

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

CASE NO. 2022080821

PARENTS ON BEHALF OF STUDENT,

v.

GATEWAY COLLEGE AND CAREER ACADEMY.

DECISION

MARCH 22, 2023

On August 26, 2022, the Office of Administrative Hearings, called OAH, received a due process hearing request from Parents on behalf of Student, naming Gateway College and Career Academy, called Gateway. Administrative Law Judge Jennifer Kelly heard the matter via videoconference on January 18, 19, 24, 25, 26, and 27, 2023.

Attorneys Phillip VanAllsburg and Andrea Blair represented Student. Mother attended all hearing days, except for the last hearing day. Attorneys Lisa Corr and

Ashley DeVance represented Gateway. Attorney Mariam Babayan observed the first hearing day on Gateway's behalf. Gateway's Executive Director, Miguel Contreras, attended all hearing days.

At the parties' request, the matter was continued to February 13, 2023, to allow time for them to prepare written closing argument briefs. OAH closed the record and submitted the matter on February 13, 2023.

ISSUES

1. Did Gateway deny Student a free appropriate public education, called a FAPE, by failing to develop an "administrative" individualized education program, known as IEP, to provide Student services comparable to those within his last agreed upon and implemented IEP?
2. Did Gateway deny Student a FAPE by failing to convene an IEP team meeting to formally adopt Student's prior IEP within 30 days of Student's enrollment at Gateway?
3. Did Gateway deny Student a FAPE by failing to provide Student with a formal IEP document that outlined his goals, modifications, accommodations, and services?
4. Did Gateway deny Student a FAPE by offering an "informal program" that was insufficient to meet Student's unique needs in academics, occupational therapy, and speech and language?

Special education law does not recognize the doctrine of continuing violations. (*Moyer v. Long Beach Unified School Dist.* (C.D.Cal. January 24, 2013, No. CV 09-04430 MMM (AJWx) 2013 WL 271686 *7, fn. 71; 71 Fed. Reg. 46697 (August 13, 2022).) Student filed the complaint on August 26, 2022; four days after the start of the 2022-2023 school year. This Decision is limited to events that occurred before August 26, 2022.

JURISDICTION

This hearing was held under the Individuals with Disabilities Education Act, its regulations, and California statutes and regulations. (20 U.S.C. § 1400 et. seq.; 34 C.F.R. § 300.1 (2006) et seq.; Ed. Code, § 56000 et seq.; Cal. Code Regs., tit. 5, § 3000 et seq.) The main purposes of the Individuals with Disabilities Education Act, referred to as the IDEA, are to ensure:

- all children with disabilities have available to them a 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) and (f); 34 C.F.R. § 300.511; Ed. Code, §§ 56501, 56502, and 56505; Cal. Code Regs., tit. 5, § 3082.) The party requesting the hearing is limited to the issues alleged in the complaint, unless the other party

consents, and has the burden of proof by a preponderance of the evidence. (20 U.S.C. § 1415(f)(3)(B); Ed. Code, § 56502, subd. (i); *Schaffer v. Weast* (2005) 546 U.S. 49, 57-58, 62 [126 S.Ct. 528, 163 L.Ed.2d 387]; and see 20 U.S.C. § 1415(i)(2)(C)(iii).) Student filed the complaint and, therefore, had the burden of proof for each issue. The factual statements in this Decision constitute the written findings of fact required by the IDEA and state law. (20 U.S.C. § 1415(h)(4); Ed. Code, § 56505, subd. (e)(5).)

Student was 16 years old at the time of the hearing and lived with his Parents within the geographic boundaries of Corona-Norco Unified School District, called Corona-Norco. Corona-Norco was Student's school district of residence. Student was enrolled in elementary school at Corona-Norco until his disenrollment in September 2019, pursuant to the terms of a settlement agreement with Corona-Norco. At the time of hearing, Student attended Gateway, a public charter school and was in 10th grade. Student was eligible for special education and related services under the category of autism.

LEGAL FRAMEWORK

A FAPE means special education and related services that are available to an eligible child that meets state educational standards at no charge to the parent. (20 U.S.C. § 1401(9); 34 C.F.R. § 300.17 (2006).) Parents and school personnel develop an IEP for an eligible student based upon the IDEA and state law. (20 U.S.C. §§ 1401(14), 1414(d)(1); Ed. Code, §§ 56031, 56032, 56341, 56345, subd. (a), and 56363, subd. (a); 34 C.F.R. §§ 300.320 (2007), 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, 402 [137 S.Ct. 988, 1000] (*Endrew F.*).

Procedural violations do not automatically require a finding of a FAPE denial. (*W.G., et al. v. Board of Trustees of Target Range School Dist.* (9th Cir. 1992) 960 F.2d 1479, 1484 (*Target Range*), superseded by statute on other grounds by IDEA Amendments of 1997.) A procedural violation only constitutes a denial of FAPE if the violation:

1. impeded the child's right to a FAPE;
2. significantly impeded the parents' opportunity to participate in the decision-making process regarding provision of a FAPE to the student; or
3. caused a deprivation of educational benefits. (20 U.S.C. § 1415(f)(3)(E)(ii); Ed. Code, § 56505, subd. (f)(2).)

CHARTER SCHOOLS

Students with disabilities retain all rights under the IDEA when they attend a charter school, just as they would when attending traditional public schools. (34 C.F.R. § 300.209(a).) A charter school that is a local educational agency must serve children with disabilities in the same manner that a local educational agency, called LEA, serves children with disabilities in other public schools. (*Id.*, subd. (b)(1)(i); Ed. Code, § 47604.) An LEA is defined as a "school district, a county office of education, a nonprofit charter

school participating as a member of a special education local plan area, or a special education local plan area.” (Ed. Code, § 56026.3.) A special education local plan area is referred to as a SELPA.

Although charter schools have been granted independence to develop unique educational models, the California Legislature did not intend that the charter school statutes override or conflict with special educational law. Education Code section 47646, subdivision (a), imposes on the charter LEA the duty to ensure that “all children with disabilities enrolled in the charter school receive special education ... in a manner that is consistent with their individualized education program and is in compliance with the IDEA and its regulations.”

Gateway is a high school located in Riverside, California. Gateway is a nonprofit public benefit corporation and, therefore, is designated as an LEA responsible for providing special education and related services to its students. (Ed. Code, §§ 56026.3, 47604.) At the time of hearing, Gateway had a single campus where it served 185 students, including approximately 15 students with IEPs. Gateway’s Executive Director, Miguel Contreras, testified at hearing. When Student enrolled at Gateway in November 2021, Gateway had approximately 70 students. A typical Gateway student was on average 17 years old, and significantly behind in completing high school credits. Students’ ages ranged from 16 to 22. For the 2021-2022 school year, Gateway accepted students ages 14 through 22. Gateway’s program was primarily delivered through an independent study model. Students typically attended one class per day in person and completed their other courses online. Gateway did not have special education classes.

Gateway was part of the El Dorado Charter SELPA. The SELPA was not the responsible LEA for Student and did not provide any special education programs or services to Gateway's students. Gateway did not contract with other LEAs to provide special education services or placement to its students.

ISSUE 1: DID GATEWAY DENY STUDENT A FAPE BY FAILING TO DEVELOP AND "ADMINISTRATIVE" IEP TO PROVIDE STUDENT SERVICES COMPARABLE TO THOSE OFFERED IN HIS LAST AGREED UPON AND IMPLEMENTED IEP?

Student contends Gateway denied him a FAPE by failing to develop an "administrative" IEP, which offered Student comparable services to his last agreed upon and implemented IEP. An "administrative" IEP is not a term defined in the IDEA or California Education Code, or their implementing regulations. At hearing, Student confirmed the term "administrative" IEP referred to the interim program a receiving LEA is required to provide a student with disabilities who transfers from another LEA within the state in the same academic year. Student further contends Gateway was required to provide Student services comparable to those contained in his March 4, 2015 IEP, developed by Corona-Norco, including specialized academic instruction, a one-to-one aide, speech and language services, and occupational therapy services.

Gateway contends the intrastate statute provisions of the IDEA did not apply to Student's transfer to Gateway because Student did not transfer from an LEA within the same academic year, but instead transferred from a private school to Gateway between school years. Gateway asserts it was not obligated to implement a six-year-old IEP, written by another school district.

IDEA AND CALIFORNIA INTRASTATE TRANSFER PROVISIONS

The IDEA and California law have specific requirements for students who transfer between public schools in the same academic year. These statutes are commonly referred to as the intrastate transfer statutes. The IDEA requires school districts to provide a FAPE to students with disabilities who transfer between school districts within the same academic year, and who have an IEP in effect in the same state, by providing services comparable to those described in the previous IEP, in consultation with the parents. (20 U.S.C. § 1414(d)(2)(C)(i)(1); 34 C.F.R. § 300.323(e).) The receiving school district is required to provide the comparable services until such time as the school district either adopts the previously implemented IEP, or develops, adopts, and implements a new IEP. (*Id.*)

The California Education Code mirrors the IDEA and further provides that for an individual with exceptional needs who transfers into a school district not operating under the same local plan area, the new district shall provide the individual with a FAPE, including services comparable to those described in the previously approved IEP, in consultation with the parents, "for a period not to exceed 30 days." (Ed. Code, § 56325, subd. (a)(1); 20 U.S.C. § 1414(d)(2)(C)(i)(I).) The district must then adopt the previously approved IEP or shall develop, adopt, and implement a new IEP that is consistent with federal and state law. (Ed. Code, § 56325, subd. (a)(1).) The intrastate transfer provisions under the IDEA and Education Code only apply in the case of a child with a disability who transfers into another school district within the same academic year. (Ed. Code, § 56325, subd. (a)(1); 20 U.S.C. § 1414(d)(2)(C)(i)(I).)

To facilitate the transfer process for a student with exceptional needs who transfers from another school district, the new school district in which the student

enrolls, must take reasonable steps to promptly obtain the child's records. This includes the student's IEP and supporting documents, and any other records relating to provision of special education or related services to the child, from the previous public agency in which the child was enrolled. (34 C.F.R. § 300.323(g)(1); Ed. Code, § 56325, subd.(b)(1).) Similarly, the previous public agency in which the child was enrolled must take reasonable steps to promptly respond to the request from the new public agency. (34 C.F.R. § 300.323(g)(2); Ed. Code, § 56325, subd. (b)(2).)

The IDEA, its implementing regulations, and the California Education Code are silent on the specific procedure by which a district is to provide a FAPE to a child with a disability who transfers between school years, such as during the summer. In its comments to the 2006 IDEA regulations, the United States Department of Education addressed whether it needed to clarify the regulations regarding the responsibilities of a new school district for a child with a disability who transfers school districts over the summer break. The United States Department of Education declined to change title 34 Code of Federal Regulations section 300.323(e), by adding specific provisions relating to transfers between school years. In its comments to the 2006 regulations, the United States Department of Education noted that, in the case of transfers between school years, the IDEA provides that the new school district is required to have an IEP in place for each eligible child at the beginning of the school year. (71 Fed. Reg. 46682 (2006).)

However, the comments did not specify that the new district was required to adopt the child's prior IEP or model the new IEP based on the child's IEP from the prior school district. Similarly, Congress did not change the regulations to require receiving districts to afford a child the right to stay put based on the prior district's IEP when the transfer was between school years. (*Ibid.*)

STUDENT'S PREVIOUS ENROLLMENT IN CORONA-NORCO

Student was initially assessed for special education eligibility before he turned three years old. In July 2009, Corona-Norco assessed Student and found him eligible for special education under the category of autism. Autism is a developmental disability significantly affecting verbal and nonverbal communication and social interaction, generally evident before age three, and adversely affecting a child's educational performance. (Cal. Code Regs., tit. 5 § 3030(b)(1).) Other characteristics often associated with autism are engagement in repetitive activities and stereotyped movements, resistance to environmental change or change in daily routines, and unusual responses to sensory experiences. (*Id.*)

As a result of his disability, Student had a history of delays in

- receptive and expressive language,
- pragmatic language,
- reading,
- writing, and
- math.

Student did not progress from grade to grade at a normal pace. Student attended school in Corona-Norco, his school of residence, through the end of the 2018-2019 school year. Student's last agreed upon and implemented IEP at Corona-Norco was dated March 4, 2015 and developed when Student was eight years old and in fourth grade. Student received specialized academic instruction in the general education classroom setting. Student was supported by a special circumstances instructional aide, referred to as a one-to-one aide, across all settings for academic and behavioral

support. Student received speech and language and occupational therapy services. Student spent 75 percent of his time outside the regular class and extracurricular and non-academic activities, and 25 percent in the regular class and extracurricular and non-academic activities.

In addition to the services Student received at school, Parents provided Student with speech and language therapy, occupational therapy, and in-home applied behavior analysis therapy for the 10-year period before the due process hearing. Student's in-home behavior services were provided by Creative Behavior Interventions and were funded through Parents' private medical insurer. Parents continued providing Student with these services through the date of hearing.

A series of disagreements arose between Student's parents and Corona-Norco over the course of Student's enrollment at Corona-Norco. Parents' disagreed with Corona-Norco's recommendation that Student's eligibility category be changed to intellectual disability. Parents also disagreed with Student's goals, accommodations, modifications, and special education program and related services. These disagreements were reflected in Student's IEP documents developed between 2015 and 2018. Parents agreed to some goals and services, but not others. Parents often provided only partial consent to portions of earlier IEPs, many months after the IEP team meetings had been held and offers of a FAPE were made. As a result, Student's IEP documents were disjointed and confusing. No witness persuasively described Student's last agreed upon educational program at Corona-Norco.

STUDENT'S 2019 SETTLEMENT AGREEMENT WITH CORONA-NORCO

Parents did not provide unequivocal consent to any of the IEPs offered by Corona-Norco after March 4, 2015. Corona-Norco filed a due process complaint with OAH in 2019, to obtain a determination that its October 2018 IEP, as finalized on December 3, 2018, offered Student a FAPE. On September 19, 2019, Parents and Corona-Norco resolved their dispute and entered into a written settlement agreement. Corona-Norco agreed to fund Student's placement at a certified non-public school or secular private school selected by Parents, for the 2019-2020 school year, commencing October 1, 2019, through the end of the 2020-2021 extended school year. Corona-Norco also agreed to reimburse Parents for applied behavior analysis, speech and language therapy, and occupational therapy services.

Parents agreed Student was a privately placed student. In the event Parents intended to re-enroll Student at Corona-Norco for the 2021-2022 school year, they agreed to give Corona-Norco notice of their intent to re-enroll Student, and permit Corona-Norco to reevaluate Student. Parents agreed to participate in an IEP team meeting. The IEP developed through this process would constitute Student's stay put placement. The IDEA's stay put provision requires that students remain in their current educational placement pending the resolution of an educational dispute. (20 U.S.C. § 1415(j); 34 C.F.R. § 300.518(a); Ed. Code, § 56505, subd. (d).) Further, the parties agreed Student was considered a parentally placed private school Student until Parents provided Corona-Norco notice, consented to all assessments, and participated in an IEP team meeting with Corona-Norco to develop a new IEP for Student.

Student disenrolled from Corona-Norco effective September 30, 2019. As of the date of hearing, Student had not re-enrolled at Corona-Norco. Student's disputes with

Corona-Norco were not at issue in this proceeding. The facts relating to the prior due process complaint are provided here for background information only. Further, these facts are relevant to whether the intrastate transfer provisions applied to Student's transfer from his unilateral private placement at Davidson Learning Center to Gateway.

STUDENT ATTENDED PRIVATE SCHOOL DURING THE 2019-2020 AND 2020-2021 SCHOOL YEARS

Children with disabilities enrolled by parents in private schools or facilities are in a category of students known as private school children with disabilities. (34 C.F.R. § 300.130; Ed. Code, § 56170.) An LEA is not required to pay for the cost of education, including special education and related services, of a child with a disability at a private school or facility if the LEA made a FAPE available to the child and the parents elected to place the child in the private school. (Ed. Code, § 56174.) Private school students with exceptional needs may receive a different level of services than received by individuals with exceptional needs in public schools. (20 U.S.C. § 1412(a)(10)(A); 34 C.F.R. § 300.138(a)(2); Ed. Code, § 56174.5, subd. (a).) No private school student with exceptional needs is entitled to any amount of service the child would receive if enrolled in a public school. (34 C.F.R. § 300.137(a); Ed. Code, § 56174.5, subd. (a).)

On December 9, 2019, Student enrolled in Davidson Learning Center, a private school located in Huntington Beach, California. Davidson Learning Center provided one-to-one personalized academic instruction for children with disabilities using curriculum aligned with California common core standards. Student attended Davidson Learning Center as a parentally placed private school student during the 2019-2020, and 2020-2021 school years. Student's last day at Davidson was sometime in August 2021.

Dr. Chris Davidson, Davidson Learning Center's owner and director, testified at hearing. Davidson was a licensed educational psychologist and board-certified behavior analyst. She held a California administrative services credential and pupil personnel services credential. She had substantial experience working with children with disabilities. Over the course of her career, Dr. Davidson worked in the public school system as an elementary school teacher, a school psychologist, a director of special education, and an assistant superintendent.

Davidson conducted a records review and an informal intake assessment for Student on November 19, 2019, for purposes of recommending an academic program for Student, who was in seventh grade. Student's speech had intelligibility and pragmatic deficits. Student's handwriting was illegible and Student was resistant to being corrected. Student had sensory needs and sometimes left the classroom without permission. Student performed at the first and second grade levels in core academic subjects when he enrolled at Davidson.

Davidson developed an individualized curriculum for Student aligned with common core standards. Davidson used state adopted textbooks, such as Go Math and Pearson Scott Foresman, and created work packets using materials from Learning A-Z and Raz-Kids, a digital learning program with downloadable teaching materials and worksheets. Student's instruction was provided one-on-one by a general education teacher.

Student attended Davidson in-person between December 9, 2019, and mid-March 2020. No witness, including Dr. Davidson or Mother, gave consistent testimony about

the amount of instructional hours Student received at Davidson. Dr. Davidson testified Student attended five days weekly for five hours per day. Mother's testimony was vague regarding how many hours Student attended. Board-Certified Behavior Analyst Xi Chen persuasively testified Creative Behavior Interventions supported Student at Davidson Learning Center three hours per day, three times per week, when Student attended school in person. Parents increased Creative Behavior Interventions' hours to five hours daily, five days per week, when Davidson Learning Center switched to a virtual delivery model in mid-March 2020, during the COVID-19 pandemic. Chen's testimony was more persuasive than Dr. Davidson's and Mother's because of Chen's detailed recollection of these events.

A general education teacher taught Student in 20-minute instructional blocks. Initially, Student engaged in some maladaptive behaviors, including tearing papers and leaving the classroom. Student's behaviors subsided after several weeks. Student took short sensory breaks when needed. Student's sensory breaks included playing in the sand or on the playground, doing wall push-ups, or playing with fidget toys. There were two or three other students in the classroom. Student received 30 minutes daily social skills instruction with six to eight students during the lunch period.

Student did not receive occupational therapy services from an occupational therapist, behavior services from a behavior therapist, or speech and language therapy services from a speech and language pathologist through Davidson Learning Center. Parents' private medical insurance and the Corona-Norco settlement funds paid for these services.

STUDENT'S ENROLLMENT AT GATEWAY ON NOVEMBER 3, 2021, FOR THE 2021-2022 SCHOOL YEAR

Parents notified Corona-Norco on January 5, 2021, of their intent to re-enroll Student at Corona-Norco for the 2021-2022 school year. Dawn Rust, Corona-Norco's Administrative SELPA Director, testified at hearing. Corona-Norco conducted evaluations of Student and held IEP team meetings on April 27, 2021, and September 23, 2021. Rust testified Corona-Norco could not complete its assessments due to Parents' failure to make Student available for assessment. Corona-Norco did not make an offer of FAPE for Student for the 2021-2022 school year.

Parents did not enroll Student at Corona-Norco, or any other school, at the start of the 2021-2022 school year. As a result of a purported impasse between Parents and Corona-Norco, Parents contacted Gateway about enrolling Student in its program. Mother testified at hearing that she initially contacted Gateway in early October 2021, because she was looking for a program for Student. At that time, Student was not enrolled at Corona-Norco or at any other school. Mother was interested in Gateway because it was located on the Riverside Community College campus and Mother believed Gateway could provide Student with vocational opportunities.

Mother understood Student's placement at Gateway was an interim placement because he was transferring into Gateway from another school. She understood that within 30 days of his placement at Gateway, an IEP team meeting would be convened and the IEP team would either adopt Student's March 4, 2015 IEP or develop a new one.

BECAUSE STUDENT DID NOT TRANSFER BETWEEN PUBLIC SCHOOLS IN THE SAME STATE WITHIN THE SAME ACADEMIC YEAR, GATEWAY WAS NOT REQUIRED TO IMPLEMENT SERVICES COMPARABLE TO HIS LAST CONSENTED TO IEP

Student completed the 2020-2021 school year at Davidson Learning Center. Student did not enroll in Corona-Norco or any other public school before the start of the 2021-2022 school year. Student enrolled at Gateway on November 3, 2021.

Student did not prove he transferred between public school districts within the same academic year. Student argued he should be considered as having enrolled in Corona-Norco at the start of the 2021-2022 school year, because he complied with the terms of his settlement agreement with Corona-Norco. Specifically, Student asserted Parents notified Corona-Norco of their intention to re-enroll Student, allowed Student to participate in some re-evaluations, and attended two IEP team meetings. However, the evidence established Student did not enroll in Corona-Norco in 2021. Gateway was not a party to the settlement agreement between Student and Corona-Norco. Gateway was not aware of its terms, nor was it bound by them.

The California Longitudinal Pupil Achievement Data System, called Data System, provides LEAs access to data and reports on students, including enrollment dates. The Data System gives LEAs immediate access to information on new students and enables LEAs to appropriately place students. The Data System indicated Student's enrollment with Corona-Norco ended on September 30, 2019. At hearing, Mother did not dispute Student was not enrolled at Corona-Norco for the 2021-2022 school year.

In a case with similar facts, the court rejected application of the intrastate transfer statutes to a student transferring mid-year into a school district from a non-public school. (*S.H. v. Mount Diablo Unified School District* (N.D.Cal. 2017) 263 F.Supp.3d 746, 758-759 (*Mount Diablo*)). The court reasoned that the transfer statutes, on their face, applied to mid-year transfers between students attending public schools, whereas student transferred into Mt. Diablo from a non-public school where he was privately placed by his parent. In *Mt. Diablo*, the school district mistakenly treated the student as a mid-year transfer student from another public school. The court rejected Mt. Diablo's argument that it reasonably treated student as a mid-year transfer student based upon the express language of the statutes which addresses mid-year transfers between public schools. (*Mount Diablo, supra*, 263 F.Supp.3d at p. 759.) The court reasoned Mt. Diablo's decision to offer services comparable with the student's prior IEP was flawed because the student's parents had not consented to the prior offered IEP. (*Id.*) Additionally, the prior offered IEP lacked goals. The court reasoned that the prior IEP's lack of parental consent and absence of goals rendered it useless as a basis for providing interim services or as a basis for an interim IEP. (*Id.*)

The intrastate transfer provisions do not specifically address transfers from a private or non-public school into a public school, either mid-year or between school years. (Ed. Code, § 56325, subd. (a)(1); 20 U.S.C. § 1414(d)(2)(C)(i)(I).) OAH interprets the IDEA and California Education Code to require a new school district in this instance to develop and implement an IEP for a child with a disability that is reasonably calculated to provide the student a FAPE based on the information available to the district. (See *Clovis Unified Sch. District v. Student* (June 4, 2009) OAH No. 2008110569, p. 32); *Parents on behalf of Student v. Acalanes Union High School District* (July 17, 2008) OAH Case No. 2007100455, p. 22.) Additionally, the new district is not required to implement a former

district's IEP to which parents did not consent or implement services "comparable" to those offered by a former district. (*Clovis, supra*, at p. 32 (new district's obligation to a child with a disability who transfers between school years is to develop an IEP for the child; no requirement to implement the prior district's IEP).) OAH decisions are not binding precedent but may be persuasive. (Cal. Code Regs., tit. 5, § 3085.)

Courts in other jurisdictions have similarly held parentally placed private school students who re-enroll in public schools and do not have a current IEP are entitled to an IEP or re-evaluation. (*M.D. v. Colonial School District* (E.D.Pa. May 13, 2021) 539 F.Supp.3d 380 (student remained eligible for services when student re-enrolled in district after two years in private school and district's obligation to provide an IEP was triggered when parents re-enrolled and requested an IEP); *Regional School Unit 51 v. Doe* (D. Maine January 29, 2013) 920 F.Supp.2d 168 (student with a disability transferring from private school to public school retained eligibility); *L.G. ex rel. E.G. v. Wissahickon Sch. Dist.* (E.D.Pa. January 4, 2011) 2011 WL 13572, Civil Action Nos. 06-0333, 06-3816 (school district met its procedural obligations by developing a new IEP for a unilaterally placed IDEA-eligible child upon his re-enrollment in the public school district).)

These decisions align with the United States Department of Education's guidance that all school districts are required to have an IEP in place for eligible children at the beginning of the school year, and school districts have the option of adopting the student's prior IEP or developing a new one. (71 Fed. Reg. 46682 (2006).) Further, consistent with title 34 Code of Federal Regulations sections 300.323(e) and (f), the new public school must take steps to adopt the child's IEP from a previous public

agency or develop and implement a new IEP within a reasonable period of time to avoid any undue interruption in the implementation of special education and related services. (*Questions and Answers On Individualized Education Programs, Evaluations, and Revaluations* (OSERS September 1, 2011).)

The preponderance of the evidence proved Student did not transfer from one public school to another within the same state during the same academic year or between school years for purposes of the IDEA and California intrastate transfer provisions. (20 U.S.C. § 1414(d)(2)(C)(i)(1); 34 C.F.R. § 300.323(e); Ed. Code, § 56325, subd. (a)(1).) Student transferred from a private school to Gateway between the 2020-2021, and 2021-2022 school years. Therefore, the intrastate transfer provisions did not apply. Gateway therefore was not obligated to provide Student with services comparable to those within his March 4, 2015 IEP. Student failed to meet his burden of proof on Issue One. Gateway prevailed on this issue.

ISSUE 2: DID GATEWAY DENY STUDENT A FAPE BY FAILING TO CONVENE AN IEP TEAM MEETING TO FORMALLY ADOPT STUDENT’S PRIOR IEP WITHIN 30 DAYS OF STUDENT’S ENROLLMENT AT GATEWAY?

Student contends Gateway was required to convene an IEP team meeting to formally adopt Student’s prior IEP within 30 days of Student’s enrollment at Gateway on November 3, 2021. Student relied on the intrastate transfer provisions under the IDEA and California Education Code discussed in Issue One. Student further contends Gateway was obligated to adopt his last consented to IEP at an IEP meeting held within 30-days of Student’s enrollment.

Gateway contends the intrastate transfer provisions did not apply and it was not required to implement Student's March 4, 2015 IEP. Gateway further contends the March 4, 2015 IEP was no longer valid and its offer of special education and services was outdated and did not meet Student's current needs. Gateway asserts it made reasonable efforts to schedule an IEP team meeting, but Mother and Student's attorney obstructed its efforts.

In the case of a child with a disability who transfers school districts within the same academic year, who enrolls in a new school, and who had an IEP that was in effect in the same state, the new school district shall provide the child with a FAPE. (20 U.S.C. § 1414(d)(2)(C)(i)(I); 34 C.F.R. § 300.323(e).) The school district must provide the student services comparable to those described in the previously held IEP, in consultation with the parents, until such time as the school district adopts the previously held IEP or develops, adopts, and implements a new IEP that is consistent with federal and state law. (*Id.*) In California, the district receiving a student with exceptional needs and who has an IEP in place must provide the student with a FAPE, including services comparable to those described in the previously approved IEP. (Ed. Code, § 56325, subd. (a)(1).) The comparable services must be provided, in consultation with the parents, for a period not to exceed 30 days, by which time the LEA shall adopt the previously approved IEP or shall develop, adopt, and implement a new IEP that is consistent with federal and state law. (*Id.*)

As discussed in Issue One, Student was not enrolled in a public school during the 2021-2022 school year, when he enrolled at Gateway. Rather, Student transferred between school years from a private school to a public school. Therefore, the intrastate

transfer provisions did not apply and Gateway was not obligated to convene an IEP team meeting to formally adopt Student's prior IEP within 30 days of his enrollment at Gateway. (Ed. Code, § 56325, subd. (a)(1).)

Student failed to prove Gateway was required to hold a 30-day IEP team meeting as required by the IDEA's and California Education Code's intrastate transfer provisions. Student did not meet his burden of proof on Issue Two.

Gateway prevailed on this issue.

ISSUE 3: DID GATEWAY DENY STUDENT A FAPE BY FAILING TO PROVIDE STUDENT WITH A FORMAL IEP DOCUMENT THAT OUTLINED HIS GOALS, MODIFICATIONS, ACCOMMODATIONS, AND SERVICES?

ISSUE 4: DID GATEWAY DENY STUDENT A FAPE BY FAILING TO MEET STUDENT'S UNIQUE NEEDS IN ACADEMICS, OCCUPATIONAL THERAPY, AND SPEECH AND LANGUAGE?

Student contends Gateway denied Student a FAPE by failing to develop a formal IEP document for Student at any time during the 2021-2022 school year, that included goals, modifications, accommodations, and services. Student further contends that the informal program provided by Gateway failed to meet Student's needs in academics, occupational therapy, and speech and language.

Gateway contends it developed a specially designed program for Student, reasonably calculated to meet Student's unique needs. Gateway further contends Student received an educational benefit from the direct specialized academic instruction provided to Student.

STUDENT WAS ELIGIBLE FOR SPECIAL EDUCATION AND RELATED SERVICES AND ENTITLED TO AN IEP

A child who has been found eligible for special education remains eligible until a subsequent evaluation deems him ineligible. (20 U.S.C. § 1414(c)(5)(A); 300 C.F.R. § 300.305(e)(1).) The exceptions to this general rule are when the child graduates with a diploma or ages out of special education. (20 U.S.C. § 1414(c)(5)(B).)

The IDEA and California Education Code reference children enrolled by their parents in private elementary schools and secondary schools. (20 U.S.C. § 1412(a)(10)(A); 34 C.F.R. §§ 300.146, 300.148.) The special education and related services available to students who are unilaterally and parentally placed in private schools are commonly called equitable participation. (20 U.S.C. § 1412(a)(1)(A); Ed. Code, § 56172.)

The IDEA and its implementing regulations and the California Education Code do not provide that a student who is a parentally placed private school student loses their eligibility under the IDEA. Further, the Ninth Circuit and the California district courts have not held that a parentally placed student loses their eligibility under the IDEA upon their unilateral enrollment in private school. To the contrary, in the context of a school district's obligation to offer an IEP to a parentally placed private school student, the Ninth Circuit Court of Appeals recently confirmed the right of a parentally placed student to request an IEP from its district of residence when there is no claim for

reimbursement (*Capistrano Unified School District v. S.W. and C.W.* (9th Cir. 2021) 21 F.4th 1125, 1138.) Implicit in the Ninth Circuit's holding is the principal that an IDEA-eligible student remains eligible for special education unless an exception applies. (20 U.S.C. § 1414(c)(5)(A) and (B); 300 C.F.R. § 300.305(e)(1).)

OAH similarly has not interpreted the IDEA and California Education Code to mean a student's eligibility for special education and related services is extinguished when they enroll in private school. In cases where a student transfers from a private school to a public school, OAH has held the school district's obligation is to develop an IEP for a child with a disability that is reasonably calculated to provide the student a FAPE based on the information available to the district. (See *Clovis Unified Sch. District v. Student* (June 4, 2009) OAH No. 2008110569, p. 32); *Parents on behalf of Student v. Acalanes Union High School District* (July 17, 2008) OAH Case No. 2007100455, p. 22.) OAH decisions are not binding precedent but may be persuasive. (Cal. Code Regs., tit. 5, § 3085.)

As mentioned in Issue One, courts in other jurisdictions have similarly held parentally placed private school students who re-enroll in public schools and do not have a current IEP are entitled to an IEP or re-evaluation. (*M.D. v. Colonial School District* (E.D.Pa. May 13, 2021) 539 F.Supp.3d 380; *Regional School Unit 51 v. Doe* (D. Maine January 29, 2013) 920 F.Supp.2d 168; *L.G. ex rel. E.G. v. Wissahickon Sch. Dist.* (E.D.Pa. January 4, 2011) 2011 WL 13572, Civil Action Nos. 06-0333, 06-3816.)

Student was a child with a disability at the time he enrolled at Gateway on November 3, 2021. Mother initially contacted Gateway in early October 2021. Mother informed Gateway that Student was eligible for special education and had a prior IEP with Corona-Norco. Mother sent Gateway an email on October 6, 2021, referencing

Student's March 2015 IEP with Corona-Norco. Mother did not provide Student's prior IEP documents in a coherent fashion. Mother attached portions of Student's earlier March 4, 2014 IEP. She also attached Student's present levels of performance from Student's October 4, 2017 IEP, which was not consented to, and proposed goals from Corona-Norco's April 27, 2021 IEP. Mother and Student met with Gateway via Zoom that same day. Mother wanted Student to take general education classes but did not believe Student had the ability to take certain courses, such as United States History.

The next day, Mother emailed Gateway's special education teacher, Kim Hatzold, stating Parents were looking to "find a fit" for Student's academic and vocational needs. Mother advised Hatzold Student required a one-to-one aide. She further advised Student had "stay put" placement with Corona-Norco. Mother did not explain to Gateway what services she believed were part of Student's supposed stay put placement. Nonetheless, Mother expressed her desire that Student receive special education and related services.

On October 24, 2021, Mother completed Gateway's enrollment and registration forms. Under the section titled "special programs/services received," Mother wrote, "SLP, OT, Resource, Learning Accommodation, Grade accommodation." SLP refers to speech and language services. OT refers to occupational therapy services.

Between October 14, 2021, and November 3, 2021, Gateway obtained copies of Student's IEP documents. Gateway sent several emails to Student's attorney requesting complete copies of Student's last agreed upon and implemented IEP and

asking whether Corona-Norco made an offer of a FAPE for the 2021-2022 school year. On October 22, 2021, Gateway's Principal, Elena Bautista, sent Mother a letter confirming Student's enrollment at Gateway. Student's first day of class was scheduled for November 1, 2021, subject to change based on having "the necessary services in place".

Bautista sent a follow-up email to Mother on October 26, 2021, requesting Mother provide Gateway a complete copy of the April 27, 2021 IEP developed by Corona-Norco. Gateway made this request to determine the appropriate amount of supports and services Student required. Mother responded that Student's attorney was "putting together" the IEPs.

Gateway also requested Student's records from Corona-Norco and made two trips to Corona-Norco's administrative office and picked up boxes of Student's educational records. At hearing, the evidence was unclear when Gateway received Student's IEPs from Corona-Norco. However, Hatzold confirmed she had received and reviewed Corona-Norco's documents by December 13, 2021. Gateway also was aware Corona-Norco started reassessing Student during the spring and summer 2021, and held IEP team meetings on April 27, 2021, and September 23, 2021, but had not completed the IEP process or made a FAPE offer for the 2021-2022 school year. Student's attorney sent Gateway a letter on October 28, 2021, describing the special education and services contained in Student's March 4, 2015 IEP. Student's attorney described Student's March 4, 2015 IEP, as Student's stay put placement. Student's

March 4, 2015 IEP, September 22, 2015 IEP amendment, and March 8, 2018 IEP amendment to the February 18, 2016 IEP, were attached to the letter. Student's attorney described Student's last agreed upon program as:

- Intensive individual services in the form of a special circumstances instructional aide across all settings for academic and behavioral support, for 1,800 minutes per week;
- Individual occupational therapy services for 30 minutes per week;
- In-class individual occupational therapy for 30 minutes per week;
- Individual language and speech services three times per week for 40 minutes per session;
- Individual occupational therapy by Centerpointe, a non-public agency, for two 60-minute sessions provided outside school hours;
- Group specialized academic instruction provided within the regular classroom four times per week for 120 minutes per session for reading, writing, and math;
- Occupational therapy collaboration for 30 minutes per month;
- Intensive individual services for 360 minutes per week in the home setting;
- Intensive individual services by the autism program for one hour per week at the service provider's location;
- Intensive individual services in the form of pull-out for 240 minutes per week;
- Language and speech services by Providence Speech and Language, a non-public agency, for 60 minutes per week; and
- For the extended school year, intensive individual services provided in the home by the autism program for 24 sessions of 150 minutes.

Attached to the attorney's letter were portions of a September 22, 2016 IEP amendment with Parent's signed consent, and portions of a March 8, 2018 amendment to the February 18, 2016 IEP. The February 18, 2016 IEP was not offered into evidence by Student, nor was any evidence introduced regarding the contents of the IEP. Mother consented to the March 8, 2018 IEP amendment. Mother handwrote a note on the amendment stating, "continue to be stay put IEP 2015."

Mother and Student visited Gateway's campus on November 1, 2021. Hatzold told Mother Gateway did not have a teacher credentialed to teach a moderate to severe disabilities class. Gateway also did not have a curriculum for Student, and Gateway needed time to "build" Student's program.

The weight of the evidence proved Student was eligible for special education at the time he enrolled at Gateway. Gateway offered no evidence to the contrary. Further, Gateway's communications with Mother showed they knew Student was a child with a disability in need of special education and related services. Student was therefore entitled to an IEP.

GATEWAY SHOULD HAVE OFFERED STUDENT AN IEP OR ISSUED AN ASSESSMENT PLAN IF ADDITIONAL INFORMATION WAS NEEDED TO DETERMINE STUDENT'S NEEDS

The threshold issue is when Gateway was obligated to offer Student an IEP. This is a unique case. The facts of this case do not squarely fall within the IDEA, its implementing regulations, or the California Education Code. However, multiple provisions of the IDEA and California Education Code apply. An IEP team meeting to develop an initial IEP for a child with a disability must be conducted within 30 days of a determination that the child

needs special education and related services. (34 C.F.R. § 300.323(c)(1); Ed. Code, § 56043, subd. (f)(2).) A school district must have an IEP in place at the beginning of each school year for each child with exceptional needs residing within the district. (20 U.S.C. § 1414(d)(2)(A); 34 C.F.R. § 300.323(a); Ed. Code, § 56344, subd. (c).) An IEP team meeting requested by parent must be held within 30 calendar days, not counting days between the regular school sessions, terms, or days of school vacations in excess of five schooldays, from the date of receipt of the parent's written request. (Ed. Code, §§ 56043, subd. (l); 56343.5.) The obligation to offer a child with a disability a FAPE includes an obligation to develop an IEP. (*Forest Grove School Dist. v. T.A.* (2009) 557 U.S. 230, 238-239 ("[W]hen a child requires special education services, a school district's failure to propose an IEP of any kind is at least as serious a violation of its responsibilities under IDEA as a failure to provide an adequate IEP."].)

Gateway and Parent agreed Student required special education and related services. Gateway told Mother it intended to have Student's "necessary services in place by November 1, 2021." Gateway contracted with TalkPath Live on December 2, 2021, to provide occupational therapy and speech and language services to Student. Gateway also communicated with other charter schools to develop a curriculum for Student and purchased the Unique Learning System software program. Gateway was aware at the time of Student's enrollment on November 3, 2021, that Student required special education and related services. It should have held an IEP team meeting within 30 days of his enrollment, or by December 8, 2021, and offered Student appropriate special education and related services. However, Gateway did not hold an IEP team meeting within 30 calendar days of November 3, 2021, or offer Student a formal IEP document at any time during the 2021-2022 school year.

STUDENT'S ATTENDANCE AT GATEWAY FROM NOVEMBER 3, 2021, THROUGH DECEMBER 16, 2021

Student's first day of school at Gateway was November 3, 2021. Between November 3, 2021, and December 16, 2021, the end of the fall term, Student attended school two days weekly between 9:30 a.m. and 12:30 p.m. Student received direct instruction from Hatzold between 9:30 a.m. and 12:00 p.m., and ate lunch between 12:00 p.m. and 12:30 p.m. Student was accompanied to school each day by registered behavior technicians from Creative Behavior Interventions. Mother informed Gateway on November 3, 2021, that registered behavior technicians from Creative Behavior Interventions would accompany Student to school. Mother did not ask Gateway's permission for the behavior technicians to serve Student at school. Gateway did not object to Student's registered behavior technicians attending school with Student.

Hatzold was Gateway's instructional support coordinator. Her duties in that role included identifying and assessing students with disabilities. She developed and wrote IEPs. She also developed 504 accommodation plans for general education students. She held a multiple subjects teaching credential and a learning handicapped teaching credential. Over the course of her career, Hatzold worked as a general education teacher, special day class teacher, and a resource specialist. A special day class teacher provides educational programs to students with disabilities in compliance with state and federal standards. A resource specialist provides direct individual and small group instruction both within the classroom and on a pull-out basis. Hatzold worked at Gateway since 2014.

Student arrived at Gateway each day ready to learn. Student displayed some atypical behaviors, such as reciting lines from cartoons and repeating conversations.

When he was frustrated, he sometimes stomped his feet, bit his thumb, made sounds, and put his head down on the desk. Sometimes Student ran away and yelled "Chase!" when he wanted his behavior aides to play chase. Hatzold could re-direct Student.

Hatzold contacted Mother on November 18, 2021, and requested a meeting on December 3, 2021. Hatzold understood Gateway was required to hold a 30-day interim IEP team meeting. At Mother's request, the meeting was scheduled for December 6, 2021. However, Mother canceled the meeting based upon her attorney's unavailability. The meeting was rescheduled for December 13, 2021. On December 9, 2021, Student's attorney sent a letter requesting Gateway provide the draft IEP, including goals, present levels of performance, and progress reports, by the following day at 4:30 p.m. Gateway had not developed present levels of performance, goals, or a draft IEP document, and requested the meeting be postponed due to its inability to provide the draft IEP on short notice.

On December 16, 2021, Gateway's attorney contacted Student's attorney and requested they schedule a meeting to discuss Student's program. The last day of the fall 2021 term was December 16, 2021. At this point, Student attended Gateway for approximately five weeks.

STUDENT'S INFORMAL PROGRAM FROM JANUARY 24, 2022, THROUGH JUNE 9, 2022

Classes resumed for the winter term on January 4, 2022. Mother sent Hatzold an email on January 9, 2022, asking when the winter term began and requesting Student continue his speech and language and occupational therapy services through his private providers. Parent also requested a copy of "the IEP so we can collaborate". However, no

IEP had been developed, nor had Gateway provided Parents with an assessment plan for any areas which it believed it required additional information. On January 11, 2023, Mother sent a follow-up email requesting confirmation when Student could start the winter term.

Hatzold responded to Mother on January 12, 2022, stating Gateway would provide instruction to Student starting January 24, 2022. Gateway increased Student's direct instruction to three days a week for two-hours each day. At hearing, no evidence was offered regarding why Student did not start the winter term until January 24, 2022; 14 schools days after the term began.

On January 26, 2022, Hatzold emailed Mother that she had purchased more workbooks for Student and was undergoing training on the Unique Learning System program, which was a cloud-based program designed to deliver differentiated, standards-aligned content to children with disabilities. Hatzold also advised that Gateway's attorney had sent a letter to Student's attorney on January 18, 2022, outlining the services and supports Gateway could offer Student starting in the spring term.

Student attended school at Gateway three days weekly for two hours per session starting on January 24, 2022 and continuing through the end of the 2021-2022 school year. Student continued to receive direct instruction from Hatzold. Creative Behavior Intervention's registered behavior technicians accompanied Student to school on most days. On days they could not attend, Gateway had an instructional assistant available to support Hatzold with Student. For example, the instructional assistant took Student for walks and accompanied him to lunch.

Creative Behavior Intervention's clinical supervisor, Xi Chen, testified at hearing. Chen held a bachelor's degree in psychology and a master's degree in clinical psychology.

Chen was responsible for targeting Student's problem behaviors and determining replacement behaviors in the home setting. Chen supervised Creative Behavior Intervention's behavior technicians, including two behavior technicians who worked with Student at home and at Gateway during the 2021-2022 school year. Chen described Student's maladaptive behaviors as yelling, biting his fingers, non-compliance, and elopement, which means leaving a designated area without permission. Student's registered behavior technicians provided sensory breaks for Student three to four times during each school day.

As of the date of the hearing, the parties had not participated in an IEP team meeting. Gateway attempted to hold an IEP team meeting in April 2022. On April 6, 2022, Hatzold proposed four IEP team meeting dates for the end of April 2022. On April 8, 2022, Hatzold proposed three more dates and times when she and Gateway's SELPA coordinator were available for an IEP team meeting. Hatzold followed-up on April 12, April 18, and April 25, 2022. Student's attorney's office responded on April 18, 2022, that April 25, 2022, did not work and they would get back to Gateway with alternate dates. No evidence was offered that Student proposed alternate meeting dates, or that Gateway made further efforts to schedule an IEP team meeting during the 2021-2022 school year.

In *Doug C.*, the school district and the parents had a difficult relationship. The Ninth Circuit confirmed a school district may not avoid its responsibilities for meeting the IDEA's statutory requirements by blaming the parents. The IDEA protects the student's interests, not the parents. (*Doug C. v. Hawaii Dept. of Educ.* (9th Cir. 2013) 720 F.3d 1038, 1043-1044.) Further, a school district may not blame a parent's decision

to not participate in an IEP team meeting for its own failure to create an IEP with the participation of the appropriate parties. (*Target Range, supra*, 960 F.2d 1479, 1485.)

An IEP team meeting may be conducted without a parent in attendance if the school district is unable to convince the parents they should attend. (34 C.F.R. § 300.322(d).) In such a case, the school district must keep a record of its attempts to arrange a mutually agreed upon time and place, such as:

- detailed records of telephone calls made or attempted and the results of those calls;
- copies of correspondence sent to the parents and any responses received; and
- detailed records of visits made to the parents' home or place of employment and the results of those visits. (34 C.F.R. § 300.322(d).)

Gateway did not try to convince Mother to attend an IEP team meeting or document its attempts to do so in compliance with 34 Code of Federal Regulations section 300.322, subdivision (d). Gateway also did not convene an IEP team meeting without Parents in attendance, when it was clear Mother was uncooperative, as permitted by this regulation.

Gateway established it made numerous attempts to convene an IEP team meeting, but Mother did not cooperate with this request. Mother's conduct and testimony at trial proved she did not want to participate in an IEP team meeting. Parent unpersuasively testified she wanted to have an IEP team meeting and was anxious to discuss Student's present levels of performance, establish goals, and

obtain an offer of FAPE. But her conduct indicated the opposite. Mother did not timely respond to Gateway's communications and was routinely unavailable. She also was not forthcoming about Student's needs, his prior program at Corona-Norco, or the fact Corona-Norco assessed Student during spring and summer 2021.

Regardless of Mother's lack of cooperation, Gateway was required to hold a IEP team meeting and make a formal offer of a FAPE in a written document that included all required IEP elements. Instead, Gateway decided to provide direct specialized academic instruction to Student without knowing exactly what Student's needs were. Further, Gateway did not rely on the information it had available to devise and propose an IEP for Student. Gateway's attempts to cobble together an undocumented special education program for Student does not meet the legal requirements of the IDEA or California law. Therefore, the preponderance of the evidence established Gateway committed a procedural violation of the IDEA by failing to develop and offer a formal IEP to Student.

GATEWAY'S INFORMAL ACADEMIC PROGRAM DID NOT COMPLY WITH THE IDEA AND DID NOT MEET STUDENT'S UNIQUE NEEDS

The IEP is the "centerpiece of the statute's education delivery system for disabled children." (*Honig v. Doe* (1988) 484 U.S. 305, 311.) In general, an IEP is a written statement for each child with a disability that is developed with the participation of parents and school personnel that describes the child's needs, academic and functional goals related to those needs, and the student's special education program and related services. (20 U.S.C. §§ 1401(14), 1414(d)(1)(A); Ed. Code, §§ 56032, 56345, subd. (a).)

The IEP must be built upon “careful consideration of the child’s present levels of achievement, disability, and potential for growth.” (*Endrew F., supra*, 580 U.S. 386, 399.)

The IEP must include:

- the child’s present levels of academic achievement and functional performance;
- a statement of measurable annual goals;
- a description of how progress towards the goals will be measured and reported;
- a statement of special education and related services;
- any program modifications or supports necessary to allow the child to make progress;
- a statement of individual appropriate accommodations that are necessary to measure academic achievement and functional performance of the student on state and districtwide assessments;
- an explanation of the extent to which the child will not be educated with nondisabled children in general education classes; and
- the frequency, location, and duration of the services. (20 U.S.C. § 1414(d)(1)(A); Ed. Code, § 56345, subd. (a).)

An IEP must set forth a formal, specific written offer of placement. (*Union School District v. B. Smith* (9th Cir. 1994) 15 F.3d 1519, 1519 (*Union*).) The requirement for a clear specific written placement offer “should be enforced rigorously” as it creates a clear record to help eliminate factual disputes. (*Ibid.*) It also assists the parents in presenting a complaint with respect to any matter relating to the educational placement

of the child and in deciding whether to accept or reject the placement and related services. (*Ibid*; *J.W. ex re. J.E.W. v. Fresno Unified Sch. Dist.* (9th Cir. 2010) 626 F.3d 431, 459-460.)

An IEP provides notice to both parties as to what services will be provided to the student. (*M.C. v. Antelope Valley Union High Sch. Dist.* (9th Cir. 2017) 858 F.3d 1189, 1197.) Parents must be able to participate in IEP development and enforcement. (*Id.* at p. 1199.) When a parent is unaware of the service offered to a student, and therefore cannot monitor how these services are provided, a FAPE has been denied, whether or not the parent had ample opportunity to participate in formulation of the IEP. (*Id.* at p. 1198.)

The Ninth Circuit has observed that the formal requirements of an IEP are not merely technical, and therefore should be enforced rigorously. A district has an obligation to make a formal, written offer in the IEP that clearly identifies the proposed program. A formal IEP also assists parents in presenting complaints with respect to any matter relating to the educational placement of the child. (*Union, supra*, 15 F.3d 1519, 1526; *J.W. v. Fresno Unified School Dist.* (9th Cir. 2010) 626 F.3d. 431, 459-460.)

Gateway was required to develop an IEP based on the information available to it or, if necessary, develop an assessment plan to ascertain Student's needs and obtain parental consent. (20 U.S.C. §§ 1412(a)(1)(A), 1414(d)(2)(A); *Student v. Los Angeles Unified School District* (January 25, 2007) OAH Case No. 2007010772 (school district entitled to assess student transferring into school district and to develop an appropriate IEP).) Gateway's obligation included making reasonable efforts to obtain Student's IEP and records from the prior school district, and to determine whether Student had a valid IEP. (*Mt. Diablo, supra*, 263 F.Supp 746, 760.)

Gateway was aware Corona-Norco had conducted some evaluations for Student during spring and summer 2021. Hatzold reviewed Student's records by December 13, 2021; the date of the originally agreed upon IEP team meeting. These documents included a psychoeducational evaluation and report dated June 9, 2021. Gateway also was aware through California's Special Education Information System, a web-based centralized system for accessing IEPs and managing special education data, that Corona-Norco held an IEP team meeting for Student on April 27, 2021. Gateway offered no evidence at hearing that it required additional information to offer Student an IEP.

Gateway cancelled the December 13, 2021 meeting, because it could not meet Student's December 9, 2021 demand, to provide his attorney a copy of a draft IEP document. Student's demand that Gateway provide the draft IEP as a condition of attending the IEP team meeting was unreasonable under the circumstances. However, this demand did not constitute grounds to cancel the meeting. Based on the facts in this case, 30 days was a reasonable amount of time for Gateway to develop an IEP to avoid any undue interruption to Student in the delivery of special education and related services. (Ed. Code, §§ 56043, subd. (l); 56343.5; *Questions and Answers On Individualized Education Programs, Evaluations, and Revaluations, Q A-4* (OSERS September 1, 2011).)

Gateway offered no plausible explanation for its failure to offer Student an IEP. For example, Gateway did not present evidence it required additional time to review Student's records or needed more information to determine Student's needs. Gateway also did not offer a reasonable basis for cancelling the December 13, 2021 IEP team meeting, or failing to hold an IEP team meeting within a reasonable time thereafter. Gateway's winter break began December 20, 2021. The winter term began January 4,

2022. Gateway offered no explanation for its decision not to schedule an IEP team meeting at the start of the winter term. Gateway also did not attempt to schedule another IEP team meeting until April 6, 2022. At that point, Student had been enrolled in Gateway for over five months.

Gateway's failure to develop an IEP for Student within 30 days of enrollment and ultimately, for the entire 2021-2022 school year, violated the basic requirements of the IDEA. (*Forest Grove, supra*, 557 U.S. 230, 238-239 (a school district's failure to propose an IEP of any kind is at least as serious a violation of its responsibilities under the IDEA as a failure to provide an adequate IEP); 20 U.S.C. §§ 1414(d)(2)(A) (requirement to have IEP in effect at the beginning of each school year), 1414(d)(2)(4)(A) (duty to review and revise, at least annually, an eligible child's IEP).) The absence of an IEP for Student was particularly significant given that each witness at hearing, including Student's special education teacher, agreed Student had needs in the areas of

- handwriting,
- reading,
- writing,
- mathematics,
- pragmatic speech, and
- behaviors.

The IDEA does not contemplate that a student with disabilities be denied services for nearly an entire school year. Gateway's lengthy delay in meeting the basic and critical requirement of developing an IEP for Student violated the IDEA.

GATEWAY'S PROCEDURAL VIOLATIONS DENIED MOTHER MEANINGFUL PARTICIPATION IN DEVELOPMENT OF AN IEP FOR STUDENT

The IDEA requires state and local educational agencies to guarantee procedural safeguards for children with disabilities and their parents in the provision of a FAPE. (20 U.S.C. § 1415(a).) The IDEA's procedural requirements mandate that a school district "comply with the IDEA's extensive and carefully drafted procedures." (*Timothy O v. Paso Robles Unified School Dist.* (9th Cir. 2016) 822 F.3d 1105, 1121-1122) As stated by the Supreme Court in *Rowley*, "Congress placed every bit as much emphasis upon compliance with procedures giving parents and guardians a large measure of participation at every stage of the administrative process." (*Rowley, supra*, 458 U.S. 176, 205-206.) Compliance with the IDEA's procedural safeguards "is essential to ensuring that every eligible child receives a FAPE, and those procedures which provide for meaningful parent participation are particularly important." (*Amanda J. v. Clark Cty. Sch. Dist.* (9th Cir. 2001) 267 F.3d 877, 891 (*Amanda J.*)). Parents not only represent the best interests of their child in the IEP development process, but also "provide information about the child critical to developing a comprehensive IEP and which only they are in a position to know." (*Id.* at p. 882.)

A parent has meaningfully participated in the development of an IEP when they are informed of the child's problems, attend the IEP team meeting, express disagreement regarding the IEP team's conclusions, and request revisions to the IEP. (*N.L. v. Knox County Schools* (6th Cir. 2003) 315 F.3d 688, 693; *Fuhrmann v. East Hanover Bd. of Educ.* (3rd Cir. 1993) 993 F.2d 1031, 1036.) Nothing in the IDEA makes the LEA's duty contingent on parental cooperation. (*Anchorage, supra*, 689 F.3d 1047, 1057.)

The failure to timely hold an IEP team meeting and offer Student an IEP was a procedural violation under the IDEA. (20 U.S.C. § 1415(f)(3)(E)(ii); 34 C.F.R. § 300.513(a);

Ed. Code § 56505, subd. (f)(2) & (j); *Target Range*, supra, 960 F.2d 1479, 1484.) Some delay in complying with the IDEA's procedural requirements is permissible. (See, e.g., *A.M. ex rel. Marshall v. Monrovia Unified Sch. Dist.* (9th Cir. 2010) 627 F.3d 773, 779 [holding that school district "did not hold an IEP team [meeting] within 30 days" of child's enrollment as required by the intrastate transfer statute, but that a two-week "brief delay during winter vacation" did not procedurally violate the IDEA].) However, in this case, Gateway did not merely delay, but never held an IEP meeting or offered Student a formal IEP. Gateway's failure to develop a formal IEP document offering Student goals, modifications, accommodations significantly impeded Parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to Student.

The IDEA imposes upon school districts the duty to conduct a meaningful meeting with the appropriate parties. Gateway failed to do so. Gateway failed to fulfill the goal of parental participation in the IEP process and failed to develop an IEP according to the IDEA. This prevented Parents from providing required input and significantly impeded Parents' ability to participate in the decision-making process. (20 U.S.C. § 1415(f)(3)(E)(ii); Ed. Code, § 56505, subd. (f)(2); *Target Range*, supra, 960 F.2d 1479, 1485.) Parents did not have an opportunity to ask questions and provide input about Student's program and were denied the opportunity to meaningfully participate in the decision-making process.

GATEWAY'S FAILURE TO OFFER STUDENT AN IEP RESULTED IN A LOSS OF EDUCATIONAL BENEFIT

Student further proved Gateway's failure to provide him an IEP with special education and related services resulted in a loss of educational opportunity and

deprived Student of educational benefit in the areas of academics, speech and language, and occupational therapy. (20 U.S.C. § 1415(f)(3)(E)(ii); Ed. Code, § 56505, subd. (f)(2).) A procedural error results in the denial of educational opportunity where there is a “strong likelihood” that alternative educational possibilities for the student “would have been better considered.” (*Doug C.*, *supra*, 720 F.3d 1038, 1047, citing *M.L. v. Federal Way Sch. Dist.* (9th Cir. 2005) 394 F.3d 634, 657.)

ACADEMICS

Gateway administered informal academic assessments for Student through the Unique Learning System software program starting February 9, 2022. The assessment provided baseline information on Student’s

- gross and fine motor skills,
- sensory integration,
- communication skills,
- vocabulary,
- reading fluency,
- reading comprehension,
- vocabulary,
- word recognition,
- math, and
- social studies.

Gateway provided instruction to Student using the Unique Learning System’s curriculum based on Student’s assessment results.

A typical day for Student included a calendar activity, a weather activity, and lessons in math, reading, and writing. Hatzold used lessons from Unique Learning System, as well as other content aligned with state standards. Hatzold also used manipulatives, including number lines, base 10 blocks, and unit cubes. Student was allowed short breaks for fun instructional activities, such as completing a maze or word find, or walking with an aide.

Hatzold tracked Student's progress by using Unique Learning System's pre-tests and post-tests in the areas of reading informational text, vocabulary development, sentence writing fluency, paragraph writing, math calculation, problem solving, communication and vocational skills. Hatzold opined that Student made progress in these areas and showed work samples demonstrating his progress. For example, Student typed his writing assignments and read them aloud to office staff. Student solved math problems using a calculator. Student demonstrated improvement in reading comprehension by answering questions from a picture supported text. Student wrote five sentences with factual details.

In its closing brief, Gateway argued Student received personalized instruction through a special education teacher and received educational benefit. Gateway tracked Student's progress using Corona-Norco's 2021 partial assessment results and draft goals as a starting point, along with pre-test and post-tests administered using the Unique Learning System program. However, no IEP was created stating Student's present levels of performance, academic and functional needs. Nor were any goals developed in Student's identified areas of need. Therefore, there was no way for Parents to have understood what was encompassed in Gateway's specialized academic instruction and in what subject matters, or the frequency and duration of the services offered. There

also was no way to gauge Student's academic progress over the course of the school year. Therefore, Gateway's informal program was not reasonably calculated to provide Student with educational benefit and denied Student a FAPE.

SPEECH AND LANGUAGE

A related service is one that is required to assist a child with a disability to benefit from special education. (20 U.S.C. § 1401(26)(A); 34 C.F.R. § 300.34(a).) In California, related services are called designated instruction and services. (Ed. Code, § 56363, subd. (a).) Speech and language services are a related service. (*Id.*)

Student proved speech and language was an area of need for Student. (20 U.S.C. § 1414(a)(2)(A).) Gateway was aware Student previously received speech and language services while he attended Corona-Norco, and that he was receiving privately funded speech and language services. Further, the evidence established Gateway was aware Student had articulation and pragmatic language deficits.

Mayomy Navarette testified at hearing. Navarette worked for Gateway as an instructional assistant. Navarette worked with Student and Hatzold on Tuesdays when Student's registered behavior technicians did not accompany Student to school. Navarette sat near Hatzold while she instructed Student. Navarette took Student on walks when Student needed instructional breaks and accompanied Student to lunch. Navarette tried to engage Student in conversation. Student engaged in limited verbal exchanges and did not maintain eye contact. Student frequently repeated words. For example, on one occasion Student repetitively said the words, "Baskin Robbins" and "ice-cream". On other occasions Student repeated words from television shows.

Hatzold also provided insight about Student's speech and language deficits. Student sometimes made sounds when he was frustrated. Student usually greeted people but required prompting to say thank you. Student sometimes asked for help from Hatzold. Student needed help using words to express his feelings. Hatzold also reviewed Corona-Norco's March 2021 draft speech and language evaluation, which indicated Student had severe expressive and receptive language impairments secondary to autism. Student did not initiate conversations, used spontaneous scripts from television shows, and struggled with conversations and interpreting social cues.

Despite being on notice of Student's language and communication deficits, Gateway failed to determine Student's present levels of performance in speech and language, develop goals to meet Student's needs, or develop an IEP. Gateway contracted with TalkPath Live in December 2021, to provide speech and language services to Student. However, Gateway did not make a formal offer of speech and language services.

OCCUPATIONAL THERAPY

At hearing, multiple witnesses testified regarding Student's sensory needs and need for support with self-monitoring, planning, organization, and task monitoring. Navarette and Hatzold consistently testified Student occasionally engaged in self-stimulatory behaviors, such as biting his fingers, and demonstrated task refusal, such as pushing items away or tearing up papers. Navarette and Hatzold confirmed Student occasionally also engaged in elopement behaviors, such as running away from his registered behavior technicians or instructional aide. Student did not leave or attempt to leave the school campus. His elopement at school never put him in danger.

Dr. Susanne Smith-Roley testified at hearing. Dr. Smith-Roley held a master's degree in allied health services and an occupational therapy doctorate. She was licensed by the California Board of Occupational Therapy. Dr. Smith-Roley held a certification in sensory integration. Dr. Smith-Roley had substantial experience assessing children with disabilities in the areas of fine and gross motor skills and sensory needs, as well as making recommendations for goals and services. Dr. Smith-Roley conducted hundreds of assessments and regularly attended 80 to 100 IEP team meetings annually.

Dr. Smith-Roley initially assessed Student when he was three years old. She reevaluated Student approximately every three years thereafter. She observed Student in his home and educational settings. Dr. Smith-Roley conducted an occupational reevaluation for Student in April 2021. Dr. Smith-Roley did not provide direct services to Student.

Dr. Smith-Roley opined Student had severe sensory deficits in the past and he benefited from occupational therapy services. Student had perceptual deficits that impacted how he reacted to data and formulated a plan to use fine and gross motor, and perceptual skills. Student had made substantial progress at the time of Dr. Smith-Roley's April 2021 reevaluation. Dr. Smith-Roley determined Student no longer required direct occupational therapy services but required regular occupational consultation services between an occupational therapist, Parents, and teachers. Dr. Smith-Roley recommended Student continue to receive 30 minutes weekly consultation services so Parents and Student's teachers could understand Student's sensory processing and planning needs. Dr. Smith-Roley could not determine Student's current occupational therapy needs and

opined she would need to reevaluate Student. Dr. Smith-Roley was not aware of Student's behaviors at Gateway and did not speak with Student's teachers at Gateway or observe him during the 2021-2022 school year.

Here, Gateway did not offer an IEP to Student during the 2021-2022 school year. Student met his burden of proving Gateway denied him a FAPE by failing to make Student a clear offer of specialized academic instruction, speech and language, and occupational therapy services. The lack of a formal offer deprived Parents of a clear record of Student's special education program and services and caused Student a loss of educational opportunity. Student prevailed on Issues Three and Four.

CONCLUSIONS AND PREVAILING PARTY

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

ISSUE 1:

Gateway did not deny Student a FAPE by failing to develop an "administrative" IEP to provide Student services comparable to those within his last agreed upon and implemented IEP.

Gateway prevailed on Issue One.

ISSUE 2:

Gateway did not deny Student a FAPE by failing to convene an IEP team meeting to formally adopt Student's prior IEP within 30 days of Student's enrollment at Gateway.

Gateway prevailed on Issue Two.

ISSUE 3:

Gateway denied Student a FAPE by failing to provide Student with a formal IEP document that outlined his goals, modifications, accommodations, and services. Student prevailed on Issue Three.

ISSUE 4:

Gateway denied Student a FAPE by offering an informal program that was insufficient to meet Student's unique needs in academics, occupational therapy, and speech and language.

Student prevailed on Issue Four.

REMEDIES

Student prevailed on Issue Three and Issue Four. Student proved by a preponderance of the evidence Gateway denied Student a FAPE under Issue Three by failing to offer Student a formal IEP within 30-days of his enrollment at Gateway outlining his goals, modifications, accommodations, and services. Student proved Issue Four by a preponderance of the evidence because the informal program provided to

Student during the 2021-2022 school year, was insufficient to meet Student's unique needs in academics, speech and language, and occupational therapy. These procedural violations significantly impeded Parent's opportunity to participate in the decision-making process regarding provision of a FAPE to Student and denied Student educational benefit.

Administrative law judges have broad latitude to fashion appropriate equitable remedies for FAPE denials. (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*); *Parents of Student W. v. Puyallup Sch. Dist., No. 3* (9th Cir. 1994) 31 F.3d 1489, 1496 (*Puyallup*).) This broad equitable authority extends to an Administrative Law Judge who hears and decides a special education administrative due process matter. (*Forest Grove, supra*, 557 U.S. 230, 244, fn. 11.) Parents may be entitled to reimbursement for the costs of placement or services they have procured for their child when the school district has failed to provide a FAPE, and the private placement or services were appropriate under the IDEA and replaced services that the school district failed to provide. (20 U.S.C. § 1412(a)(10)(C); *Burlington, supra*, 471 U.S. 359, 369-371.)

In remedying a FAPE denial, the student is entitled to relief that is appropriate in light of the purposes of the IDEA. (20 U.S.C. § 1415(i)(2)(C)(iii); 34 C.F.R. § 300.516(c)(3).) Appropriate relief means "relief designed to ensure that the student is appropriately educated within the meaning of the IDEA." (*Puyallup, supra*, 31 F.3d 1489, 1497.)

School districts may be ordered to provide compensatory education or additional services to a student who has been denied a FAPE. (*Id.* at p. 1496.) Compensatory education is a prospective award of educational services designed to catch-up the

student to where he should have been absent the denial of a FAPE. (*Brennan v. Regional School Dist. No. 1* (D.Conn. 2008) 531 F.Supp.2d 245, 265; *Orange Unified School Dist. v. C.K.* (C.D.Cal. June 4, 2012, No. SACV 11-1253 JVS(MLGx) 2012 WL 2478389, at *12.) Compensatory education is an equitable remedy that depends upon a fact-specific and individualized assessment of a student's current needs. (*Puyallup, supra*, 31 F.3d 1489,1496.; *Reid ex rel. Reid v. Dist. of Columbia* (D.D.C. Cir. 2005) 401 F.3d 516, 524.) The award must be "reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place." (*Reid, supra*, at p. 524; *R.P. ex rel. C.P. v. Prescott Unified School Dist.* (9th Cir. 2011) 631 F.3d 1117, 1125.) However, hour-for-hour relief for a denial of FAPE is not required by law. (*Puyallup, supra*, 31 F.3d 1489, 1497.) "[E]quitable considerations are relevant in fashioning relief." (*Burlington, supra*, 471 U.S. 359, 374.) 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.) A student should not be punished for a parent's missteps.

STUDENT'S REQUEST FOR PROSPECTIVE SERVICES

Student requested OAH order the special education and services contained in Student's March 4, 2015 IEP, as amended on March 8, 2018, as Student's prospective placement. Student failed to prove the present levels of performance, goals, and offers of placement and services contained in either the March 4, 2015 IEP, or any subsequent IEPs or amendments, were reasonably calculated to provide Student a FAPE. Student's request ignored Student's evolving needs and the requirement that an IEP be revised annually. Student's request was based on outdated or incomplete evaluations and was not sufficient to prove Student's prospective placement.

DR. SUSANNE SMITH-ROLEY'S RECOMMENDATIONS

Student requested 30-minutes weekly occupational therapy consultation services based upon Dr. Susanne Smith-Roley recommendations. Dr. Smith-Roley reevaluated Student in spring 2021. Dr. Smith-Roley determined Student's sensory deficits had improved significantly as of spring 2021, and Student no longer required direct occupational therapy services. Dr. Smith-Roley convincingly opined she could not make a recommendation about Student's current occupational needs without first conducting a reevaluation. She opined Student required 30-minutes weekly occupational consultation services, to Student's teachers, to provide them an understanding of Student's sensory processing needs. Gateway offered no expert opinions refuting Dr. Smith-Roley.

DR. CHRIS DAVIDSON'S RECOMMENDATIONS

Student requested five hour daily academic instruction five days weekly based upon Dr. Chris Davidson's recommendations. Dr. Davidson was a qualified educator. However, her testimony was generally unpersuasive because she did not work directly with Student and she could not accurately recall how many hours Students attended Davidson Learning Center during the 2019-2020, and 2020-2021 school years.

Dr. Davidson also did not believe Student's academic instruction needed to be provided by a special education teacher. Dr. Davidson's opinion expressly contradicted the IDEA's requirement that states ensure that personnel are appropriately and adequately prepared and trained, and have the content knowledge and skills, to serve children with disabilities. (20 U.S.C. § 1412(a)(14)(A).) Specifically, the IDEA requires each teacher employed as a special education teacher must obtain full state certification or pass the

state special education licensing examination and hold a license to teach in the state as a special education teacher. (20 U.S.C. § 1412(a)(14)(C).) Dr. Davidson's testimony displayed a lack of understanding of the IDEA's requirements for certified special education teachers and a lack of appreciation of the special skills and knowledge provided by certified special education teachers. As a result, Dr. Davidson's testimony about Student's academic needs was generally unconvincing.

Dr. Davidson generally opined Student required four to five hours of daily direct academic instruction, five days weekly, including 30 minutes of daily social skills instruction. Dr. Davidson's testimony was not based on Student's current assessment data or Student's current identified areas of academic need. Dr. Davidson's recommendations were not prospectively appropriate for Student.

XI CHEN'S RECOMMENDATIONS

Student requested behavioral support throughout the school day by a registered behavior technician trained in applied behavior analysis. None of Student's prior IEPs required Student's one-to-one-aide to be trained in applied behavior analysis. Chen opined Student required full-time behavioral support by a registered behavior technician trained in applied behavior analysis. Chen did not offer information about any assessments conducted by Creative Behavior Intervention, including a functional behavior assessment. Chen also did not describe Student's behavioral goals in either the home or educational settings or discuss Student's progress towards his goals during the 2021-2022 school year. The lack of detailed information supporting Chen's opinions rendered her opinions on Student's behavior needs generally unpersuasive.

Chen's testimony also was not given substantial weight because she did not recommend an IEP team convene to consider Student's need for a behavior intervention plan, behavior goals, or a one-to-one aide. Chen also offered opinions outside her area of expertise. For example, she opined Student should not receive speech and language or occupational therapy services through a virtual model. However, Chen was not a licensed speech and language pathologist or occupational therapist and therefore was not qualified to offer opinions in these areas.

In his closing brief, Student requested an order mandating Student's prospective program as follows:

- 90 minutes weekly speech and language services;
- behavioral aide support throughout the school day;
- five hours daily specialized academic instruction, five days per week; and
- 30 minutes weekly parental and staff consultation with an occupational therapist.

Student's request did not correlate to any IEP introduced at hearing, reflecting the overall confusion about Student's educational program. Further, Student's request was not based on current assessment data. Therefore, Student's request was not reasonably calculated to enable Student to make progress appropriate in light of his circumstances. Further, providing services based upon the March 4, 2015 IEP, with outdated present levels of performance and goals is inconsistent with the IDEA's mandate that a school district review a child's IEP at least once a year and make revisions if necessary. (20 U.S.C. § 1414(c)(1)(B)(iv), 1414(d)(4); Ed. Code, § 56341.1,

subd. (d).) It also is contrary to the obligation of a school district to reevaluate a student every three years, unless the school district and parents agree a re-evaluation is unnecessary. (20 U.S.C. § 1414(a)(2)(B)(ii); 34 C.F.R. § 300.303(b)(2).)

Student offered no current, assessment-based information on Student's needs in all areas. No persuasive evidence indicated the type, frequency, or duration of services that would be appropriate to enable Student to make progress or address his unique needs in the areas of academics, speech and language, and occupational therapy. Student's request for prospective services, therefore, is denied.

As an equitable remedy for Gateway's failure to offer Student a FAPE in an IEP or provide Student a program reasonably calculated to provide Student educational benefit, Gateway shall conduct a comprehensive evaluation of Student in the areas of psychoeducation, including social emotional and functional behavior, occupational therapy, and speech and language. These evaluations may be conducted by Gateway, or by a nonpublic agency with whom it contracts.

COMPENSATORY EDUCATION

OAH's January 10, 2023 Order Following Prehearing Conference for Hearing by Videoconference, mandated that any party seeking reimbursement for expenditures shall present admissible evidence of these expenditures, or a stipulation to the amount of the expenditures. It further required a party seeking compensatory education to provide evidence regarding the type, amount, duration, and need for any requested compensatory education. Finally, it required that documents offered as evidence to support a request for reimbursement be separated by vendor.

Student is entitled to compensatory education for Gateway's FAPE denials under Issues Three and Four. There were a total of 24 school weeks between December 3, 2021, 30 days from Student's enrollment at Gateway, through June 9, 2022, the relevant period of FAPE denials under Issues Three and Four. Student is entitled to remedies for Gateway's failure to offer speech and language services, occupational therapy services and specialized academic instruction minutes for this 24-school week period. The calculation for compensatory education hours was not based on an hour-for-hour relief. However, the award is equitable based upon Gateway's failure to offer an IEP for the entire 2021-2022 school year, and Student's demonstrated needs. (*Puyallup, supra*, 31 F.3d 1489, 1497; *Burlington, supra*, 471 U.S. 359, 374.)

Student sought reimbursement for speech and language services paid by Parents. Student failed to submit invoices and corresponding proof of payment in violation of OAH's January 10, 2023 Order Following Prehearing Conference for Hearing by Videoconference. Student also failed to offer expert testimony by a speech and language pathologist regarding the nature of Student's speech and language deficits or frequency or duration of services to compensate Student for any missed services. Therefore, no reimbursement for Parents' out-of-pocket costs is awarded.

The evidence proved Student had speech and language deficits, including articulation and receptive and expressive language deficiencies, which Gateway failed to meet. Hatzold explained Student had difficulty answering questions, understanding vocabulary, and engaging in socially appropriate greetings and conversations. As a remedy, Student is entitled to 24 hours of speech and language services to be provided by a non-public agency. This award represents one-hour weekly speech and language services for the 24 school weeks between December 3, 2021, and June 9, 2022. This award may be used for individual or group speech and language services, at Parents'

discretion. This award takes into consideration Student receives weekly speech and language services funded by Parents' private medical insurance, and therefore, additional hours would be excessive considering Student's academic and personal commitments. These services shall be provided by a certified nonpublic agency.

Student is entitled to compensatory education based upon Gateway's failure to make a formal offer of specialized academic instruction. Student is entitled to 96 hours of compensatory individual specialized academic instruction from a credentialed special education teacher, to be provided by a nonpublic agency. This award is calculated at four hours weekly for 24 school weeks, for a total of 96 hours. This award takes into consideration that Student was provided direct academic instruction by a special education teacher for approximately four hours weekly during the fall 2021-2022 semester and six hours weekly during the winter and spring 2021-2022 semesters. Gateway shall contract with a certified nonpublic agency within 30 calendar days of this Decision to provide Student 96 hours of compensatory, individual specialized academic instruction.

Student is entitled to compensatory education based upon Gateway's failure to offer Student occupational therapy consultation services. Student is entitled to 12 hours occupational therapy consultation services. This award is based on Dr. Smith-Roley's recommendation and is calculated at 30 minutes per week for 24 weeks, for a total of 12 hours. Gateway shall contract with a certified nonpublic agency within 30 calendar days of this Decision to provide Student 12 hours of compensatory, occupational therapy consultation services.

Student did not meet his burden of proving he was entitled to reimbursement for costs paid by Parents for Creative Behavior Intervention's behavioral services. Mother

testified private behavior services funded by Parents' medical insurance company had been ongoing for more than 10 years. Student failed to establish a causal connection between the services provided by Creative Behavior Interventions and the issues on which Student prevailed. Further, Student presented no persuasive evidence as to the amounts of Parents' out-of-pocket costs. Mother testified the behavioral services were obtained through Parents' insurance. Although Mother claimed to pay out of pocket expenses over a certain threshold, her testimony and documentary evidence was insufficient to substantiate the exact amount of any out-of-pocket costs.

Further, Mother's noncooperation with Gateway's attempts to hold an IEP team meeting warrants a denial of Mother's request for reimbursement of costs for privately funded behavior services. Gateway made an effort to schedule an IEP team meeting within 30 days of Student's enrollment at Gateway. It also tried to schedule Student's annual IEP during April 2022. Mother ignored Gateway's multiple attempts to hold an IEP team meeting or claimed she or her attorney was unavailable. Mother testified she wanted to meet with Gateway in an IEP team meeting, but her testimony was not convincing because she routinely did not respond to Gateway's meeting requests. While this Decision finds Gateway denied Student a FAPE by failing to offer Student an IEP, the due process hearing could, perhaps, have been avoided if Mother had cooperated with Gateway's attempts to hold an IEP team meeting.

The compensatory education hours shall be available through December 31, 2025. Parents shall be allowed to access services during summer or other school breaks, or other times convenient to meet Student's needs outside his regular school schedule.

STAFF TRAINING

Gateway did not fully appreciate its obligations regarding the procedures for holding IEP team meetings and developing legally compliant IEPs. Staff training can be an appropriate compensatory remedy and is appropriate in this case. (*Park, ex rel. Park v. Anaheim Union High School Dist.* (9th Cir. 2006) 464 F.3d 1025, 1034.) Accordingly, Gateway shall provide four hours of special education training from an independent institution not affiliated with Gateway, specializing in special education training to school districts, to its entire administrative and special education teaching staff. The training shall include instruction on an LEA's assessment requirements, IEP team meeting requirements, and development of IEPs. The training shall be completed by December 31, 2023.

ORDER

1. Gateway shall hold an interim IEP team meeting with all required IEP team members within 15 calendar days of the date of this Order to develop an IEP to provide Student with an offer of specialized academic instruction and related services. The IEP team shall consider Student's need for specialized academic instruction, speech and language services, and occupational therapy services. The IEP team shall also consider the need for a behavior goal or goals for Student and/or the use of positive behavior interventions and supports, and other strategies, to address those behaviors, and/or intensive individualized services. The IEP team shall specifically consider Student's inattention to task and elopement, and any other maladaptive behaviors known to the IEP team at the time of the IEP team meeting.

2. Gateway shall conduct reevaluations for Student in the areas of psychoeducation, including social emotional and functional behavior, occupational therapy, and speech and language. Gateway may conduct these assessments, or contract with a nonpublic agency. Gateway shall provide Parents an assessment plan within 15 calendar days of the date of this Order. If Gateway contracts with a nonpublic agency to conduct the evaluations, it shall ensure that the assessments are completed and an IEP team meeting is held to review the assessment results within 60 calendar days of the date Parents return the signed consent to assessment plan to Gateway. Gateway shall timely convene an IEP team meeting to review each assessment report. Parents shall make Student available for the assessments.
3. Gateway shall contract with a certified nonpublic agency within 30 calendar days of this Order to provide Student 96 hours of compensatory, individual specialized academic instruction, 24 hours of speech and language services, and 12 hours of occupational therapy consultation services. All hours will be available until December 31, 2025. All unused hours remaining on December 31, 2025 shall be forfeited. This remedy is compensatory only and does not constitute a stay put placement.
4. Gateway shall contract with a non-public agency or independent law firm specializing in special education law within 60 calendar days of this Order to provide at least four hours of special education training to all employees of Gateway who are general education teachers, special education teachers, school principals, assistant principals, or other similar administrator titles.

Training shall include providing procedural safeguards, encouraging parental attendance at IEP team meetings, and the step-by-step process for developing legally complaint IEPs. This training shall be provided by an independent agency or institution not affiliated with Gateway and which specializes in education training to school districts or charter schools and may not be provided by the law firm that represented Gateway in the due process hearing. The training shall be completed by December 31, 2023.

5. All other relief sought by Student is denied.

RIGHT TO APPEAL 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 with 90 days of receipt.

JENNIFER KELLY

Administrative Law Judge

Office of Administrative Hearings