized academic instruction, speech and language services, and accommodations as offered in the January 15, 2021 IEP, as amended.

District prevailed on these portions of Issue 1A.

Alpine denied Student a FAPE during the 2021-2022 school year by materially failing to implement occupational therapy services. Student did not prevail as to the 2022 extended school year occupational therapy services.

Student prevailed on the portion of 1A pertaining solely to occupational therapy services during the regularly school year.

ISSUE 1B:

Alpine did not deny Student a FAPE during the 2021-2022 school year and extended school year, by failing to offer an appropriate general and special educational placement.

District prevailed on Issue 1B.

ISSUE 1C:

Alpine did not deny Student a FAPE during the 2021-2022 school year and extended school year, by failing to assess Student in all areas of suspected disability, specifically in the areas of academics, speech and language, occupational therapy, adapted physical education, assistive technology, and special circumstance instructional assistance.

District prevailed on Issue 1C.

ISSUE 1D:

Alpine did not deny Student a FAPE during the 2021-2022 school year and extended school year, by failing to consider Dr. Robert Gray's December 1, 2021 independent psychoeducational evaluation report and recommendations at the March 7, 2022 IEP team meeting.

District prevailed on Issue 1D.

ISSUE 1E:

Alpine did not deny Student a FAPE during the 2021-2022 school year and extended school year, by failing to develop any appropriate goals in the March 7, 2022 IEP and by failing to develop goals in the areas of articulation, behavior, and self-care to address needs in bathroom use and Student's ability to access food from her lunch box.

District prevailed on Issue 1E.

ISSUE 1F:

Alpine did not deny Student a FAPE during the 2021-2022 school year and extended school year, by failing to revise the January 2021 or March 2022 IEPs to address Student's lack of progress.

District prevailed on Issue 1F.

Issue 1G:

Alpine did not deny Student a FAPE during the 2021-2022 school year and extended school year, by failing to provide a safe educational environment in that Alpine did not appropriately address bullying of Student and classroom disruption which prevented Student from accessing her education.

District prevailed on Issue 1G.

ISSUE 1H:

Alpine did not deny Student a FAPE during the 2021-2022 school year and extended school year, by failing to offer appropriate services and supports in the form of a one-to-one aide and adapted physical education.

District prevailed on Issue 1H.

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Issue 2A:

Alpine did not deny Student a FAPE during the 2022-2023 school year, by materially failing to implement specialized academic instruction, speech and language services, occupational therapy, and accommodations as offered in the March 7, 2022, IEP through November 3, 2022, when Parent withdrew Student from school.

District prevailed on Issue 2A.

ISSUE 2B:

Alpine did not deny Student a FAPE during the 2022-2023 school year, by failing to assess Student in all areas of suspected disability, specifically in the areas of academics, speech and language, occupational therapy, adapted physical education, assistive technology, and special circumstance instructional assistance.

District prevailed on Issue 2B.

ISSUE 2C:

Alpine did not deny Student a FAPE during the 2022-2023 school year, by failing to provide a safe educational environment in that Alpine did not appropriately address bullying, which impacted Student's access to her education.

District prevailed on Issue 2C.

ISSUE 2D:

Alpine did not deny Student a FAPE during the 2022-2023 school year, by failing to offer an aide at school or during transportation and failing to offer individual and increased frequency and duration for speech and language services in the March 7, 2022 IEP.

District prevailed on Issue 2D.

ISSUE 2E:

Alpine did not deny Student a FAPE during the 2022-2023 school year, by failing to develop any appropriate goals.

District prevailed on Issue 2E.

ISSUE 2F:

Alpine did not deny Student a FAPE during the 2022-2023 school year, by failing to obtain Parent consent before conducting the March 28, 2023 speech and language and May 15, 2023 academic assessments of Student.

District prevailed on Issue 2F.

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ISSUE 2G:

Alpine did not deny Student a FAPE during the 2022-2023 school year, by denying meaningful parental participation at the May 18, 2023 IEP team meeting by refusing to answer Parent questions regarding the March 28, 2023 and May 15, 2023 assessments.

District prevailed on Issue 2G.

ISSUE 2H:

Alpine did not deny Student a FAPE during the 2022-2023 school year, by failing to offer an appropriate special day class in the March 9, 2023 and May 18, 2023 IEPs.

District prevailed on Issue 2H.

ISSUE 2I:

Alpine did not deny Student a FAPE during the 2022-2023 school year, by failing to consider Christie Himstreet's independent speech and language evaluation report and recommendations at the March 9, 2023 and May 2023 IEP team meetings.

District prevailed on Issue 2I.

ISSUE 2J:

Alpine did not deny Student a FAPE during the 2022-2023 school year, by failing to offer placement at any school other than Shadow Hills Elementary School in the May 2023 IEP.

District prevailed on Issue 2J.

REMEDIES

Student prevailed on the portion of Issue 1A regarding material failure to implement Student's occupational therapy services during the 2021-2022 regular school year.

Under federal and state law, 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)(1)(C)(iii); Ed. Code, § 56505, subd. (g); see *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] (Burlington).)

This broad equitable authority extends to an Administrative Law Judge who hears and decides a special education administrative due process matter. (*Forest Grove School Dist. v. T.A.* (2009) 557 U.S. 230, 244, fn. 11 [129 S.Ct. 2484, 174 L.Ed.2d 168].)

School districts may be ordered to provide compensatory education or additional services to a student who has been denied a FAPE. (*Student W. v. Puyallup School Dist.* (9th Cir. 1994) 31 F.3d 1489, 1496 (*Puyallup*).) A 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).) The conduct of both parties must be reviewed and considered to determine whether equitable relief is appropriate. (*Puyallup*, supra, 31 F.3d at pp. 1496-1497.)

An award to compensate for past violations must rely on an individualized assessment, just as an IEP focuses on the individual student’s needs. (*Reid ex rel. Reid v. Dist. of Columbia* (D.D.C. Cir. 2005) 401 F.3d 516, 524 citing *Puyallup*, supra, 31 F.3d at p. 1497.) The award must be fact-specific and 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 ex rel. Reid*, supra, 401 F.3d at p. 524.)

Here, Alpine failed to provide Student with 280 minutes of occupational therapy services required under Student’s January 2021 and March 2022 IEPs for the 2021-2022 school year. Accordingly, Alpine shall be required to provide Student with compensatory education in the form of 280 minutes of occupational therapy services through providers of Alpine’s choosing. Parents shall make Student reasonably available to receive the services unless Parents choose not to obtain the services. Alpine shall make the services available for Student to use no later than 45 days after issuance of this Decision and the services shall be waived if not used by June 28, 2024.

ORDER

1. Alpine shall provide Student with 280 minutes of occupational therapy services beginning no later than 45 days after issuance of this Decision.

Student shall have until June 28, 2024 to use the services. Whatever occupational therapy services are not used by 5:00 PM on June 28, 2024, shall be deemed forfeited.

2. Alpine may choose a provider from the district or any school district, special education local plan area, or other local educational agency, or nonpublic agency, at Alpine's discretion.
3. The parties shall meet and confer as to the time and location of the compensatory services. If an agreement cannot be reached, then Student must receive services at a district school during regular school hours.

All 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.

Cole Dalton

Administrative Law Judge

Office of Administrative Hearings

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