

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

CASE NO. 2022090021

PARENTS ON BEHALF OF STUDENT,

v.

SAN DIEGO UNIFIED SCHOOL DISTRICT.

DECISION

March 15, 2023

On August 31, 2022, Parents on behalf of Student filed a due process hearing request with the Office of Administrative Hearings, called OAH, naming San Diego Unified School District. On October 4, 2022, OAH granted the parties' joint request to continue this matter. Administrative Law Judge Paul H. Kamoroff heard this matter by videoconference on January 10, 11, 12, 17, 18, 19, 24, 25, and 26, 2023.

Attorneys Meagan M. Nunez and Jennifer L. Varga represented Parents and Student. Parents attended all hearing days on Student's behalf. Attorneys Jonathan P.

Read and Juliana Mascari represented San Diego Unified School District, called San Diego. Brian Spry, San Diego's Director of Due Process Hearings and Mediations, attended all hearing days on San Diego's behalf.

At the parties' request, OAH continued the matter to February 21, 2023, for written closing briefs. OAH closed the record and submitted the matter on February 21, 2023.

ISSUES

At the start of the hearing, the parties and the Administrative Law Judge clarified issues based upon the complaint, and Student's motions to correct issues and withdraw issues. The remaining issues have been rephrased and reorganized for clarity. The ALJ has authority to redefine a party's issues, so long as no substantive changes are made. (*J.W. v. Fresno Unified School Dist.* (9th Cir. 2010) 626 F.3d 431, 442-443.)

1. Did San Diego deny Student a free appropriate public education, called FAPE, during the 2020-2021 school year, beginning August 31, 2020, through October 9, 2020, by failing to:
 - a. implement Student's individualized education program, called IEP, dated December 18, 2019, January 27, 2020, and February 27, 2020;
 - b. offer or implement services and supports for mental health; and
 - c. assess in the area of behavior?
2. Did San Diego deny Student a FAPE during the 2020-2021 school year, by failing to provide prior written notice of its decision to not place Student at a residential treatment center?

3. Did San Diego deny Student a FAPE, pursuant to an October 9, 2020 IEP, by failing to:
 - a. offer an appropriate placement;
 - b. offer appropriate supports and services;
 - c. offer appropriate annual goals;
 - d. include legally sufficient present levels of performance;
 - e. make a clear and specific FAPE offer;
 - f. consider the full continuum of educational placements;
 - g. assess Student in the area of behavior prior to the IEP team meeting;
 - h. re-evaluate Student in the areas of psychoeducation, educationally related mental health services, and social and emotional functioning;
 - i. revise Student's IEP; and by
 - j. predetermining the IEP?
4. Did San Diego deny Student a FAPE, pursuant to a November 5, 2020, and November 13, 2020 IEP, by failing to:
 - a. offer an appropriate educational placement;
 - b. offer appropriate services and supports;
 - c. offer appropriate goals;
 - d. include legally sufficient present levels of performance;
 - e. consider the full continuum of educational placements;
 - f. provide Parents accurate information;
 - g. assess Student in the area of behavior;

- h. re-evaluate Student in the areas of psychoeducation, educationally related mental health services and social and emotional functioning; and
 - i. revise Student's IEP?
- 5. Did San Diego deny Student a FAPE in December 2020, by failing to revise Student's IEP?
- 6. Did San Diego deny Student a FAPE, by failing to hold an IEP team meeting within 30 days of Parents' request on March 6, 2021?
- 7. Did San Diego deny Student a FAPE, pursuant to an April 27, 2021 IEP, by:
 - a. failing to consider an independent educational evaluation by Jennifer Zeisz, Ph.D.; and
 - b. failing to make a formal, clear, and specific FAPE offer?
- 8. Did San Diego deny Student a FAPE during the 2021-2022 school year, up to December 1, 2021, pursuant to an August 17, 2021 letter, by:
 - a. failing to offer a FAPE;
 - b. predetermining Student's IEP;
 - c. failing to include Parents in decisions regarding Student's IEP;
 - d. failing to include persons knowledgeable of Student and their evaluation data when offering a placement;
 - e. failing to make a clear and specific offer of FAPE;
 - f. offering a FAPE without convening an IEP team meeting; and
 - g. failing to consider an independent educational evaluation by Dr. Zeisz?
- 9. Did San Diego deny Student a FAPE during the 2021-2022 school year, up to December 1, 2021, by failing to revise Student's IEP?

10. Did San Diego deny Student a FAPE during the 2021-2022 school year, up to December 1, 2021, by failing to assess and develop an IEP within 60 days of Parents' consent to an assessment plan signed on May 13, 2021?
11. Did San Diego deny Student a FAPE during the 2021-2022 school year, up to December 1, 2021, by failing to offer a FAPE at the October 8, 2021 IEP team meeting?

JURISDICTION

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

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

The IDEA affords parents and local educational agencies the procedural protection of an impartial due process hearing with respect to any matter relating to the identification, assessment, or educational placement of the child, or the provision of a FAPE to the child. (20 U.S.C. § 1415(b)(6) & (f); 34 C.F.R. § 300.511; Ed. Code, §§ 56501, 56502, and 56505; Cal. Code Regs., tit. 5, § 3082.) The party requesting the hearing is limited to the issues alleged in the complaint, unless the other party

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

Student was 16 years old and in 10th grade at the time of hearing. Student's parents resided within San Diego's geographic boundaries at all relevant times. In December 2019, San Diego held an initial IEP team meeting for Student and found him eligible for special education under the category of emotional disturbance.

On September 30, 2020, Parents disenrolled Student from San Diego. From September 30, 2020, through December 2021, Parents privately placed Student and did not request for San Diego to develop an IEP while he was privately placed. On December 2, 2021, San Diego and Parents agreed to change Student's special education eligibility to specific learning disability.

Parents reenrolled Student in San Diego on January 7, 2022, and Student attended a San Diego school at the time of the hearing.

PRIVATELY PLACED STUDENTS

Student's issue 1, beginning September 30, 2020, and issues 3, 4, 5, 7, 8, 9, 10, and 11, allege San Diego did not meet its obligations to Student while he was privately placed by Parents. These issues are impacted by laws pertaining to privately placed Students.

For public school children with disabilities, school districts make a FAPE available by having an IEP in effect at the beginning of each school year. (34 C.F.R. § 300.323(a).) Private school children with disabilities, however, do not have an individual entitlement to a FAPE. (34 C.F.R. § 300.137; *Capistrano Unified Sch. Dist. v. S.W.*, 21 F.4th 1125, 1138 (9th Cir. 2021), cert. denied, (*Capistrano*).)

Title 34, section 300.130, of the Code of Federal Regulations defines parentally placed private school children with disabilities as children with disabilities enrolled by their parents in private, including religious, schools or facilities. (20 U.S.C. § 1412(a)(10)(A).) Section 300.137(a) states “no parentally-placed private school child with a disability has an individual right to receive some or all of the special education and related services that the child would receive if enrolled in a public school.” (*Id.*) These regulations and statutes do not distinguish between private school students who are privately placed as a result of a dispute over an IEP or those privately placed as a matter of preference. (*Capistrano, supra*, 21 F.4th at pp. 1138-40.) Consequently, once a parent unilaterally enrolls the student in private school, the student meets the definition of a private school child with a disability and does not have an individual entitlement to special education and related services. (*Id.*)

In *Capistrano*, parents of a disabled first grade student withdrew that student from public school and placed her at a private school. The parents filed a complaint seeking reimbursement for the private placement. Parents subsequently withdrew the complaint and request for reimbursement, and then filed a second complaint, again seeking reimbursement for the private placement. Student remained privately placed during the rest of first grade and all of second grade.

The Ninth Circuit held that if a student has been enrolled in a private school by their parents, the school district does not need to develop an IEP, even when

reimbursement has been requested or if a complaint has been filed. When parents withdraw a student from public school and place a student in private school, all a parent has to do is ask for the school district to develop an IEP, and then the school district must develop one. There is no freestanding requirement that IEPs be conducted for privately placed student. (*Id.*)

STUDENT WAS PRIVATELY PLACED FROM SEPTEMBER 30, 2020, THROUGH DECEMBER 30, 2021

By email on September 29, 2020, Parents notified San Diego that, beginning September 30, 2020, they were privately placing Student at a wilderness therapy program. Parents' email did not express disagreement with Student's IEP, request reimbursement, or request an IEP team meeting.

From October 1, 2020, through December 29, 2020, Parents privately placed Student at Trails Carolina, called Trails, a wilderness therapy program located in North Carolina. Immediately following Trails, on December 30, 2020, Parents privately placed Student at Whetstone Academy, called Whetstone, a therapeutic boarding school located in South Carolina.

Throughout this time, Parents informed San Diego that Student was privately placed. This included numerous emails and in-person discussions throughout fall 2020, spring 2021, and fall 2021. Despite many communications with San Diego staff, Parents did not request that San Diego develop an IEP while Student was privately placed.

During the hearing, Mother and Father each confirmed they privately placed Student at Trails and Whetstone. Parents anticipated privately placing Student at Trails from October 1, 2020, through the end of December 2020, and did so. Parents

anticipated privately placing Student at Whetstone from December 30, 2020, through the end of December 2021, and did so. Testimony from Andrey Taylor, a mental health service provider employed by Whetstone Academy, confirmed that Student's scheduled stay at Whetstone was one calendar year. It was normal for students to spend one year at the therapeutic boarding school, and that length of stay was anticipated by Whetstone Academy staff when Student began attending Whetstone. This coincided with Student's actual stay at Whetstone Academy, which concluded at the end of December 2021.

In preparation for his return to the school district, San Diego convened an annual IEP team meeting for Student on December 2, 2021. Parents consented to the December 2, 2021 IEP, and reenrolled Student in San Diego on January 7, 2022. Student began attending a San Diego public school thereafter. Student did not dispute the December 2, 2021 IEP, and none of Student's issues go beyond December 1, 2021.

Consequently, as a preliminary matter, a preponderance of the evidence showed Parents privately placed Student, from September 30, 2020, through the end of December 2021. A preponderance of evidence also showed Parents did not request for San Diego to develop an IEP for Student while he was privately placed. Therefore, San Diego was not obligated to develop an IEP or offer Student a FAPE from September 30, 2020, through the end of December 2021. (*Capistrano, supra*, 21 F.4th at pp. 1138-40.)

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ISSUE 1: THE 2020-2021 SCHOOL YEAR, AUGUST 31, 2020, THROUGH OCTOBER 9, 2020

Student asserts San Diego denied him a FAPE during the 2020-2021 school year, beginning August 31, 2020, through October 9, 2020. Specifically, Student complains that San Diego failed to implement his IEP, failed to offer or implement services and supports for mental health, and failed to assess in the area of behavior.

San Diego responds that it materially implemented Student's IEP, which included services and supports for mental health. San Diego further responds that conditions did not warrant a behavior assessment.

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

In general, a child eligible for special education must be provided access to specialized instruction and related services which are individually designed to provide educational benefit through an IEP reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances. (*Board of Education of the Hendrick Hudson Central School Dist. v. Rowley* (1982) 458 U.S. 176, 201-204; *Endrew F. v. Douglas County School Dist.* RE-1 (2017) 580 U.S. 386, 402 [137 S.Ct. 988, 1000].)

Student had a history of emotional problems including suicidal ideation. These problems resulted in Parents placing Student in psychiatric hospitals or partial

hospitalization programs in fall 2018, spring 2019, fall 2019, and spring 2020. In November 2019, Parents placed Student at a residential treatment center, the San Diego Center for Children, in San Diego, California. A residential treatment center is a live-in facility that provides students with therapeutic and behavioral interventions in an educational setting.

San Diego conducted Student's initial evaluation for special education eligibility in fall 2019. Amongst other areas of assessment, San Diego conducted testing in the areas of psychoeducation, academics, behavior, and mental health.

On December 18, 2019, San Diego held an initial IEP team meeting for Student. The IEP team determined Student was eligible for special education and related services under the disability category of emotional disturbance. As part of the IEP offer, San Diego offered

- various accommodations and supports,
- three annual goals,
- 30 hours per week of specialized academic instruction,
- 53.5 hours per year of educationally related mental health services,
- 30 hours per year of mental health behavior intervention services, and
- a behavior intervention plan.

San Diego offered Student placement at a separate school, Riley Alternative School, called Riley, a small, special day school operated by San Diego. Riley was a kindergarten-through-eighth grade school that provided intensive mental health services for students with severe social or emotional difficulties. Riley provided a highly structured, therapeutic environment with behavior and mental health services embedded in each class. Except for physical education, classes were limited to five

students, with three adults assigned to each class. Physical education classes normally included 10 students and six adults. Riley was designed and operated as an alternative to a comprehensive school for IEP students with serious emotional problems. After eighth grade, students from Riley matriculated to Marcy School, a similarly designed alternative school for high school age students, also operated by San Diego.

San Diego held subsequent IEP team meetings on January 27, 2020, and February 27, 2020, during which San Diego offered substantially the same IEP, collectively referred to as the February 27, 2020 IEP. Parents did not immediately consent to the IEP offer.

On March 2, 2020, Student filed a complaint against San Diego in OAH case number 2020030085. On May 5, 2020, the parties signed a settlement agreement that resolved the case. As part of the settlement, Parents agreed to placement at Riley and full consent to the February 27, 2020 IEP.

A. FAILURE TO IMPLEMENT STUDENT'S IEP FROM AUGUST 31, 2020, TO OCTOBER 9, 2020

Student alleges San Diego denied him a FAPE by failing to implement the February 27, 2020 IEP, from August 31, 2020, through October 9, 2020.

A school district violates the IDEA if it materially fails to implement a child's IEP. A material failure occurs when there is more than a minor discrepancy between the services provided to a disabled child and those required by the IEP. (*Van Duyn v. Baker School Dist.* (9th Cir. 2007) 502 F.3d 811, 815, 822.)

On August 31, 2020, the first day of the 2020-2021 school year, Student began attending eighth grade at Riley. On September 29, 2020, Parents notified San Diego they would be privately placing Student at a wilderness therapy program, without expressing disagreement with Student's IEP. On October 1, 2020, Student began attending Trails.

Student's issue 1 goes through October 9, 2020. However, San Diego could not provide Student a FAPE following Parents' private placement of Student on September 30, 2020. Nor was San Diego obligated to offer Student a FAPE while Student was privately placed because Parents' notice of private placement did not request for San Diego to develop an IEP for Student. (*Capistrano, supra*, 21 F.4th at pp. 1138-40.) Consequently, Student's issue 1a is limited to the 22 school days, from August 31, 2020, to September 29, 2020.

Student primarily complains San Diego failed to implement the February 27, 2020 IEP, Student's operative IEP at the beginning of the 2020-2021 school year, because San Diego provided Student with distance learning during fall 2020. During this time, California's Governor authorized distance learning to help curb the spread of a deadly, infectious disease called COVID-19. Despite the Governor's orders and the global pandemic, Mother testified San Diego failed to implement Student's IEP by failing to provide in-person instruction.

On March 4, 2020, California Governor Gavin Newsom declared a State of Emergency in California as a result of the COVID-19 pandemic. On March 13, 2020, Governor Newsom issued Executive Order N-26-20, which authorized school districts to continue educating students to the extent feasible, through distance learning and/or independent study.

In response to COVID-19's unprecedented rapid spread, on March 19, 2020, Governor Newsom issued Executive Order N-33-20, ordering all California residents to immediately stay at their home except as needed to operate critical federal infrastructure sectors. (Cal. Exec Order N-33-20 (March 19, 2020).) The California State Public Health Officer issued a list of designated essential workers who were allowed to leave their homes to support specified critical infrastructure sectors, which included workers teaching at public and private K-12 schools, but only for distance learning. Executive Order N-33-20 remained in effect until June 11, 2021. (*Brach v. Newsom* (9th Cir. 2021) 6 F.4th 904, 911.)

The Governor's distance learning order was authorized under Government Code sections 8567, 8627, and 8665, and Health and Safety Code sections 120125, 120140, 131080, 120130, subdivision (c), 120135, 120145, 120175, and 120150. The Governor's order and local educational agencies' school closures and limitation of instruction to distance learning was consistent with the Ninth Circuit's decision in *N.D. v. Hawaii Dept. of Educ.* (9th Cir. 2010) 600 F.3d 1104, 1116- 1117 (*N.D.*). In *N.D.*, the Hawaii Department of Education, which operates Hawaii's schools as a single local educational agency, shut down public schools on Fridays to alleviate a major fiscal crisis.

The Ninth Circuit upheld the school district's ability to stop providing instruction on Fridays to alleviate a major emergency and rejected the students' arguments that ceasing services owed to them under their IEPs violated the IDEA. The Ninth Circuit explained that Congress did not intend for the IDEA to apply to system wide administrative decisions. Because Hawaii's furloughs affected all public schools and all students, disabled and non-disabled alike, it did not conflict with Congress's intent of protecting disabled children

from being singled out. (*Id.* at p. 1116.) The Court reasoned the IDEA does not give the parents of disabled children veto power over a state's decisions regarding the management of its schools. (*Id.* at p. 1117.)

The United States District Court found the Governor's distance learning order lawful. (*E.M.C. v. Ventura Unified School District* (C.D.Cal. October 14, 2020, No. 2:20-CV-09024-SVW-PD) 2020 WL 7094071 (*E.M.C.*)). Similar to Student's allegations, the student in *E.M.C.* experienced difficulties with distance learning and alleged she required in-person services despite the Governor's prohibition on in-person instruction. Relying on *N.D.*, the court upheld the Governor's order, and denied the student's request for in-person services despite the student's IEP providing in-person services, as the IEP had been modified by lawful statewide restrictions prohibiting in-person instruction. (*Id.* at *6.) The court rejected the student's argument that restrictions on in-person services did not excuse a school district from its obligation to provide in-person IEP services. Similarly, Student's IEP was lawfully modified by the statewide restrictions requiring school closures and distance learning.

Student argues San Diego should have provided Student in-person instruction during distance learning, including in-person mental health services, despite the foregoing. Student's argument is supported by *Parent v. Orcutt Union Sch. Dist.*, OAH Case No. 2020100618 (April 22, 2021) (*Orcutt*). In *Orcutt*, the student was severely disabled and attacked his parent during distance learning. Therefore, *Orcutt* found the student qualified for an exception to distance learning and the school district should have provided the student in-person support. *Orcutt* relied on California Department of Education guidance that supported an exception to distance learning for a severely disabled or medically fragile student. OAH issued *Orcutt* in April 2021.

However, following *Orcutt*, in October 2021, the Ninth Circuit reminded us that school districts were not obligated to follow guidance from the Department of Education, which is not binding law. (*Cyrus Csutoras v. Paradise High School* (9th Cir. 2021) 12 F.4th 960, 968.) Consequently, San Diego was not required to provide in-person instruction or to determine whether the severity of Student's disability qualified him for an exception to distance learning. (*Ibid.*, see also *N.D.*, *supra*, F.3d at p. 1117; *Ms. S. v. Vashon Island School Dist.* (9th Cir. 2003) 337 F.3d 1115, 1131 (superseded on other grounds by statute); Cal. Code Regs., tit. 5, § 3085 [OAH Decisions are not binding precedent]). Consequently, San Diego's unilateral modification of Student's IEP as part of a district-wide response to distance learning directives was lawful.

Student's argument also overlooks that, in fall 2020, COVID-19 was a deadly pandemic with no available vaccine that killed millions worldwide and eventually killed over one million Americans. It was reasonable for San Diego to follow the Governor's orders to close schools and provide distance learning to help curb the spread of this sometimes fatal, airborne, respiratory virus. In-person instruction would have exposed Student, Parents, and any other relatives who came into contact with Student, to risk of infection and possible death. It would have also exposed school workers to risk of infection and death, along with their families and others they had contact with. This highlights the impracticality and deadly risks associated with a parent or an IEP team having the ability to veto lawful stay-at-home orders, as proposed by Student.

Evidence also showed that San Diego appropriately met Student's educational needs during distance learning. For example, San Diego worked on Student's IEP goals and provided specialized academic instruction through synchronous and asynchronous instruction. From 8:50 a.m. to 11:55 a.m. each school day, Student attended live instruction by videoconference, also known as synchronous instruction.

Each class had five students and three adults, including a teacher and mental health behavior aides. From 1:30 PM to 3:30 PM each school day, Student received asynchronous instruction, meaning instruction provided through learning packets and supervised by a teacher. Student attended his academic classes each school day, completed work, and progressed academically during the limited time he attended Riley. Each class was small and structured, with embedded specialized academic instruction and mental health behavior services consistent with Student's IEP.

Student argues that, although he attended his academic classes, he did not attend advisory classes, held each school day from 12:05 p.m. to 12:40 p.m.. He sometimes missed a physical education class and missed three individual counseling sessions. For these reasons, Student asserts San Diego failed to implement his IEP. Student does not dispute that San Diego made these classes and services available to Student. Rather, Student argues that his failure to log into these classes and services was tantamount to San Diego failing to provide the classes and services. This argument was unpersuasive.

San Diego mental health providers, including licensed mental health clinician Aaron Stroud and educational specialist Jordan Means, frequently communicated with Parents while Student was enrolled at Riley. By emails on September 1, 11, 16, 17, 18, 21, and 29, 2020, San Diego staff communicated with Parents regarding Student's school program, progress, and mental health needs. Beginning September 17, 2020, San Diego contacted Parents regarding Student's absences during advisory and physical education classes. By email on September 18, 2020, Mother reported that Student missed those classes because he was sometimes irritable and sometimes had difficulty accessing the videoconference platform, called Zoom, that was used for distance learning. Means, Stroud, and Parents agreed they would continue attempting to get

Student to log into each of his classes and counseling services. While Student asserts these exchanges show San Diego did not implement Student's IEP, they instead demonstrate that IEP services were made available to Student, school staff regularly communicated with Parents regarding the implementation of Student's IEP, and school staff quickly followed-up with Parents when Student missed a class or service.

In sum, San Diego lawfully provided distance learning and materially implemented Student's specialized academic instruction and mental health behavior intervention services through synchronous and asynchronous instruction. While Student missed some classes and three counseling sessions, each class and service were made available to Student. Finally, the time frame, 22 days, was too short to determine if Student would continue missing certain classes and services, or if this was a temporary problem experienced by all students when transitioning to a new school or learning platform, as Means persuasively explained during his testimony. A totality of the facts, including the short time frame, established the missed services did not constitute a material failure to implement Student's IEP.

Student failed to prove by a preponderance of the evidence that San Diego denied him a FAPE by failing to implement the IEP dated December 18, 2019, January 27, 2020, and February 27, 2020 from August 31, 2020, through October 9, 2020. San Diego prevailed on Issue 1a.

B. OFFER OR IMPLEMENT SERVICES AND SUPPORTS FOR MENTAL HEALTH

Student complains that San Diego denied him a FAPE from August 31, 2020, to October 9, 2020, by failing to offer or implement services and supports for mental health.

As part of its FAPE obligation, school districts are required to provide designated instruction and services when necessary to assist the child in benefiting from special education. (Ed. Code, § 56363, subd. (a).) Designated instruction and services may include mental health services. (Ed. Code, § 56363, subds. (b)(9) and (b)(10).)

The February 27, 2020 IEP included services and supports for mental health, including 53.5 hours per year of educationally related mental health services and 30 hours per year of mental health behavior intervention services. The mental health services were offered in Student's IEP following a psychoeducational evaluation and a mental health related services assessment conducted by San Diego in October and December 2019. Consequently, Student's allegation that San Diego failed to offer mental health supports and services is incorrect.

Student did not allege the mental health services offered in the February 27, 2020 IEP were inappropriate. In fact, Student did not challenge the appropriateness of any part of the February 27, 2020 IEP as an issue for this hearing. Rather, Student's claim begins on August 31, 2020, six months after the February 27, 2020 IEP. Moreover, the February 2020 IEP fell outside of the two-year statute of limitations for special education claims. (20 U.S.C. § 1415(b)(6)(B); 34 C.F.R. § 300.507(a)(2) (2006); Ed. Code, § 56505, subd. (l).) While the provision of the IEP may be ongoing, special education law does

not recognize the doctrine of continuing violations as an exemption from the two-year statute of limitations. (71 Fed.Reg. 46697 (2006); . 20 U.S.C. § 1415(b)(6)(B); 34 C.F.R. § 300.507(a)(2); Ed. Code, § 56505, subd. (l))

Regarding Student's claim that San Diego failed to implement mental health supports and services, as discussed in Issue 1a, a preponderance of the evidence showed that San Diego did not deny Student a FAPE by failing to implement any IEP services, including those for mental health. San Diego materially implemented Student's mental health behavior intervention services through synchronous and asynchronous instruction. While Student missed individual counseling sessions, services were made available to Student and the time frame, 22 days, was too short to determine if Student would continue missing services or if this was a temporary problem experienced by all students when transitioning to a new school or learning platform. A totality of the facts, including the short time frame, established the missed services did not constitute a material failure to implement Student's IEP.

Student failed to show by a preponderance of the evidence that San Diego denied him a FAPE by failing to offer or implement mental health supports or services from August 31, 2020, to October 9, 2020. San Diego prevailed on Issue 1b.

C. FAILURE TO ASSESS BEHAVIOR

Student asserts San Diego denied him a FAPE, from August 31, 2020, to October 9, 2020, by failing to assess in the area of behavior.

A school district's failure to assess a student, including for behavior, constitutes a procedural violation of the IDEA. (*R.B., ex rel. F.B. v. Napa Valley Unified Sch. Dist.* (9th Cir. 2007) 496 F.3d 932, 940.) A procedural violation of the IDEA constitutes a denial of a FAPE if the violation:

1. impeded the child's right to a FAPE;
2. significantly impeded the parent's opportunity to participate in the decision making process; or (3)
3. caused a deprivation of educational benefits. (Ed. Code, § 56505(f)(2); *W.G. v. Bd. of Trustees of Target Range Sch. Dist. No. 23, Missoula, Mont.* (9th Cir. 1992) 960 F.2d 1479, 1484 (*Target Range*).)

San Diego previously assessed Student for behavior in December 2019, less than one year before Student's claim. The assessment was conducted as part of a psychoeducational evaluation by a school psychologist, was not disputed by Student, and resulted in a behavior intervention plan for Student. Consequently, Student's claim is not for an assessment, but for a reassessment.

A school district must conduct a reassessment if it determines that the educational or related service needs of the child, including improved academic achievement and functional performance of the child warrant a reevaluation, or if the student's parents or teacher request a reassessment. (20 U.S.C. § 1414(a)(2)(A)(i); Ed. Code, § 56381, subd. (a)(1).)

Student argues that behaviors demonstrated during September 2020 warranted a reassessment for behavior. For example, Father testified that Student was aggressive towards his brother and Mother at home during that time. However, despite frequent

communications between Parents and school staff throughout September 2020, Parents failed to communicate that Student demonstrated increased behavioral problems at home. Although Parents reported Student was sometimes irritable, given Student's educational profile and placement at a therapeutic, alternative school for students with emotional problems, Parents' statement was insufficient to provide notice that a new behavior assessment was warranted.

Significantly, neither Parents nor school staff requested any assessment, including for behavior, during this time. In addition, San Diego mental health service provider Means credibly testified Student did not demonstrate any behavior issues while at school, nor were any behavior concerns reported by Student's teachers or behavior aides. To the contrary, Student did well in his academic classes, was not disruptive, and got along with others.

Student failed to show by a preponderance of the evidence that San Diego denied him a FAPE, by failing to assess for behavior. San Diego prevailed on Issue 1c.

ISSUE 2: PRIOR WRITTEN NOTICE

Student alleges San Diego denied him a FAPE during the 2020-2021 school year, by failing to provide prior written notice of its refusal to place Student at a residential treatment center. San Diego responds that it provided Parents with prior written notice of its refusal to place Student at a residential treatment center.

The IDEA requires written prior notice to parents when a school district proposes or refuses to change the educational placement of a child with disability or the provision of a FAPE. (20 U.S.C. § 1415(b)(3)). A prior written notice must contain a description of

the action proposed or refused by the agency, an explanation for the action, and a description of the assessment procedure or report which is the basis of the action. (Ed. Code, § 56500.4, subd. (b).)

Student's claim fails for several reasons. First, neither San Diego nor Parents requested a change to Student's IEP that required prior written notice. Rather, on September 29, 2020, Parents notified San Diego they were privately placing Student at a wilderness therapy program. Parents did not request any changes to placement in Student's IEP, express disagreement with the IEP, or request an IEP team meeting. Consequently, San Diego was not required to provide Parents with prior written notice because San Diego did not propose or refuse a change of Student's placement. (*Id.*)

Although Parents did not request an IEP team meeting, San Diego mistakenly believed it had to convene an IEP team meeting to disenroll Student. It therefore held an amendment IEP team meeting over several days following Student's private placement. San Diego held an amendment IEP team meeting for Student on October 9, 2020, November 5, 2020, and November 13, 2020. The amendment IEP offered the same educational program as the February 27, 2020 IEP. Parents consented in full to the amendment IEP and did not request for San Diego to place Student at a residential treatment center. To the contrary, Parents made clear to the IEP team and in the IEP written notes that Student was privately placed. In fact, San Diego agreed to Parents' request to mark Student's official date of disenrollment from the school district, and the beginning of Student's private placement, as September 30, 2020. Again, San Diego was not required to provide Parents with prior written notice of a refusal or proposal to change Student's educational placement, as none was requested or denied. (*Id.*)

Nonetheless, in an abundance of caution, San Diego provided Parents with prior written notices on October 1, 2020, and October 26, 2020. Each prior written notice stated San Diego refused to fund a residential treatment center placement for Student. Each prior written notice explained the rationale for this refusal was that San Diego believed it offered a FAPE in Student's IEP. And each prior written notice included a copy of Notice of Procedural Safeguards, which explained Parents' rights under the IDEA. During the hearing, Parents admitted they received the prior written notices.

By email on March 6, 2021, Mother requested that San Diego reconsider its refusal to fund a residential treatment center. Student argues Parents' request for San Diego to reconsider its prior written notice required San Diego to send another prior written notice. Student failed to provide any law to support that San Diego was required to send another prior written notice under these circumstances. Rather, San Diego informed Parents twice that it refused to fund a residential treatment center because it believed Student's operative IEP offered a FAPE. San Diego was not required to send another prior written notice regarding the same refusal.

Student failed to prove by a preponderance of the evidence that San Diego denied him a FAPE during the 2020-2021 school year, by failing to provide Parents prior written notice of its refusal to fund a residential treatment center. San Diego prevailed on Issue 2.

ISSUES 3 AND 4: THE OCTOBER 9, 2020, NOVEMBER 5, 2020, AND NOVEMBER 13, 2020 IEPs

Student complains that San Diego denied Student a FAPE, pursuant to an October 9, 2020 IEP, for several reasons. Specifically, by failing to offer appropriate

placement, supports, services, annual goals, and present levels of performance, by failing to make a clear and specific FAPE offer, to consider the full continuum of educational placements, to assess Student in the area of behavior prior to the IEP team meeting, to re-evaluate Student in the areas of psychoeducation, educationally related mental health services, and social and emotional functioning, by failing to revise Student's IEP, and predetermining the IEP.

Student also asserts San Diego denied him a FAPE, pursuant to a November 5, 2020, and November 13, 2020 IEP. Specifically, Student asserts San Diego failed to offer appropriate placement, services, supports, goals, and present levels of performance, by failing to consider the full continuum of educational placements, provide Parents accurate information, assess Student in the area of behavior, re-evaluate Student in the areas of psychoeducation, educationally related mental health services and social and emotional functioning, and revise Student's IEP.

San Diego responds that it was not obligated to offer Student a FAPE because he was privately placed during this time frame.

On September 29, 2020, Parents notified San Diego they were privately placing Student, beginning September 30, 2020. Parents did not request changes to Student's IEP, disagree with the IEP, request reimbursement for a private placement, or ask San Diego to develop an IEP while Student was privately placed. Nor did Parents or any of his teachers request an assessment of any sort. Consequently, San Diego was not obligated to assess Student, offer a FAPE, or provide Student a FAPE, after September 30, 2020. (*Capistrano, supra*, 21 F.4th at pp.1138-40.)

Student mischaracterizes the October 9, 2020, November 5, 2020, and November 13, 2020 IEP team meetings as separate IEP offers. They were not. Following Parents' private placement of Student on September 30, 2020, San Diego mistakenly believed it had to convene an amendment IEP team meeting to disenroll Student. San Diego therefore began an amendment IEP team meeting on October 9, 2020, but continued the meeting because Mother could not attend.

Parents and San Diego exchanged emails over the next several weeks to reschedule the amendment IEP team meeting. Mother agreed with San Diego's mistaken belief that an IEP team meeting was necessary to disenroll Student and to discontinue San Diego providing Student grades while he was privately placed. Therefore, as part of the email exchange, she requested that San Diego hold the amendment IEP team meeting as soon as possible, as Parents wanted to ensure there was no question that Student was privately placed.

In sum, although Parents did not request that San Diego develop an IEP for Student while he was privately placed, San Diego held an amendment IEP team meeting over three days, October 9, 2020, November 5, 2020, and November 13, 2020. San Diego and Parents agreed the only purpose for the amendment IEP was to disenroll Student. Accordingly, Parents and San Diego agreed to disenroll Student on September 30, 2020. San Diego offered the same educational program contained in Student's February 27, 2020 annual IEP, and Parents consented in full to the amendment IEP. Parents did not request any changes to the IEP, any assessments, or for San Diego to develop an IEP for Student while he was privately placed. San Diego had no obligation to offer Student a

FAPE after Parents placed him in private school, and San Diego's IEP amendment to document disenrollment did not create an obligation to offer a FAPE after Student disenrolled.

Parents continued to privately place Student through the end of December 2021, and made clear their intent to keep Student privately placed throughout that time. For these reasons, San Diego was not obligated to develop an IEP for Student until requested to do so by Parents. (*Id.*) In sum, San Diego was not obligated to develop an IEP or offer a FAPE in October and November 2020, or through December 2021. Therefore, all of Student's claims regarding Issue 3 and Issue 4 fail as a matter of law.

Student failed to show by a preponderance of the evidence that the IEPs dated October 9, 2020, November 5, 2020, and November 13, 2020, denied Student a FAPE. San Diego prevailed on Issues 3a through 3j, and 4a through 4i.

ISSUE 5: FAILING TO REVISE THE IEP IN DECEMBER 2020

Student complains San Diego denied him a FAPE by failing to revise his IEP in December 2020. Student argues his annual IEP team meeting was due in December 2020, and that San Diego did not hold an annual IEP team meeting for Student during the 2020-2021 school year.

San Diego responds that it was not obligated to hold an annual IEP team meeting for Student while he was privately placed.

Once a student's parents place a student in a private school the school district is not required under the IDEA to develop an IEP unless the parent requests that an IEP be developed, regardless of whether a parent requested reimbursement for the private school placement. (*Capistrano, supra*, 21 F.4th at pp. 1138-40.)

Parents privately placed Student at Trails in North Carolina from October 1, 2020, through December 29, 2020. On December 30, 2020, Parents privately placed Student at Whetstone in South Carolina. Parents did not request for San Diego to hold an annual IEP team meeting in December 2020, or for San Diego to develop an IEP while Student was privately placed. Consequently, it was not necessary for San Diego to revise Student's educational program while he was privately placed, including in December 2020.

Student failed to prove by a preponderance of the evidence that San Diego denied him FAPE by failing to revise his IEP in December 2020. San Diego prevailed on Issue 5.

ISSUE 6: FAILING TO HOLD AN IEP TEAM MEETING WITHIN 30 DAYS OF PARENTS' REQUEST ON MARCH 6, 2021

Student complains that San Diego denied him a FAPE by failing to convene an IEP team meeting within 30 days of Parents' request for an IEP team meeting on March 6, 2021. San Diego responds that Parents did not request an IEP team meeting on March 6, 2021.

A school district must convene an IEP team meeting when a parent requests a meeting to develop, review, or revise the IEP. (Ed. Code, § 56343, subd. (c).) In

California, the meeting must be held within 30 days from the date of receipt of the written request, not counting days between the student's regular school sessions, terms, or days of school vacation in excess of five schooldays. (Ed. Code, § 56343.5.)

Student's issue is based upon a March 6, 2021 email, sent by Mother to San Diego employees Pamela Busch and Sue Solario. Student mischaracterizes the email as a request for an IEP team meeting. It was not. The brief email stated the following:

Hello Pamela and Sue,

I refer you to your letter of October 1, 2020 refusing to fund placement for our son, [Student's name]. I have attached an [independent educational evaluation] undertaken in December 2020 and request the District reconsider its determination to fund the placement.

Best, [Mother]

Mother also sent a copy of the email to Student's attorney at the time. The October 1, 2020 refusal referenced in Mother's email was San Diego's prior written notice of its refusal to fund a residential treatment center.

During hearing, Mother testified that she intended for the March 6, 2021 email to request an IEP team meeting. However, Mother and Father were educated professionals, represented by an attorney, and had filed a prior complaint against San Diego. Parents were capable of requesting an IEP team meeting if that is what they desired. Rather, the March 6, 2021 email was a response to San Diego's October 1, 2020 prior written notice that, for the first time, requested for San Diego to fund Student's private placement.

The March 6, 2021 email did not constitute an IEP team meeting request. San Diego was therefore not obligated to convene an IEP team meeting within 30 days of the email.

Student failed to show by a preponderance of the evidence that San Diego denied him a FAPE by failing to hold an IEP team meeting within 30 days of March 6, 2021. San Diego prevailed on Issue 6.

ISSUE 7: THE APRIL 27, 2021 IEP

Student complains that San Diego denied him a FAPE by failing to consider an independent educational evaluation by Dr. Zeisz, and by failing to make a formal, clear, and specific FAPE offer, during an April 27, 2021 IEP team meeting. San Diego responds that Student was privately placed during this time and it had no obligation to offer or provide Student with a FAPE.

An independent educational evaluation is an evaluation conducted by a qualified examiner not employed by the school district. (34 C.F.R. § 300.502(a)(3)(i).) When presented with an outside expert's report, a school district need only review and consider the report; it need not follow its recommendations. (*G.D. v. Westmoreland School Dist.* (1st Cir. 1991) 930 F.2d. 942, 947.)

An IEP must set forth a formal, specific written offer of placement. (*Union v. Smith* (9th Cir. 1994) 15 F.3d 1519, 1526, cert. denied (1994) 513 U.S. 965.)

On November 20, 2020, Dr. Zeisz conducted an independent educational evaluation of Student. At the time, Student was privately placed at Trails.

By email on March 6, 2021, Mother provided San Diego a copy of Dr. Zeisz's assessment report. Mother did not request an IEP team meeting or for San Diego to develop an IEP for Student. At the time of the email, Parents privately placed Student at Whetstone, and intended to keep Student there through December 2021.

Although not requested by Parents or required by law, San Diego held an IEP team meeting on April 27, 2021, to review Dr. Zeisz's independent educational evaluation. Parents and Dr. Zeisz attended the meeting, along with appropriate San Diego staff, including a school psychologist. Prior to the IEP team meeting, Parents notified San Diego that they had privately placed Student at Whetstone and that he would remain there through December 2021.

Dr. Zeisz thoroughly presented her report to the IEP team during the April 27, 2021 IEP team meeting. The IEP team considered Dr. Zeisz's report and determined they would need additional information, including new school district assessments, before revising Student's IEP. No changes to Student's operative IEP were offered at that time.

Therefore, Student's claim that San Diego did not consider Dr. Zeisz's independent educational evaluation is incorrect. The April 27, 2021 IEP team meeting was held to review Dr. Zeisz's independent educational evaluation and did so, thoroughly, and with school staff qualified to consider the report.

In addition, Student's claim that San Diego failed to make a formal, clear, and specific FAPE offer at the April 27, 2021 IEP is misplaced. San Diego was under no duty to offer a FAPE at that time because Parents had privately placed Student and did not request for San Diego to develop an IEP. (*Capistrano, supra*, 21 F.4th at pp. 1138-40.)

The Ninth Circuit's opinion in *Capistrano*, concerning a private placement in 2016, was published on December 30, 2021. It found that the school district had no obligation to offer a FAPE in 2016 when a student was privately placed unless the parent expressly requested an IEP, which the parent in *Capistrano* did not. San Diego did not have the benefit of the *Capistrano* decision in April 2021, and unnecessarily held an IEP team meeting to consider Student's private assessment. Even so, pursuant to *Capistrano*, San Diego owed no duty to Student to offer a FAPE in April 2021.

Student failed to show by a preponderance of the evidence that San Diego denied him a FAPE by failing to consider Dr. Zeisz's independent educational evaluation at the April 27, 2021 IEP, or by failing to make a formal, clear, and specific FAPE offer at the April 27, 2021 IEP team meeting. San Diego prevailed on Issues 7a and 7b.

ISSUES 8 AND 9: THE AUGUST 17, 2021 LETTER AND FAILING TO REVISE STUDENT'S IEP

Student complains that San Diego denied him a FAPE during the 2021-2022 school year, up to December 1, 2021, pursuant to a letter dated August 17, 2021, by failing to revise Student's IEP. Specifically, in Issue 8, Student argues the August 17, 2021 letter failed to offer a FAPE, predetermined Student's IEP, failed to include Parents in decisions regarding Student's IEP, failed to include persons knowledgeable of Student and their evaluation data when offering a placement, failed to make a clear and specific offer of FAPE, offered a FAPE without convening an IEP team meeting, and failed to consider Dr. Zeisz's independent educational evaluation.

In Issue 9, Student asserts San Diego denied Student a FAPE by failing to revise his IEP before December 1, 2021.

San Diego responds that it was not obligated to offer Student a FAPE because Parents had privately placed him at that time.

Student mischaracterizes the August 17, 2021 letter as an IEP offer. Rather, the letter was a prior written notice.

On August 17, 2021, Riley and Marcy school principal Pamela Bush sent Parents a prior written notice letter. The prior written notice letter informed Parents that San Diego was proposing to assess Student in various areas in preparation for his eventual return to the school district. The letter followed up on an April 29, 2021 assessment plan San Diego sent to Parent, and Parents consent to that plan on May 13, 2021. The letter reconfirmed Student was privately placed at Whetstone and that San Diego had proposed an assessment plan to obtain updated information to prepare for Student's eventual return to the school district. In addition, the letter informed Parents that Student's operative IEP was available for implementation, including the February 2020 annual IEP, and November 2020 amendment IEP, if they elected to reenroll Student in San Diego at an earlier time.

In preparation for Student's eventual return to San Diego, San Diego determined that new school district assessments of Student were warranted. San Diego initially assessed Student in fall 2019, and Student's mandatory three-year reassessments were not due until fall 2022. (20 U.S.C. § 1414(a)(2)(B); Ed. Code, § 56381, subd. (a)(2).) However, in light of Student being privately placed for over a year, San Diego acted cautiously to obtain updated information for Student before the three-year review. San Diego's August 17, 2021 prior written notice letter explained this to Parents.

Student argues the August 17, 2021 letter was an IEP offer. It was not. As stated on the face of the letter, it was a prior written notice of San Diego's proposal to assess

Student. The reference to Student's operative IEP merely informed Parents that San Diego was willing and able to serve Student should he return to the school district. The prior written notice did not constitute a new IEP offer, as Student alleged.

Because Parents privately placed Student, San Diego was not required to offer Student a FAPE pursuant to the August 17, 2021 letter, or at all, until Parents requested that San Diego develop an IEP. (*Capistrano, supra*, 21 F.4th at pp. 1138-40.) Consequently, Student's allegations that San Diego denied him a FAPE, based on various reasons related to the August 17, 2021 letter, are factually and legally incorrect. Similarly, Student's claim that he was denied a FAPE because San Diego did not revise his IEP while he was privately placed is also incorrect.

Student failed to show by a preponderance of the evidence that San Diego denied him a FAPE pursuant to the August 17, 2021 letter, or by failing to revise his IEP, through December 1, 2021. San Diego prevailed on Issues 8a through 8g, and 9.

ISSUE 10: FAILURE TO ASSESS AND DEVELOP AN IEP WITHIN 60 DAYS OF PARENTS' CONSENT TO THE ASSESSMENT PLAN

Student complains San Diego denied him a FAPE during the 2021-2022 school year, up to December 1, 2021, by failing to assess and develop an IEP within 60 days of Parents' consent to an assessment plan signed on May 13, 2021.

San Diego responds that it had no legal obligation under the IDEA to offer Student a FAPE while he was privately placed.

An IEP team meeting to review the results of an assessment must be held within 60 days, not counting days between a student's regular school sessions, terms, or days

of vacation in excess of five school days, from the receipt of the parent's written consent to the assessment, unless the parent agrees in writing to an extension. (Ed. Code, § 56043, subd. (f)(1).)

Parents privately placed Student from September 30, 2020, through the end of December 2021, and reenrolled Student in San Diego on January 7, 2022. Parents notified San Diego of this timeline and San Diego held an IEP team meeting for Student in advance of his return to the school district, on December 2, 2021. To develop this IEP, San Diego believed it required updated information regarding Student's needs. To acquire this information, San Diego offered Parents an assessment plan on April 29, 2021, well in advance of Student's return to San Diego.

The assessment plan proposed to assess Student in a variety of areas by qualified assessors, including academics, intellectual development, social emotional, behavior, and mental health. By email on May 13, 2021, Parents consented to the assessment plan.

Student argues San Diego should have completed the assessments and held an IEP team meeting to review the assessments by September 28, 2021, 60 calendar days following their consent, plus the summer break.

Evidence showed that San Diego did not complete the assessments within the timeline required for special education assessments. Rather, San Diego completed and reviewed the assessments during an IEP team meeting held on December 2, 2021.

However, Parents did not make Student available for assessments in California. Rather, Parents only permitted San Diego to assess Student at a private school in South Carolina. Hence, a condition to assessing Student was for San Diego to send

its assessors 2,341 miles out-of-state, because Student was residing at Whetstone, a private boarding school in South Carolina, throughout spring, summer, and fall 2021. In addition, San Diego assessors who traveled to South Carolina were delayed access to Student because of Whetstone's COVID-19 related quarantine restrictions.

Despite these conditions, San Diego sent its assessors to Whetstone during summer and fall 2021. The assessors eventually completed and reviewed their assessments at the December 2, 2021 IEP team meeting. The December 2, 2021 IEP team meeting, and review of San Diego's assessments, predated Student's return to San Diego on January 7, 2022, by over one month. Parents did not dispute any assessment and agreed in full to the IEP.

Parents unwillingness to make Student available for assessments in California, and delays caused by the private placement, eliminated San Diego's duty to complete the assessments within 60 days. It is well settled that parents may not place conditions on a school district's ability to assess. Federal courts have held that a parent who insists on placing conditions on assessments may be regarded as having refused consent to the assessments. In *G.J. v. Muscogee County Sch. Dist.* (M.D. Ga. 2010) 704 F.Supp.2d 1299 (11th Cir. 2012) 668 F.3d 1258, parents claimed to agree to a reassessment. However, they attached conditions to their approval, including requiring particular assessors, meetings with parents before and after the assessments, and limitations on the use of the assessments. The District Court deemed this a refusal to consent, noting that, with such restrictions, the parents purported consent was not consent at all. (*Id.*, 704 F.Supp.2d at p. 1309.) In affirming, the Eleventh Circuit found that parents' conditions eliminated any obligations the school district had under the IDEA for the reevaluation process. (*Id.*, 668 F.3d at p. 1264.)

Similarly, in *R.A. v. West Contra Costa Unified Sch. Dist.* (N.D.Cal., Aug. 17, 2015, Case No. 14-cv-0931-PJH) 2015 WL 4914795 [nonpub. opn.], a parent approved an assessment plan on the modest condition that she be allowed to observe the assessment when conducted. The District Court found that minor condition eliminated the parent's consent, finding this request amounted to the imposition of improper conditions or restrictions on the assessments and thereby eliminated the school district's obligation to assess the student. (*Id.* at p. 3.)

Given the foregoing, Parents' condition that San Diego send its assessors 2,341 miles to assess Student at a private school, and then to abide by restrictions set by the private school which extended their time out-of-state at great cost to San Diego, was unduly burdensome. This burdensome condition eliminated San Diego's obligation to timely assess Student.

Further, Student failed to show that he was denied a FAPE by San Diego's failure to assess and review the assessments within 60 days. A school district's failure to timely assess a student constitutes a procedural violation of the IDEA. (*R.B., ex rel. F.B. v. Napa Valley Unified Sch. Dist.* (9th Cir. 2007) 496 F.3d 932, 940.) A procedural violation of the IDEA constitutes a denial of a FAPE if the violation:

1. impeded the child's right to a FAPE;
2. significantly impeded the parent's opportunity to participate in the decision making process; or
3. caused a deprivation of educational benefits. (Ed. Code, § 56505(f)(2); *Target Range, supra*, 960 F.2d at p. 1484.)

Here, Student was privately placed by Parents, who did not anticipate Student leaving private placement until the end of December 2021. During this time, San Diego

had no obligation to develop an IEP for Student, as Parents did not request an IEP. (*Capistrano, supra*, 21 F.4th at pp. 1138-40.) Nonetheless, San Diego completed the assessments and reviewed the assessments with Parents during an IEP team meeting held on December 2, 2021. Parents consented in full to the December 2, 2021 IEP, and did not dispute any of the assessments. San Diego was unable to implement the IEP until Parents placed Student back in public school, which occurred on January 7, 2022. Hence any delay to the assessments or IEP to review the assessments caused no harm to Student or Parents.

Student failed to show that San Diego's failure to complete the assessments and hold an IEP team meeting by September 28, 2021, more than three months before Student's return to San Diego, impeded his right to a FAPE, significantly impeded Parents' opportunity to participate in the decision-making process, or caused a deprivation of educational benefits.

Student failed to prove by a preponderance of the evidence that San Diego denied him a FAPE, by failing to assess and hold an IEP team meeting within 60 days of Parents' consent to an assessment plan signed on May 13, 2021. San Diego prevailed on Issue 10.

ISSUE 11: THE OCTOBER 8, 2021 IEP TEAM MEETING

Student complains that San Diego denied him a FAPE, by failing to offer a FAPE at an October 8, 2021 IEP team meeting. San Diego responds that it was not obligated to offer Student a FAPE while he was privately placed.

Student mischaracterizes the October 8, 2021 IEP team meeting. San Diego initially scheduled an IEP team meeting on October 8, 2021, to review the assessments agreed to by Parents on May 13, 2021. However, the assessments were not completed by that time. Accordingly, the IEP team briefly met on October 8, 2021, and agreed to continue the IEP team meeting to December 2, 2021, to provide San Diego additional time to complete the assessments. Parents agreed to the continuance and the IEP team met on December 2, 2021, during which the IEP team reviewed the assessments.

As found in Issue 10, San Diego's delay in completing the assessments and holding an IEP team meeting to review the assessments, did not deny Student a FAPE. Similarly, San Diego was not obligated to develop an IEP for Student while he was privately placed. Consequently, it was not necessary for San Diego to offer Student a FAPE on October 8, 2021.

Student failed to prove by a preponderance of the evidence that San Diego denied him a FAPE, by failing to offer a FAPE at an October 8, 2021 IEP team meeting. San Diego prevailed on Issue 11.

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.

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ISSUES 1a THROUGH 1c:

San Diego did not deny Student a FAPE, during the 2020-2021 school year, beginning August 31, 2020, through October 9, 2020, by failing to

- a. implement Student's individualized education program,
- b. offer or implement services and supports for mental health, or
- c. assess in the area of behavior.

San Diego prevailed on this issue and sub-issues.

ISSUE 2:

San Diego did not deny Student a FAPE during the 2020-2021 school year, by failing to provide prior written notice of its decision to not place Student at a residential treatment center.

San Diego prevailed on this issue.

ISSUES 3a THROUGH 3j:

San Diego did not deny Student a FAPE, pursuant to an October 9, 2020 IEP, by failing to

- a. offer an appropriate placement,
- b. offer appropriate supports and services,
- c. offer appropriate annual goals,
- d. include legally sufficient present levels of performance,
- e. make a clear and specific FAPE offer,
- f. consider the full continuum of educational placements,

- g. assess Student in the area of behavior prior to the IEP team meeting,
- h. re-evaluate Student in the areas of psychoeducation, educationally related mental health services, and social and emotional functioning,
- i. revise Student's IEP, or
- j. by predetermining the IEP.

San Diego prevailed on this issue and sub-issues.

ISSUES 4a THROUGH 4i:

San Diego did not deny Student a FAPE, pursuant to a November 5, 2020, and November 13, 2020 IEP, by failing to

- a. offer an appropriate educational placement,
- b. offer appropriate services and supports,
- c. offer appropriate goals,
- d. include legally sufficient present levels of performance,
- e. consider the full continuum of educational placements,
- f. provide Parents accurate information,
- g. assess Student in the area of behavior,
- h. re-evaluate Student in the areas of psychoeducation, educationally related mental health services and social and emotional functioning, or
- i. revise Student's IEP.

San Diego prevailed on this issue and sub-issues.

ISSUE 5:

San Diego did not deny Student a FAPE in December 2020, by failing to revise Student's IEP.

San Diego prevailed on this issue.

ISSUE 6:

San Diego did not deny Student a FAPE, by failing to hold an IEP team meeting within 30 days of Parents' request on March 6, 2021.

San Diego prevailed on this issue.

ISSUES 7a AND 7b:

San Diego did not deny Student a FAPE, pursuant to an April 27, 2021 IEP, by

- a. failing to consider an independent educational evaluation by Dr. Zeisz, or
- b. failing to make a formal, clear, and specific FAPE offer.

San Diego prevailed on this issue and sub-issues.

ISSUES 8a THROUGH 8g:

San Diego did not deny Student a FAPE during the 2021-2022 school year, up to December 1, 2021, pursuant to an August 17, 2021 letter, by

- a. failing to offer a FAPE,
- b. predetermining Student's IEP,
- c. failing to include Parents in decisions regarding Student's IEP;
- d. failing to include persons knowledgeable of Student and their evaluation data when offering a placement,
- e. failing to make a clear and specific offer of FAPE,
- f. offering a FAPE without convening an IEP team meeting, or
- g. by failing to consider an independent educational evaluation by Dr. Zeisz.

San Diego prevailed on this issue and sub-issues.

ISSUE 9:

San Diego did not deny Student a FAPE during the 2021-2022 school year, up to December 1, 2021, by failing to revise Student's IEP.

San Diego prevailed on this issue.

ISSUE 10:

San Diego did not deny Student a FAPE during the 2021-2022 school year, up to December 1, 2021, by failing to assess and develop an IEP within 60 days of Parents' consent to an assessment plan signed on May 13, 2021.

San Diego prevailed on this issue.

ISSUE 11:

San Diego did not deny Student a FAPE during the 2021-2022 school year, up to December 1, 2021, by failing to offer a FAPE at the October 8, 2021 IEP team meeting.

San Diego prevailed on this issue.

ORDER

All of Student's claims for relief are denied.

RIGHT TO APPEAL THIS DECISION

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

PAUL H. KAMOROFF

Administrative Law Judge

Office of Administrative Hearings