

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

CASE NO. 2022090902

PARENTS ON BEHALF OF STUDENT,

v.

PALM SPRINGS UNIFIED SCHOOL DISTRICT.

DECISION

APRIL 12, 2023

On September 27, 2022, Parent on behalf of Student filed a due process hearing request with the Office of Administrative Hearings, called OAH, naming Palm Springs Unified School District, called Palm Springs. On October 28, 2022, OAH granted the parties' hearing continuance request. Administrative Law Judge Cynthia Fritz heard this matter by videoconference on February 7, 8, 9, 10, 13, and 14, 2023.

Attorney Wendy Dumlao represented Student. Parent attended all hearing days on Student's behalf. Student did not attend the hearing.

Attorneys Maria Gless and Austin Jones represented Palm Springs. Program Specialist Sofia Wagner attended the February 7, 8, 9, and 10, 2023 hearing days, and Interim Special Education Director Jodi Curtis attended the February 13 and 14, 2023 hearing days, on Palm Springs' behalf.

At the parties' request, OAH continued this matter to March 6, 2023, for closing briefs. On March 6, 2023, the record closed and the matter was submitted for decision.

ISSUES

1. Did Palm Springs deny Student a free appropriate public education, called FAPE, from September 27, 2020, through the 2020-2021 extended school year, by failing to:
 - a. adequately assess in the areas of social-emotional and behavior;
 - b. offer resource time that would not interfere with core curriculum classes;
 - c. offer appropriate specialized academic instruction;
 - d. offer appropriate reading intervention services;
 - e. offer appropriate counseling and behavior aids, services, and supports;
 - f. offer appropriate aide services and supports;
 - g. offer an appropriate behavior intervention plan;
 - h. offer a one-to-one aide during distance learning;
 - i. implement Student's individualized education program, called IEP, during distance learning, specifically from September 27, 2020, through April 2021; and
 - j. offer extended school year services?

2. Did Palm Springs deny Student a FAPE, during the 2021-2022 school year through extended school year, by failing to offer:
 - a. resource time that would not interfere with core curriculum classes;
 - b. appropriate specialized academic instruction;
 - c. appropriate reading intervention services;
 - d. appropriate counseling and behavior aids, services, and supports;
 - e. appropriate aide services and supports;
 - f. an appropriate behavior intervention plan;
 - g. adequate toileting aids, services, and supports;
 - h. adequate compensatory speech services;
 - i. adequate compensatory specialized academic instruction; and
 - j. extended school year services?

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 (2006); 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.Ed2d 387]; and see 20 U.S.C. § 1415(i)(2)(C)(iii).) As the petitioning party, Student bore the burden of proof on all issues. The factual statements in this Decision constitute the written findings of fact required by the IDEA and state law. (20 U.S.C. § 1415(h)(4); Ed. Code, § 56505, subd. (e)(5).)

Student was 10 years old and in fifth grade at the time of hearing. Student resided with Parent within the geographic boundaries of Coachella Valley Unified School District. Student attended Palm Springs on a transfer permit. Student's diagnoses are

- autism spectrum disorder;
- attention deficit hyperactivity disorder, called ADHD; and
- Facioscapulohumeral Muscular Dystrophy.

Student qualified for special education eligibility under the categories of autism and other health impairment in November 2018. Student struggles with

- reading,
- writing,
- math,

- receptive and expressive language,
- pragmatics,
- inattention, and
- behavior.

The issue determinations below are reorganized for clarity.

PRELIMINARY ISSUE: DETERMINATION OF OPERATIVE IEP'S

Student maintains the only consented to IEP for the relevant time was the October 29, 2019 IEP. Neither party disputes that Parent consented to this IEP offer. This was the operative IEP at the start of the statutory period.

Palm Springs asserts Parent also consented to the October 26, 2020 IEP on November 6, 2020. Parent claims her November 6, 2020 signature was forged.

The IEP is the “centerpiece of the [IDEA’s] education delivery system for disabled children” and consists of a detailed written statement that must be developed, reviewed, and revised for each child with a disability. (*Honig v. Doe* (1988) 484 U.S. 305, 311 [108 S.Ct. 592, 98 L.Ed.2d 686]; 20 U.S.C. §§ 1401(14), 1414(d)(1)(A); Ed. Code, §§ 46032, 56345.) An IEP provides a statement of the special education, related services, and program modifications and accommodations that will be provided for the child to advance in attaining the goals, make progress in the general education curriculum, and participate in education with disabled and nondisabled peers. (20 U.S.C. §§ 1401(14), 1414(d)(1)(A); Ed. Code, §§ 56032, 56345, subd. (a)(1)(A).)

Parents must provide informed, written consent before a school can implement any changes to a student’s IEP offer. (34 C.F.R. §§ 300.300(b) (2008).) Consent means

that the parent has been fully informed of all relevant information regarding the proposed action and understands and agrees in writing to it. (34 C.F.R. §§ 300.300(b) (2008); 300.9 (2008); Ed. Code, § 56021.1.)

Palm Springs requested Parent's consent to the October 26, 2020 IEP on November 6, 2020, by sending a digital request for her signature through electronic mail. Parent acknowledged receipt of the electronic message and electronically signed the IEP. Parent states the signature is different from her previous signatures and was forged. No evidence was presented that the electronic mail address used by Palm Springs was incorrect or that other people had access to Parent's computer, phone, or electronic mail. Thus, Parent's allegation was unpersuasive.

The weight of the evidence showed that Parent consented to the October 26, 2020 IEP on November 6, 2020. This became the operative IEP as of November 6, 2020, and remained operative through the relevant time in this matter, extended school year 2022.

ISSUES 1A: FAILING TO ADEQUATELY ASSESS IN SOCIAL-EMOTIONAL AND BEHAVIOR DURING THE 2020-2021 SCHOOL YEAR

Student contends that Palm Springs knew of Student's inattention challenges during distance learning and his failure to meet all his behavioral goals, warranting a reassessment in social-emotional functioning and behavior. Palm Springs maintains that reassessments were not required as Student had been assessed in social-emotional and behavior in 2018, it was aware of his inattention issues which could be easily redirected, and no new social-emotional or behavioral concerns arose during that time.

Before deciding whether a child qualifies for special education services, a school district must assess the child in all areas of suspected disability. (20 U.S.C. § 1414(a), (b)(3)(B); Ed. Code, §§ 56320, 56321.) A disability is “suspected,” and a child must be assessed, when the district is on notice that the child has displayed symptoms of that disability or disorder. (*Timothy O. v. Paso Robles Unified Sch. Dist.* (9th Cir. 2016) 822F.3d 1105, 1119.) Such notice may come in the form of concerns expressed by parents about a child’s symptoms, opinions expressed by informed professionals, or other less formal indicators, such as the child’s behavior. (*Id.* at p. 1120 [citing *Pasatiempo by Pasatiempo v. Aizawa* (9th Cir. 1996) 103 F.3d 796 and *N.B. v. Hellgate Elementary Sch. Dist.*, 541 F.3d 1202].)

The IDEA provides for reevaluations, referred to as reassessments in California law, to be conducted not more frequently than once a year unless the parent and school district agree otherwise, but at least once every three years unless the parent and school district agree that a reevaluation is not necessary. (20 U.S.C. § 1414(a)(2)(B); 34 C.F.R. § 300.303(b) (2006); Ed. Code, § 56381, subd. (a)(2).) A reassessment must also be conducted if a school district determines that the educational or related service needs of a student warrant reassessment, or if the student’s parents or teacher request a reassessment. (20 U.S.C. § 1414(a)(2)(A)(i); see also Ed. Code, § 56381, subd. (a)(1).)

Student failed to show that Palm Springs should have reassessed him in social-emotional functioning and behavior from September 27, 2020, through the 2020-2021 school year. In 2018, Student was diagnosed with autism spectrum disorder and ADHD. Student entered Palm Springs through an inter-district transfer in first grade, August 2018. Soon after entry, Palm Springs conducted an initial special education assessment, including social-emotional and behavior assessments and found Student qualified for special education under the autism and other health impairment categories.

The following year, on October 29, 2019, the IEP team determined that Student had behavior needs with task initiation and completion, on-task participation, and keeping hands to himself. The October 2019 IEP team developed goals in task initiation and completion, on-task participation, and behavior regulation, and offered a behavior intervention plan to address aggressive behavior. It offered preferential seating, visual cues, positive reinforcement, access to an exercise band, frequent checks for understanding, prompts, modeling, verbal praise, review of social stories, participation chips for attention, and behavior consultation between the general education teacher and special education teacher, as behavior accommodations and interventions. Palm Springs also offered numerous accommodations to assist Student with academics. Parent consented to this IEP. Palm Springs knew of Student's social-emotional functioning and behavior needs at the time of the October 2019 IEP team meeting.

In March 2020, during Student's second grade school year at Palm Springs, the COVID-19 pandemic occurred and California schools closed. 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. On March 20, 2020, the California Department of Education, CDE, issued guidance urging local educational agencies to continue providing special education and related services as outlined in a student's IEP, through a distance learning model. (Cal. Dept. of Educ., Special Education Guidance for COVID-19 (March 20, 2020).) CDE's guidance also allowed local educational agencies to consider providing services at home, individually at school sites, or other appropriate locations. (*Ibid.*) The delivery of in-person services was discretionary and not required.

Student's third grade year began August 5, 2020, and Student received his education through a distance learning format through April 11, 2021. On April 12, 2021, through the end of the 2020-2021 school year, Student received his education through a hybrid learning model. During hybrid learning, Student attended in-person classes and received special education and related services two times a week for a portion of the day and distance learning for the rest of the week.

None of the federal or state guidance concerning special education and services during the COVID-19 pandemic required assessments to deliver special education and related services through a distance learning format. California Senate Bill 98 explicitly authorized distance learning and did not condition it on assessments of each student receiving special education and related services. (Ed. Code, § 43500, subd. (b), as added Stats. 2020, Ch. 24 (S.B. 98), § 34.)

On August 26, in the fall 2020, Parent expressed concerns about Student's progress and requested Student be retained for the year in second grade. The IEP team at that time determined that Student was making progress on his IEP goals but acknowledged Student had challenges with distance learning including inattention which required more prompting and redirection.

Instead of retention, Palm Springs believed Student required more special education support and would set up a schedule with the autism special day class teacher to receive some of his specialized academic support in this smaller setting while in distance learning. This setting included a small teacher to student ratio, and support with a classroom teacher and at least one teacher's aide. Parent consented to Palm

Springs' offer on September 16, 2020. Palm Springs knew Student had additional behavior and social-emotional needs at the start of the 2020-2021 school year and offered supports and services to address those needs.

Student's IEP team convened on October 26, 2020. Parent expressed concerns with Student's progress during distance learning due to his inattention issues. At that time, Student partially met or met all his behavior, academic, and speech and language goals demonstrating educational progress. The team acknowledged that Student had greater challenges with inattention and work completion during distance learning and needed multiple verbal and visual prompts and direction to engage, but he could be redirected by his teachers and service providers online.

The October 2020 IEP team determined that Student continued to have behavior needs with behavior regulation, task initiation and completion, and on-task participation, and updated his behavior goals. Palm Springs offered Student different and additional accommodations and interventions related to his behavior needs. The behavior intervention plan continued to be in place for keeping hands to himself. Palm Springs also offered numerous accommodations to assist him in his academics.

It also offered Student a distance learning plan. The Distance Learning IEP Aligned Plan offered accommodations that could be implemented across settings, like

- extra time to complete work,
- frequent checks for understanding,
- reminder cues for redirection,
- graphic organizers,
- a math chart,

- word banks,
- text-to-speech,
- verbal cues for redirection and to maintain attention,
- directions repeated with visual cues,
- positive reinforcement for on-task behavior and participation, and
- accommodations unique to a virtual setting like smaller Zoom breakout rooms.

The virtual autism special day class included an aide to assist students along with the teacher. At that time, Palm Springs knew of Student's behavior and social-emotional needs and offered behavior interventions and supports to address them.

The following year, Palm Springs reviewed Student's October 2020 IEP behavior goals. Student met his behavior regulation goal, and partially met his behavior task initiation completion goal, and met or partially met all his academic and speech and language goals. This showed Student's progress during distance learning and hybrid learning. No Palm Springs witness or any other witness, including Parent, expressed any other concerns with social-emotional functioning or behavior except the inattention and work completion issues. No one requested reassessment of Student in social-emotional and behavior throughout the 2020-2021 school year.

Palm Springs was not required to reassess Student until November 2021 for his triennial assessments. The evidence did not establish a need to reassess Student earlier during distance learning and hybrid learning during the 2020-2021 school year because Palm Springs knew Student's current social-emotional status and behavior needs as corroborated through the documentary and testimonial evidence.

Accordingly, Student failed to prove Issue 1a. Student failed to prove by a preponderance of the evidence that Palm Springs should have assessed Student in social-emotional and behavior from September 27, 2020, to the end of the 2020-2021 school year, including extended school year.

ISSUE 1f, 1h, AND 2e: FAILING TO OFFER A ONE-TO-ONE AIDE DURING DISTANCE LEARNING AND APPROPRIATE AIDE SUPPORTS, FROM SEPTEMBER 27, 2020, THROUGH THE 2021-2022 SCHOOL YEAR, INCLUDING EXTENDED SCHOOL YEAR

Student contends that Palm Springs denied him a FAPE because he required one-to-one, in-person, aide support and additional aide supports and services for his inattention and learning issues during distance learning and in-person learning. Student also asserts that he required more aide support during in-person learning due to his behavioral meltdowns. Palm Springs maintains no additional aide support or services were required to meet Student's needs.

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 (2006).) 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 (2007), 300.321 (2006), and 300.501 (2006).)

Whether a student was offered or denied a FAPE is determined by looking to what was reasonable at the time the IEP was developed, not in hindsight. (*Adams v. State of Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149, citing *Fuhrmann v. East Hanover Bd. of Education* (3rd Cir. 1993) 993 F.2d 1031, 1041.)

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

In resolving the question of whether a school district has offered a FAPE, the focus is on the adequacy of the school district's proposed program. (*Gregory K. v. Longview Sch. Dist.* (9th Cir. 1987) 811 F.2d 1307, 1314.) For a school district's offer of special education services to a disabled pupil to constitute a FAPE under the IDEA, a school district's offer must be designed to meet the student's unique needs, comport with the student's IEP, and be reasonably calculated to provide the student with some educational benefit in the least restrictive environment. (*Ibid.*)

In the case of a child whose behavior impedes his or her learning or that of others, the IEP team must consider, when appropriate, "strategies, including positive behavioral interventions, strategies, and supports to address that behavior." (20 U.S.C. § 1414(d)(3)(B)(i); 34 C.F.R. § 300.324(a)(2)(i) (2006); Ed. Code, § 56341.1, subd.(b)(1).)

STUDENT FAILED TO PROVE THAT STUDENT REQUIRED A ONE-TO-ONE AIDE AND OTHER AIDE SERVICES AND SUPPORTS DURING THE 2020-2021 SCHOOL YEAR

Two witnesses, Parent and Chantelle Zepada, endorsed one-to-one, in-person, aide support during distance learning, although neither one communicated that request to Palm Springs during the 2020-2021 school year. Parent hired Zepada, a family friend with a master's degree in communicative sciences and disorders, to assist Student during distance learning in 2020. Zepada was not familiar with Student's IEP, behavior and academic supports and accommodations, or his behavior intervention plan.

Zepada assisted Student in-person at her residence with distance learning and work completion. Zepada maintained Student needed one-to-one behavioral aide support during distance learning for his executive functioning deficits, transitions, and time management. She explained that he needed breaks about every 30 minutes and would get off task after a few minutes if she was not present. Zepada, however, conceded that she would step away at times while Student was participating in distance learning, and Student could be redirected quickly when inattentive. Thus, Zepada's opinion about the need for a one-to-one aide was inconsistent with Student's ability as described and was given less weight.

When Zepada was unavailable, Parent sent Student to a day care facility to participate in his distance learning during the 2020-2021 school year. Parent asserted that day care staff regularly redirected Student, gave breaks, provided headphones, and moved his desk to assist him with distance learning. Parent also alleged that Student went to Lego game sites on his computer during class. Because of these issues, Parent argued Student required a one-to-one aide support for his inattention and learning.

Bonnie Keane, Student's credentialed third grade teacher, noted that staff at the day care were redirecting Student too much and characterized the facility as noisy. While Keane agreed that Student needed more direction and prompts during distance learning, she established that she could easily redirect him over the distance learning Zoom application. Keane explained that Student was too dependent on the day care staff and their support was interfering with his ability to work independently during distance learning. Keane repeatedly asked the day care staff to stop redirecting him.

Keane was able to tell through a computer application if Student was going on non-school computer sites and agreed that he did do so during distance learning. However, Keane could redirect Student back to his schoolwork when that occurred, and she did. Keane did not support a one-to-one behavioral or instructional aide or any additional aide support for Student during distance learning as the supports and accommodations provided for in Student's IEP were appropriate to meet Student's needs at that time.

In April 2021, Student began hybrid learning and attending school in-person two days per week with approximately 24 other students. Student did not need any aide support during hybrid learning as he readily responded to Keane's redirection in his IEP accommodations and supports. Keane established that Student made progress academically and behaviorally through distance learning and hybrid learning.

Keane's opinion was detailed and based on her personal knowledge of Student as his teacher during distance learning and hybrid learning. She was sincere and convincing, and her testimony was supported by other documentary and testimonial evidence. Thus, Keane's opinion was given great weight.

Paula Kadubeck, Student's credentialed special education resource teacher, worked with Student on some of his small group specialized academic instruction during distance learning and hybrid learning. Kadubeck, like Keane, observed that Student could participate independently in distance learning and hybrid learning with his teachers' and service providers' virtual redirection and prompts and that he was making progress. She agreed with Keane and Zepada that Student could be redirected. Kadubeck did not endorse behavioral or instructional one-to-one aide support or any aide support for Student as Student's IEP interventions and supports met Student's needs.

Kadubeck was knowledgeable and her opinion was based on personal experience delivering instruction to Student during the 2020-2021 school year. Her opinion withstood cross examination. Thus, Kadubeck's opinion was given substantial weight.

Student's expert, Dr. Kuo, who had doctorates in medicine and educational psychology, generally opined that Student needed more support but focused on academic support not behavior support. Dr. Kuo recommended individualized one-to-one academic instruction and tutoring support, not aide support. Dr. Kuo failed to give an opinion as to whether Student needed any type of aide support.

Student had greater challenges with attention and work completion during distance learning and hybrid learning, and required more direction and prompts to engage in school. However, Student met or partially met his academic and behavior goals for the 2020-2021 school year showing progress during distance and hybrid learning. Student's autism special day class had an aide assigned to the class to give additional support to all students. Student could independently log onto the computer to access distance learning and even maneuver to other preferred sites. Palm Springs

staff easily redirected him without the need for a one-to-one aide. No other evidence was presented regarding the need for any other aide supports or services during the 2020-2021 school year, including extended school year.

Student received educational benefit during distance and hybrid learning as evidenced by his goal progress reports in October 2020 and October 2021. The evidence showed Student did not require any type of one-to-one aide during distance learning and hybrid learning or any other additional aide support or services during the 2020-2021 school year.

Student failed to prove Issue 1f and 1h. Student failed to prove by the preponderance of the evidence that Palm Springs denied Student a FAPE by failing to offer one-to-one aide support during distance learning, and other aide services and supports from September 27, 2020, through the end of the 2020-2021 school year, including extended school year.

STUDENT FAILED TO PROVE THAT PALMS SPRINGS OFFERED INADEQUATE AIDE SERVICES AND SUPPORTS DURING THE 2021-2022 SCHOOL YEAR

Student began fourth grade on August 4, 2021, and attended in-person learning at school. During fourth grade, Student received group aide support in his autism special day class and toileting support, and the other behavior and academic supports and interventions already summarized. Parent did not request one-to-one aide support until March 30, 2022. Parent asserted at hearing that Student required a one-to-one aide for the entirety of the school year to help with Student attending in class, work completion, and his behavioral meltdowns.

In October 2021, Palm Springs completed Student's triennial assessments including testing in

- cognitive,
- social-emotional,
- behavior,
- attention,
- health,
- academics, and
- speech.

Kadubeck completed Student's academic testing. School psychologist Michelle Baker conducted Student's cognitive, social-emotional, behavior, and attention assessments and conducted interviews, including Student's fourth grade teacher, Alissah Gil. Gil asserted that Student interacted well with friends and classmates, communicated his interests, shared during morning meetings, and followed directions when prompted. Gil reported that his behavior and interactions were typical but he resisted transitions and directions when involved in preferred activities. Gil did not recommend any type of aide services or supports for Student at that time.

The October 2021 assessments showed that Student exhibited behavior related to

- autism spectrum disorder,
- significant inattention in the classroom,
- difficulty shifting and sustaining attention to multiple cues,
- an impulsive response style, and
- challenges with social perception.

Student had academic weaknesses in reading fluency, reading comprehension, math calculations, math problem solving, and oral language. The assessment team recommended a variety of behavior and academic accommodations and interventions to support Student but did not recommend any additional aide services or supports.

Palm Springs reviewed the assessments at the October 26, 2021 IEP team meeting. Parent expressed concerns with Student's speech and reading comprehension at that time but did not request any one-to-one aide support or additional aide support. In fact, no one requested additional aide services or supports for Student at the time of the October 2021 IEP team meeting. However, Palm Springs did not complete the meeting and it was continued to November 16, 2021.

At the November 2021 IEP team meeting, Palm Springs discussed Student's present levels of performance. No team member, including Parent, requested additional aide support and services. Additionally, no one presented any information that would put Palm Springs on notice that Student needed additional aide services and supports, including one-to-one aide support. The meeting was continued to February 18, 2022.

At the February 18, 2022 IEP team meeting, Palm Springs discussed Student's behavior needs and supports related to his attention and transitioning issues and proposed behavior strategies, interventions and supports. Student's behavior had improved as he no longer exhibited aggressive behaviors. Palm Springs discussed his behavior intervention plan that would assist with focus in class. Parent asked clarifying questions but did not request one-to-one aide support or additional aide services and supports. Further, no other IEP team member discussed concerns with the behavior intervention and supports or the need for additional aide services and supports. The IEP team continued the meeting to February 24, 2022.

On February 24, 2022, no one requested Student receive a behavior or academic aide. Instead, Parent requested one-to-one specialized academic instruction and a consistent toileting aide. Student's toileting issue will be discussed below in Issue 2g. The IEP team continued the meeting to March 30, 2022.

On March 30, 2022 IEP team meeting, Palm Springs offered a variety of behavior goals, interventions and supports including

- a goal in task initiation and completion,
- behavior consultation,
- preferential seating,
- simplifying directions,
- giving one direction at a time,
- providing cues before giving directions,
- warning before transitions,
- posing questions directly to Student to increase participation,
- posing questions in multiple choice format, and
- providing sentence starters.

It also offered numerous academic accommodations and interventions. Student's advocate requested a related services independence assistance assessment to evaluate Student for a one-to-one aide for behavior, and for one-to-one instructional support for academics. Palm Springs agreed to assess Student for one-to-one aide support.

Palm Springs's aide support assessment was completed September 1, 2022, after the relevant time in this matter. After acquired evidence may shed light on the objective reasonableness of a school district's actions at the time the school district rendered its decision. (*E.M. v. Pajaro Valley Unified Sch. Dist.* (9th Cir. 2011) 652 F.3d. 999,1006.)

Licensed and credentialed school psychologist Anthony Duong, who holds a master's degree in educational psychology and has over 15 years of experience conducting assessments, completed the aide support assessment. Duong reviewed Student records including prior assessments and gathered functional, behavioral, and developmental information in preparing for the assessment. He gathered Parent, teacher, and Student input, including interviewing both Student's general education teacher and the special education resource teacher.

For the assessment, Baker, behavior interventionist Paula Soufl, and Duong observed Student. Baker observed Student twice in his general education classroom in May 2022. Soufl observed Student twice in May 2022 at lunch, recess, during transitions, and in his general education classroom. Duong observed Student five times in August 2022

- in his general education classroom,
- during morning transition,
- lunch,
- lunch transition,
- recess,
- afternoon transition, and
- during his specialized academic instruction.

Baker, Soufl, and Duong's observations showed that Student independently navigated the classroom, obtained correct materials, followed most class rules, and responded favorably to check-ins and redirection. The observations demonstrated that Student did not display challenges requiring a one-to-one aide.

Duong also conducted two assessments. The Peer Comparison Rating Scale compared Student's learning behaviors to that of his classmates. The results found no significant behavior issues. The Related Services Independence Assistance Rubric collected ratings with respect to health, behavior, instruction, and inclusion mainstreaming. Student's fifth grade general education teacher Allison Collins, Student's fifth grade resource teacher Diane Riley, Gil, Kadubeck, Soufl, Baker, and Duong completed the ratings. Instruction was generally ranked as a significant need while all other categories showed rankings from minor to moderate. Gil was the only rater that scored Student in the severe needs range for instruction.

The data from the assessments showed that Student needed extra support in

- instruction through visual supports,
- more verbal and nonverbal cues,
- teacher check-in,
- a visual schedule,
- small group academic instruction, and
- lower student to teacher ratios.

The data did not support a need for a one-to-one behavior or instructional aide or any additional aide support or services. At hearing, Duong opined Student needed increased small group specialized academic instruction support because of concerns related to Student's reading ability. Duong endorsed a teacher for his academic support, such as a special education teacher, not an aide. Duong was knowledgeable and his testimony was detailed and well-reasoned. Cross-examination did not reveal any significant shortcomings. Thus, Duong's testimony was given great weight.

Student argued that Gil endorsed one-to-one aide support for Student. This argument was not supported by the evidence. At hearing, Gil endorsed having a classroom aide in her general education classroom, not one-to-one aide support for Student. She believed an aide in the classroom would be beneficial in providing extra assistance to all her students, including Student. Gil attended Student's October 2021, November 2021, and February 2022 IEP team meetings and did not mention or recommend additional aide services or supports for Student at that time. Thus, Gil's opinion was given less weight because she never communicated this information in the four IEP team meetings she attended or throughout the 2021-2022 school year. Additionally, no other Palm Springs staff member, including Kadubeck, who continued to provide specialized academic instruction to Student in fourth grade, maintained Student needed a one-to-one instructional or behavioral aide or additional aide services or supports. Nor did the assessment data support Gil's opinion.

Palm Springs agreed that Student had issues with inattention and work completion. It also conceded that Student had about four to five behavioral meltdowns during the 2021-2022 school year. One involved him scratching himself, but Student was able to be redirected within five minutes. Palm Springs staff generally agreed that Student was significantly inattentive but responded to redirection quickly. The evidence showed that Student made progress behaviorally and academically during the 2021-2022 school year and could function independently with the behavior supports and interventions offered through his IEP. Student's academic and toileting needs, addressed in detail below, also did not warrant additional aide services and supports.

Thus, Student failed to prove Issue 2e. Student failed to prove by a preponderance of the evidence that Palm Springs denied Student a FAPE for failing to offer appropriate aide services and supports from September 27, 2020, through the 2021-2022 school year, including extended school year.

ISSUE 1e AND 2d: FAILING TO OFFER APPROPRIATE COUNSELING AND BEHAVIOR AIDS, SERVICES, AND SUPPORTS FROM SEPTEMBER 27, 2020, THROUGH 2021-2022 SCHOOL YEAR, INCLUDING EXTENDED SCHOOL YEAR

Student generally asserted a need for additional behavior support. Palm Springs maintained that it offered Student appropriate behavior aids, services, and supports.

Related services are transportation and other developmental, corrective, and supportive services that are required to assist the child in benefiting from special education and may include counseling and behavior services when appropriate. (20 U.S.C. § 1401(26); 34 C.F.R. § 300.34 (2006); Ed. Code, § 56363, subd. (a) [in California, related services are also called designated instruction and services].)

Student presented neither documentary or testimonial evidence at hearing that Student needed or required counseling or behavior services. Dr. Kuo generally opined that Student needed additional academic one-to-one instruction but did not endorse additional behavior aids, services, and supports.

Student presented evidence supporting his need for visual supports and prompts, redirection, and check ins. Palm Springs offered all these behavioral interventions, strategies, and supports for Student's behavioral needs in the operative IEPs.

Student also argued that because Student's on-task participation goal was not met for the 2021-2022 school year that unspecified behavior aids, services, and supports were needed. A student, however, may derive educational benefit if some of the goals and objectives are not fully met, or if the student makes no progress towards some of them if the student makes progress toward others. (Rowley, *supra* 458 U.S. at pp. 202-203.) Here, Student met or partially met other behavior goals and his academic and speech goals. Thus, Student made progress and the assertion was unconvincing.

Student failed to prove Student's Issues 1e and 2d. Student failed to show by a preponderance of the evidence that Palm Springs failed to offer appropriate counseling, behavior aids, services, or supports from September 27, 2020, through the 2021-2022 school year, including extended school year.

ISSUE 1g AND 2f: FAILING TO OFFER APPROPRIATE BEHAVIOR INTERVENTION PLANS FROM SEPTEMBER 27, 2020, THROUGH 2021-2022 SCHOOL YEAR, INCLUDING EXTENDED SCHOOL YEAR

Student asserted that Palm Springs should have updated Student's behavior intervention plan during distance learning and in-person learning because the plan only addressed peer interactions on campus and should have addressed Student's inattention issues. Student failed to meet his burden in proving this issue.

A school district must develop a behavior support plan if the IEP team finds that the child's behavior impedes his own learning or the learning of others. (34 C.F.R. § 300.324 (a)(2)(1) (2006).)

Student's behavior intervention plan from September 27, 2020, through the end of the 2020-2021 school year addressed aggressive behavior with peers that occurred

when Student physically attended school. The behavior plan did not address behaviors during distance learning. Although the behavior plan was not specific to distance learning, Student did not establish that he required an updated behavior intervention plan.

Student had behavior goals and numerous accommodations and strategies that addressed Student's attention and task completion needs. Further, Student's teachers easily redirected him during distance learning and hybrid learning. Student failed to prove that Student's behavior during the 2020-2021 school year impeded his learning or the learning of others. The evidence showed that he made behavioral progress and received educational benefit during distance learning without an updated behavior intervention plan. Thus, Student failed to show that the failure to update the behavior intervention plan denied Student a FAPE. Student failed to prove Issue 1g.

Since August 4, 2021, Palm Springs moved to a full-time in-person learning model and Student attended school in-person. In the 2021-2022 school year, Palm Springs offered Student a behavior intervention plan related to Student's focus and work completion in class while he attended school in person. Palm Springs also offered a positive behavior tracking system that noted Student's listening, following directions, doing work, and copying from the board daily. Student failed to address this behavior intervention plan in his closing brief and no evidence was presented at hearing that disputed its appropriateness.

Thus, Student failed to prove Issue 2f. Student failed to show by a preponderance of the evidence that Palm Springs failed to offer appropriate behavior intervention plans from September 27, 2020, through the 2021-2022 school year, including extended school year.

ISSUES 1b AND 2a: FAILING TO OFFER RESOURCE TIME THAT WOULD NOT INTERFERE WITH CORE CURRICULUM CLASSES FROM SEPTEMBER 27, 2020, TO THE 2021-2022 SCHOOL YEAR, INCLUDING EXTENDED SCHOOL YEAR

Student contends Palm Springs denied Student a FAPE by failing to offer resource time that did not interfere with core curriculum classes. Palm Springs maintains that if Student missed any core classes for resource instruction, it did not deny Student a FAPE.

Students with disabilities may be removed from general education environment when the nature or severity of the disability is such that the education in the regular classes with the use of supplementary aids and services cannot be achieved satisfactorily. (20 U.S.C. § 1412(a)(5)(A).)

Student failed to establish through any documentary evidence or witness testimony that any of Student's operative IEPs offered resource time during Student's core curriculum classes. As to the 2020-2021 school year, Student presented no evidence to support this contention or that Student's special education services were delivered during his core classes. Thus, Student failed to prove Student's Issue 1b.

As to the 2021-2022 school year, the evidence showed that Student missed a portion of science class to receive special education resource services. Student did not establish how much class time he missed. Parent raised this concern in March 2022. Once Parent raised this concern, Student's schedule was changed. Thus, Student failed to show how this unspecified amount of missed science class denied Student a FAPE. Student failed prove Student's Issue 2a. Student failed to meet his burden of proving

that Student was denied a FAPE for failing to offer resource time that would not interfere with core curriculum from September 27, 2020, through the 2021-2022 school year.

ISSUES 1c, 2b, 2i, AND 2h: FAILING TO OFFER APPROPRIATE SPECIALIZED ACADEMIC INSTRUCTION FROM SEPTEMBER 27, 2020, THROUGH THE END OF THE 2021-2022 SCHOOL, INCLUDING EXTENDED SCHOOL YEAR, AND FAILING TO OFFER ADEQUATE COMPENSATORY EDUCATION

Student contends Palm Springs' offer of specialized academic instruction should have been individual versus group specialized academic instruction and in-person instead of a distance learning format. Additionally, Student maintained Palm Springs' compensatory academic and speech offers were inappropriate. Palm Springs asserts that Student made progress in his group specialized academic instruction and speech while participating in distance learning and in person, and all offers were appropriate.

Special education is instruction specially designed to meet the unique needs of a child with a disability. (20 U.S.C. § 1401(29); 34 C.F.R. § 300.39 (2006); Ed. Code, § 56031.) Specialized academic instruction, sometimes called specially designed instruction, means adapting, as appropriate to the needs of the disabled child, the content, methodology, or delivery of instruction, to address the unique needs of the child that result from the child's disability, and to ensure access of the child to the general curriculum, so that the child can meet the educational standards within the jurisdiction of the public agency that apply to all children. (34 C.F.R. § 300.39(b)(3) ((2006).)

STUDENT FAILED TO PROVE PALM SPRINGS OFFERED INAPPROPRIATE SPECIALIZED ACADEMIC INSTRUCTION DURING THE 2020-2021 SCHOOL YEAR DURING DISTANCE AND HYBRID LEARNING

Student's operative IEP offer from September 27, 2020, through October 25, 2020, was the October 2019 IEP. Palm Springs offered Student 90 minutes of group specialized academic instruction in a separate classroom, at the rate of 16 times monthly, for a total of 1440 monthly minutes. Student was also offered 30 minutes, once a week of push in group specialized academic instruction, a total of 120 minutes monthly. The total monthly group specialized academic instruction offered was 1560 minutes or 26 hours. Parent consented to the IEP. The IEP team offered Student's academic goals in

- basic reading sight words,
- basic reading decoding,
- reading comprehension,
- math place values, and
- math reasoning word problems.

Student failed to demonstrate that his specialized academic instruction offer was inappropriate.

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On October 26, 2020, Palm Spring held Student's annual IEP team meeting and reviewed Student's October 2019 IEP goals. Student met his goals in

- basic reading sight words,
- basic reading decoding,
- reading comprehension,
- math place values, and
- math reasoning word problems.

Student partially met his written expression goal.

Student argued that some Palm Springs students were allowed to attend class in-person at school during the 2020-2021 school year but Student was not offered the same in-person opportunity. CDE allowed local educational agencies to consider providing services at home, individually at school sites, or other appropriate locations but it was discretionary. (Cal. Dept. of Educ., Special Education Guidance for COVID-19 (March 20, 2020).) Regardless, Student failed to show he required in-person instruction to receive a benefit before Palm Springs reopened for hybrid learning.

Distance learning was challenging for Student. However, he made progress on his goals. Kadubeck collected data related to Student's goals and progress. She opined that Student was making adequate academic progress while participating in distance learning. Keane agreed. Kadubeck's insight into Student's needs at that time was consistent with the testimonial and documentary evidence. Thus, Kadubeck's testimony was given great weight. No evidence was presented that Palm Springs should have

offered individual specialized academic instruction. Student did not prove that Palm Springs denied him a FAPE by failing to offer appropriate specialized academic instruction through October 25, 2020.

Student also failed to show that the October 26, 2020 specialized academic instruction offer was inappropriate. At the October 26, 2020 annual IEP meeting, the team drafted new academics goals for Student in

- basic reading decoding,
- reading fluency,
- reading comprehension,
- written expression,
- math calculation multiplication concepts, and
- math reasoning word problems.

Palm Springs continued to offer the same amount and type of specialized academic instruction and included Student's Distance Learning IEP Aligned Plan. For distance learning, it offered

- group specialized academic instruction 45 minutes, 12 times monthly in the resource specialist program;
- 30 minutes of group specialized academic instruction five times weekly in an autism support classroom; and
- 30 minutes, 12 times monthly of group specialized academic instruction during general education class in a breakout room.

Palm Springs offered a total of 1500 minutes, or 25 hours, of group specialized academic instruction during distance learning.

The October 2020 IEP offer was operative through the end of the 2020-2021 school year. The October 2021 IEP team reviewed Student's October 2020 IEP goals. Student partially met his

- basic reading decoding,
- fluency,
- reading comprehension,
- written expression,
- math calculation multiple concepts, and
- math reasoning word problems.

Student argued that the specialized academic instruction offer was inappropriate and should have been individual instruction and in-person instruction because the goals were only partially met. A student may derive educational benefit if some of the goals are not fully met. (Rowley, *supra* 458 U.S. at pp. 202-203.) The evidence showed that Student made progress on his academic goals and received educational benefit. Thus, Student's assertion failed.

Student also maintained that Student's grades and inability to perform at grade level showed a failure to provide appropriate specialized academic instruction, namely individual and in-person instruction. By the end of year, Keane noted that Student's reading fluency had improved. Student was working on third grade level texts. Keane acknowledged Student had not met the grade-level standard on some language arts and math skills. While Student received some low grades, Keane noted that his grades did not reflect all of Student's progress that year. Keane maintained that Student was

making adequate progress in academics during distance learning and hybrid learning. Keane's opinion which was detailed and well-reasoned and corroborated by the documentary evidence. Thus, it was given substantial weight.

Further, Student improved in some academic areas. For example, at the beginning of 2020, Student read 289 out of 300 sight words for a first grade level, and an average of 68 words a minute when given a third grade passage. At that time, his reading comprehension was at a first grade level with visuals. By the beginning of the 2021 school year, Student read an average of 87 words per minute with 94 percent accuracy at a third grade level and his reading comprehension improved to a second grade level.

Student's October 2021 academic assessments conducted by Kadubeck showed growth in reading and fluency as compared to the 2018 academic testing. Student demonstrated strengths in

- basic reading,
- oral reading,
- writing samples,
- sentence writing fluency,
- number matrices, and
- math calculations.

In November 2021, a private neuropsychologist assessed Student. This same private assessor evaluated Student in 2018. The private assessment results also showed

progress, particularly in verbal abstract concept formation, vocabulary, and verbal explanatory reasoning ability and improvements in reading comprehension, verbal fluency, and oral math skills.

The evidence showed that despite some lower academic grades and not being at grade level for some skills, Student made adequate progress in his distance and hybrid learning environments during the 2020-2021 school year. Student failed to prove that the October 2020 IEP group specialized academic instruction offer during distance and hybrid learning denied Student a FAPE. Accordingly, Student failed to prove Student's Issue 1c. Student did not meet his burden of proving that Palm Springs denied Student a FAPE from September 27, 2020, through the end of 2020-2021 school year, by failing to provide appropriate specialized academic instruction.

STUDENT FAILED TO PROVE THAT PALM SPRINGS OFFERED
INAPPROPRIATE SPECIALIZED ACADEMIC INSTRUCTION DURING THE
2021-2022 SCHOOL YEAR BUT DEMONSTRATED THAT ITS
COMPENSATORY ACADEMIC OFFER WAS INADEQUATE.

The operative specialized academic instruction offer at the beginning of the school year through March 29, 2022, was the October 2020 offer. As stated above, Palm Springs reviewed the October 2021 psychoeducational assessment and identified Student's present levels in reading and writing. The evidence demonstrated Student made adequate academic progress through October 2021, and no evidence showed that Student required individual specialized academic instruction.

At part two of the annual meeting in November 2021, Palm Springs identified Student's present levels in math. There was no indication he required individual, as opposed to continued group specialized academic instruction, to make progress and derive educational benefit through November 2021.

In its March 12, 2020 guidance, OSERS stated that an IEP team would be required to make an individualized determination as to whether compensatory services were needed to make up for any skills that may have been lost during school closure due to the COVID-19 pandemic. (OSERS, March 12, 2020, *Questions and Answers on Providing Services to Children with Disabilities During the Coronavirus Disease 2019 Outbreak*, Answer to Questions A-1, A-2, and A-3.) OSERS reiterated this in additional guidance dated March 16, 2020. (OSERS, March 16, 2020, *Fact Sheet Addressing the Risk of COVID-19 in Schools While Protecting the Civil Rights of Students*.) In its subsequent March 21, 2020 guidance, OSERS stated:

"Where, due to the global pandemic and resulting closures of schools, there has been an inevitable delay in providing services ... IEP teams ... must make an individualized determination whether and to what extent compensatory services may be needed when schools resume normal operations." (OSERS, March 21, 2020, *Supplemental Fact Sheet Addressing the Risk of COVID-19 in Preschool, Elementary and Secondary Schools While Serving Children with Disabilities*, pp. 2-3.)

California Department of Education, in its March 20, 2020 guidance, stated: "[O]nce the regular school session resumes, [districts] should plan to make individualized determinations, in collaboration with the IEP team, regarding whether or not

compensatory services may be needed for a student.” (Calif. Dep’t. of Ed., March 20, 2020, *Special Education Guidance for COVID-19, COVID-19 School Closures and Services to Students with Disabilities*.)

As part of SB 98, enacted on June 29, 2020, Education Code section 43509, subdivision (a)(1)(A) required the governing board of a school district to adopt a learning continuity and attendance plan, called an LCAP. Education Code section 43509, subdivision (f) required the California Department of Education to develop a template for the LCAP, which would include what additional supports will be provided for pupils with exceptional needs served across the full continuum of placements during the period in which distance learning was provided. The LCAP must include how the school district will address learning loss that resulted from COVID-19 during the 2019-2020 and 2020-2021 school years. The LCAP should also state how learning status should be assessed and measured.

On February 7, 2022, Kadubeck, Baker, and Palm Springs speech and language pathologist Melanie Robley-Spencer, analyzed if Student experienced a learning gap due to COVID-19 school closures. They determined that Student experienced a mild learning gap of less than one year in reading comprehension, written expression, and math problem solving. Kadubeck testified at hearing that their analysis was accurate.

The same month, Parent requested one-to-one specialized academic instruction for Student due to Student’s lack of academic progress. Palm Springs did not believe Student required individual specialized academic instruction and that the group instruction helped him model academic behavior which, in turn, increased his academic progress.

Dr. Kuo attended three of Student's IEP team meetings in November 2021 and February 2022. Dr. Kuo endorsed Parent's request for individualized specialized academic instruction to rectify Student's slow progress and recalled discussing this with the IEP team in February 2022. Dr. Kuo opined that Student made progress but should have made more progress commensurate with his ability. However, Dr. Kuo endorsed short-term individual academic instruction only.

Dr. Kuo's main concern was Student's reading ability and recommended individualized academic services to assist him in becoming a functional reader because his adult outcome would largely be dictated by his ability to read. Dr. Kuo opined that more targeted individualized instruction was required for a short period of time for remediation. Dr. Kuo did not specify the amount or the length of time needed for the individual specialized academic instruction. Dr. Kuo's opinion was logical, based on substantial training and experience, and in line with Palm Springs' findings regarding Student's learning loss by February 2022.

On March 30, 2022, Palm Springs offered Student compensatory services. It offered a 40-hour spring special education learning loss recovery program, and a 60-hour summer special education learning loss recovery program. The offered compensatory programs provided placement in a small group of approximately nine students with a credentialed resource specialist teacher and speech services.

Parent did not agree that the learning loss recovery programs were sufficient and believed Student required one-to-one specialized academic instruction. Parent agreed to have Student attend the spring compensatory offer but rejected the summer compensatory offer. Parent explained that Student had already been tested for Lindamood-Bell's one-to-

one reading instruction summer program. Parent requested that Palm Springs pay for the Lindamood-Bell summer program, plus an additional two years of Lindamood-Bell instruction, and private one-to-one compensatory speech services.

The question of learning loss and recoupment are distinct from the compensatory education remedy for specific denials of FAPE. An award to compensate for past violations must be fact-specific and reasonably calculated to provide the educational benefits that likely would have accrued from those special education services the school district should have supplied in the first place. (*Reid ex rel. Reid v. Dist. of Columbia* (D.C. Cir. 2005) 401 F.3d 516, 524.) Compensatory education services to remedy learning loss experienced during distance learning is based on the OSERS and California Department of Education guidance cited above, and Education Code section 43509. These services are to be provided even in the absence of specifically adjudicated issues in due process, even if Student failed to prevail on any of them.

Student attended the spring 2022 compensatory program. Parent described it as a computer-based model without individualized support and thus, unhelpful to Student. The evidence confirmed that the learning loss program was computer based, like Student's distance learning program, and not specifically tailored to Student's individual needs. While the evidence showed that Student did not require one-to-one behavioral or academic aide support in general to receive a FAPE, Palm Springs knew Student needed short-term targeted instruction in reading comprehension, written expression, and math problem solving for learning loss during distance learning as evidenced by the individualized analysis undertaken by Kadubeck, Baker, and Robley-Spencer. The evidence demonstrated that the learning loss program was a more

generalized academic and speech program rather than focused on Student's specific academic areas in which he had experienced learning loss. Thus, Palm Springs' compensatory academic offer to remediate learning loss that Student experienced because of distance learning only, was inadequate.

Thus, Student proved Issue 2i. Student proved that Palm Springs' academic compensatory offer was inadequate.

At the March 30, 2022 IEP team meeting, Palm Springs also increased Student's group specialized academic instruction an additional 120 minutes monthly to 28 hours per month. This offer aligned with Palm Springs IEP team members' opinions that Student required more group specialized academic instruction, not one-to-one individual academic instruction. The evidence showed that Student had a historical pattern of being successfully educated in a group setting without one-to-one academic instruction or aide support which was corroborated by Duong's assessment and opinion that Student required more group specialized academic instruction rather than one-to-one academic or behavior aide support.

Parent believed Student was distracted by others in group instruction and needed one-to-one instruction, but as shown, Palm Springs staff could easily redirect Student. Palm Springs witnesses agreed that small group instruction was appropriate and beneficial to Student. The weight of evidence showed that Student made educational academic progress during the 2021-2022 school year. By June 2022, Student made progress on most his academic goals while participating in group specialized academic instruction. By September 2022, Student partially met or met all his academic goals from the previous year. Student failed to meet his burden of proving that the March 30, 2022 specialized academic instruction offer denied Student a FAPE.

Thus, Student failed to prove Issue 2b. Student failed to prove by a preponderance of the evidence that Palm Springs' specialized academic instruction offer was inappropriate and denied Student a FAPE for the 2021-2022 school year, including extended school year.

STUDENT FAILED TO SHOW PALM SPRINGS' SPEECH COMPENSATORY OFFER WAS INADEQUATE

The March 20, 2022 IEP team offered the spring and summer group speech services. The evidence showed that a qualified speech provider would push into the spring and summer learning loss small groups to deliver this service.

Parent rejected Palm Springs' compensatory summer speech offer and wanted Student to receive one-to-one compensatory speech services instead of group speech services. Two witnesses endorsed one-to-one speech and language compensatory services for Student, Parent and Student's private speech and language pathologist Jyll Chandler. Parent preferred Chandler's one-to-one speech services to group speech services because she thought they were more effective. Chandler opined that individual speech and language services would be better for Student to target his specific goals and it was more appropriate for him because he needed more direction while in group speech services.

The evidence showed that Student made progress on his speech goals during distance learning and in-person learning with group speech services and he could be redirected easily. Robley-Spencer, Student's speech and language pathologist during the 2020-2021 and 2021-2022 school years explained she collected speech and language data and implemented Student's speech services. She opined that Student

needed redirection during group speech services but it could be obtained within a short time and he continued to make progress on his speech goals. Chandler did not dispute that Student made progress and conceded he could be redirected during group speech services. Thus, Chandler's opinion failed on these points.

Student had speech goals for receptive language, communication, and pragmatics. Student's pragmatic goals involved initiating interactions and staying on topic. His receptive language goals worked on following multi-step directions, verbally sequencing stories, and answering questions using age appropriate vocabulary. His communication goals focused on formulating age level grammatically accurate sentences and retelling stories and events. Group speech therapy provides opportunities for Student to react to other children rather than just a pathologist and to build skills by modeling other students. Individual speech services do not provide the same environment, like a school setting, in which to develop communicative exchange. Chandler conceded that group speech services are helpful for pragmatic skills which is a speech need for Student yet continued to endorse all individual speech services for Student. Because of this, Chandler's opinion on this point was not convincing.

Accordingly, Student failed to prove Student's Issue 2h. Student failed to meet his burden in showing that Palm Springs' compensatory speech offer was inappropriate.

ISSUES 1d AND 2c: FAILING TO OFFER APPROPRIATE READING INTERVENTIONS FROM SEPTEMBER 27, 2020, THROUGH THE END OF THE 2021-2022 SCHOOL YEAR, INCLUDING EXTENDED SCHOOL YEAR

Student failed to address this issue in his closing brief. Rather, Student focused on why Lindamood-Bell was the appropriate methodology for Student's reading services

instead of proving that Palm Springs' reading interventions were inappropriate. Palm Springs asserts that its reading interventions during this time were appropriate.

Palm Springs' witnesses persuasively explained that appropriate reading strategies and interventions were utilized with Student during the relevant time. No witnesses presented any evidence that Palm Springs should have used different reading interventions with Student. Dr. Kuo mentioned generally that Student needed more support in reading but did not describe any specific reading interventions that Palm Springs should utilize. Instead, Dr. Kuo endorsed different reading goals; one-to-one reading instruction; and Parent's choice of methodology, Lindamood-Bell.

An IEP is not required to include the specific instructional methodologies the school district will use to educate the child. (*C.P. v. Prescott Unified School Dist.* (9th Cir. 2011) 631 F.3d 1117, 1122 (*C.P.*); 71 Fed. Reg. 46,665 (Aug. 14, 2006).) Rather, the "IDEA accords educators discretion to select from various methods for meeting the individualized needs of a student, provided those practices are reasonably calculated to provide educational benefit." (*Ibid.*; see *Rowley, supra*, 458 U.S. 176, 206 and 208 [questions of educational policy and methodology left to school authorities].)

Thus, Student failed to prove Student's Issues 1d and 2c. Student failed to meet his burden demonstrating that Palm Springs should have provided different reading interventions to Student from September 27, 2020, through the end of the 2021-2022 school year.

ISSUE 1i: FAILING TO IMPLEMENT STUDENT’S IEP FROM SEPTEMBER 27, 2020, THROUGH APRIL 2021

Student contends that Palm Springs failed to implement Student's specialized academic instruction and speech and languages services from September 27, 2020, through April 2021 during the COVID-19 pandemic. Palm Springs maintains that it materially implemented both Student’s specialized academic instruction and speech and language services.

Where a student alleges a FAPE denial based on an IEP implementation failure, the student must prove that the failure was “material,” which means that the services provided to a disabled child fall “significantly short of the services required by the child’s IEP.” (*Van Duyn v. Baker School Dist. 5J* (9th Cir. 2007) 502 F.3d 811, 822.) No statutory requirement of perfect adherence to the IEP exists, nor is there any reason rooted in the statutory text to view minor implementation failures as FAPE denials. (*Id.* at p. 821.) “A material failure occurs when there is more than a minor discrepancy between the services a school provides to a disabled child and the services required by the child’s IEP.” (*Id.* at p. 815.) The materiality standard does not require that the child suffer demonstrable educational harm to prevail. (*Id.* at p. 822.) Implementation failures are not procedural errors. (*Id.* at p. 819.)

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STUDENT PROVED THAT PALM SPRINGS MATERIALLY FAILED TO IMPLEMENT STUDENT'S SPEECH AND LANGUAGE SERVICES

Student was entitled to 30 minutes, eight times monthly, of group speech and language services based upon Student's October 2019 and 2020 IEPs. Student's Distance Learning IEP Aligned Plan also offered the same speech and language services.

The evidence proved that Student was not provided 22 of the 56, 30 minute sessions, during this time. Palm Springs failed to provide 11 hours out of the 28 hours required. Robley-Spencer also conceded that although Student made progress on his speech and language goals, his progress was negatively impacted during this time. Thus, Student proved by a preponderance of the evidence that Palm Springs materially failed to implement Student's speech and language services from September 27, 2020, through April 30, 2021, denying him a FAPE.

STUDENT FAILED TO PROVE THAT PALM SPRINGS MATERIALLY FAILED TO IMPLEMENT STUDENT'S SPECIALIZED ACADEMIC INSTRUCTION

Student was entitled to 90 minutes, 16 times monthly, totally 1440 minutes monthly of group specialized academic instruction, in a separate classroom. Student was also offered 30 minutes, 1 time weekly of push in group specialized academic instruction, totally 120 minutes monthly. The total monthly group specialized academic instruction minutes were 1560 minutes monthly or 26 hours. Student's Distance Learning IEP Aligned Plan offered 25 hours of group specialized academic.

The evidence showed that Palm Springs exceeded the requisite number of hours for some months and failed to provide enough hours of group specialized academic

instruction for other months. Taking this time in whole, Palm Springs failed to provide 19 hours out of the 188 hours of group specialized academic instruction required, which is not a material failure to implement this service. Thus, Student failed to prove by a preponderance of the evidence that Palm Springs materially failed to implement Student's specialize academic instruction from September 27, 2020, through April 30, 2021. Student proved Issue 1i as to the speech services only.

ISSUE 2g: FAILING TO OFFER ADEQUATE TOILETING AIDS, SERVICES, AND SUPPORTS DURING THE 2021-2022 SCHOOL YEAR

Student asserts Palm Springs should have offered Student a consistent female aide for his toileting needs during the 201-2022 school year. Palm Springs contends that it offered the appropriate toileting support for Student.

Student failed to meet his burden of proof on this issue. Parent had concerns with Student's toileting upon return to in-person school and asserted Student needed help wiping himself at school. In April 2021, Palm Springs offered Student a "designated single bathroom with wipes and change of clothes, training on location of designated bathroom, daily reminder to use it if it is needed, mom would be messaged." During the 2021-2022 school year, Palm Springs added paraprofessional aide support if needed for Student's toileting issues but did not designate that the aide should be female or male. Parent requested that Student be assigned an aide and that the aide be female for fear of abuse by a male staff member when assisting with Student's toileting issues.

Student failed to show how Palm Springs' offers for toileting assistance were inappropriate for the 2021-2022 school year Palm Springs' witnesses established Student did not need any toileting assistance during the year. Parent described Student

with feces in his underwear when he returned from school but Parent failed to give any specificity as to the number of incidents at school and when they occurred. Her testimony contrasted significantly to multiple Palm Springs staff who had personal knowledge of what occurred at school with Student and did not endorse her opinion.

Additionally, Parent's opinion that male paraprofessionals abused children was overgeneralized. Dr. Kuo supported Parent's opinion. However, both Parent and Dr. Kuo failed to present any evidence specific to Palm Springs, only general opinions of male abuse of children. Thus, their opinions were given less weight. Student failed to prove by the preponderance of the evidence that Palm Springs toileting offers to Student were inappropriate during the 2021-2022 school year.

ISSUE 1j AND 2j: FAILING TO OFFER EXTENDED SCHOOL YEAR SERVICES FROM SEPTEMBER 27, 2020, THROUGH THE 2021-2022 SCHOOL YEAR, INCLUDING EXTENDED SCHOOL YEAR

Student asserts Palm Springs should have offered extended school year services for the 2020-2021 and the 2021-2022 school years because Student regressed during school breaks and failed to recoup the skills shortly after returning to school. Palm Springs contends that Student did not require extended school year services because he did not regress and if he did, he had the ability to recoup the skills in a short time.

A local educational agency must provide extended school year services when a child's IEP team determines that the services are necessary for the provision of a FAPE to the child. (34 C.F.R. § 300.106(a)(2) (2006).) Extended school year services are special education and related services that are provided to a child with a disability beyond the normal school year of the public agency, in accordance with the child's IEP, at no cost to

the parent of the child, and that meet the standards of the state educational agency. (34 C.F.R. § 300.106(b). (2006)). IEP team determination regarding extended school year services are prospective and not intended to make up for past FAPE denials.

The California Code of Regulations states that extended school year services must be provided, in accordance with 34 Code of Federal Regulations part 300.106:

- for each individual with exceptional needs who has disabilities which are likely to continue indefinitely or for a prolonged period;
- and interruption of the child's educational programming may cause regression;
- when coupled with limited recoupment capacity; and
- rendering it impossible or unlikely that the child will attain the level of self-sufficiency and independence that would otherwise be expected in view of his or her disabling condition.

(Cal. Code Regs, tit. 5, § 3043; see also 34 C.F.R. § 300.106 (2006); Ed Code, § 56345, subd. (b)(3).)

STUDENT FAILED TO PROVE THAT PALM SPRINGS DENIED STUDENT A FAPE FOR FAILING TO OFFER EXTENDED SCHOOL YEAR FOR THE 2020-2021 SCHOOL YEAR

Student failed to present evidence in support of extended school year for this time. Student failed to address extended school year for the 2020-2021 school year in his closing brief.

The IEP team reviewed Student's need for extended school year services and reviewed the extended school year worksheet. It determined that Student did not require extended school year because:

- Student could regain skills lost over the break that would be expected based upon his disability in a short amount of time,
- did not display a loss of previously taught skills,
- was not in a crucial stage in learning such that an interruption in school may cause loss of skill,
- and could maintain skills without the need for extended school year.

Student failed to present evidence to the contrary for that time. Student failed to prove Issue 1j. Student failed to show that Palm Springs denied Student a FAPE for failure to offer extended school year for summer 2021.

STUDENT PROVED THAT PALM SPRINGS DENIED STUDENT A FAPE FOR FAILING TO OFFER EXTENDED SCHOOL YEAR FOR SUMMER 2022

The October 2021 IEP and the amendment IEPs failed to offer Student extended school year instruction which Student established was necessary. The October 2021 IEP proposed its FAPE offer to Student on March 30, 2022.

By February 2022, Palm Springs knew Student suffered some learning loss in reading comprehension, writing, and math problem solving. Palm Springs attributed this learning loss due to distance learning, not regression and offered compensatory education. However, Kadubeck conceded that Student regressed over the summer 2021 break in his goals one and two, basic reading decoding and fluency rate and accuracy but believed Student could recoup this loss in a short time. Baker also admitted that

Student slightly regressed but believed he could regain his loss quickly. By March 1, 2022, Student had recouped his loss in basic reading decoding but not for fluency rate and accuracy. The evidence also showed that he regressed in reading comprehension and word problems over summer 2021 and had not recouped his skills by March 1, 2022.

On March 30, 2022, the Palm Springs IEP team members determined that Student did not require extended school year because he could regain skills lost over the break, was not at a crucial stage in learning such that an interruption in school may cause loss of skill and could maintain skills without extended school year services. Palm Springs believed that Student did not display a loss of previously taught skills; the evidence refuted this contention. The evidence showed that Student was unable to recoup from previous regression within a short time. This should have put Palm Springs on notice that Student could regress the following summer and not recoup in a short time as previously shown.

Palm Springs asserted that it offered compensatory education for Student's learning loss and thus, did not need to offer extended school year services. This argument is flawed. An extended school year determination is prospective while the compensatory education relates to past learning loss during COVID-19.

Thus, Student proved Issue 2j. Student proved that Palm Springs denied Student a FAPE by failing to offer extended school year for summer 2022.

CONCLUSIONS AND PREVAILING PARTY

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

ISSUE 1a:

Student failed to meet his burden of proving that Palm Springs denied Student a FAPE from September 27, 2020, through the 2020-2021 school year, including extended school, by failing to adequately assess in the areas of social-emotional and behavior.

Palm Springs prevailed on this issue.

ISSUE 1b:

Student failed to meet his burden of proving that Palm Springs denied Student a FAPE from September 27, 2020, through the 2020-2021 school year, including extended school, by failing to offer resource time that would not interfere with other core curriculum classes.

Palm Springs prevailed on this issue.

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ISSUE 1c:

Student failed to meet his burden of proving that Palm Springs denied Student a FAPE from September 27, 2020, through the 2020-2021 school year, including extended school, by failing to offer appropriate specialized academic instruction.

Palm Springs prevailed on this issue.

ISSUE 1d:

Student failed to meet his burden of proving that Palm Springs denied Student a FAPE from September 27, 2020, through the 2020-2021 school year, including extended school, by failing to offer appropriate reading intervention services.

Palm Springs prevailed on this issue.

ISSUE 1e:

Student failed to meet his burden of proving that Palm Springs denied Student a FAPE from September 27, 2020, through the 2020-2021 school year, including extended school, by failing to offer appropriate counseling and behavior aids, services, and supports.

Palm Springs prevailed on this issue.

ISSUE 1f:

Student failed to meet his burden of proving that Palm Springs denied Student a FAPE from September 27, 2020, through the 2020-2021 school year, including extended school, by failing to offer appropriate aide services and supports.

Palm Springs prevailed on this issue.

ISSUE 1g:

Student failed to meet his burden of proving that Palm Springs denied Student a FAPE from September 27, 2020, through the 2020-2021 school year, including extended school, by failing to offer an appropriate behavior intervention plan.

Palm Springs prevailed on this issue.

ISSUE 1h:

Student failed to meet his burden of proving that Palm Springs denied Student a FAPE from September 27, 2020, through the 2020-2021 school year, including extended school, by failing to offer a one-to-one aide during distance learning.

Palm Springs prevailed on this issue.

ISSUE 1i:

Student met his burden of proving that Palm Springs denied Student a FAPE from September 27, 2020, through the 2020-2021 school year, including

extended school, by failing to implement Student's individualized education program during distance learning, specifically in speech and language but not as to specialized academic instruction.

Student partially prevailed on this issue as to speech and language services. Palm Springs partially prevailed on this issue as to specialized academic instruction.

ISSUE 1j.

Student failed to meet his burden of proving that Palm Springs denied Student a FAPE from September 27, 2020, through the 2020-2021 school year, including extended school, by failing to offer extended school year services.

Palm Springs prevailed on this issue.

ISSUE 2a:

Student failed to meet his burden of proving that Palm Springs denied Student a FAPE during the 2021-2022 school year, through extended school year, by failing to offer resource time that would not interfere with other core curriculum classes.

Palm Springs prevailed on this issue.

ISSUE 2b:

Student failed to meet his burden of proving that Palm Springs denied Student a FAPE during the 2021-2022 school year, through extended school year, by failing to offer appropriate special academic instruction.

Palm Springs prevailed on this issue.

ISSUE 2c:

Student failed to meet his burden of proving that Palm Springs denied Student a FAPE during the 2021-2022 school year, through extended school year, by failing to offer appropriate reading intervention services.

Palm Springs prevailed on this issue.

ISSUE 2d:

Student failed to meet his burden of proving that Palm Springs denied Student a FAPE during the 2021-2022 school year, through extended school year, by failing to offer appropriate counsel and behavior aids, services, and supports.

Palm Springs prevailed on this issue.

ISSUE 2e:

Student failed to meet his burden of proving that Palm Springs denied Student a FAPE during the 2021-2022 school year, through extended school, by failing to offer appropriate aide services and supports.

Palm Springs prevailed on this issue.

ISSUE 2f:

Student failed to meet his burden of proving that Palm Springs denied Student a FAPE during the 2021-2022 school year, through extended school, by failing to offer an appropriate behavior intervention plan.

Palm Springs prevailed on this issue.

ISSUE 2g:

Student failed to meet his burden of proving that Palm Springs denied Student a FAPE during the 2021-2022 school year, through extended school, by failing to offer adequate toileting aids, services, and supports.

Palm Springs prevailed on this issue.

ISSUE 2h:

Student failed to meet his burden of proving that Palm Springs denied Student a FAPE during the 2021-2022 school year, through extended school, by failing to offer compensatory speech services.

Palm Springs prevailed on this issue.

ISSUE 2i:

Student met his burden of proving that Palm Springs denied Student a FAPE during the 2021-2022 school year, through extended school, by failing to offer compensatory academic instruction.

Student prevailed on this issue.

ISSUE 2j:

Student met his burden of proving that Palm Springs denied Student a FAPE during the 2021-2022 school year, through extended school, by failing to offer extended school year services.

Student prevailed on this issue.

REMEDIES

Student partially prevailed on Issue 1i, failure to implement Student's speech and language services. Student prevailed on Issue 2i, failure to offer appropriate academic compensatory education, and Issue 2j, failure to offer extended school year for summer 2022.

As remedies, Student requested in his complaint reimbursement for the summer 2022 Lindamood-Bell reading intervention program, two years prospective Lindamood-Bell services to be provided at the public school site, extended school year services, a one-to-one behavior aide, and compensatory private speech services. In his closing brief, Student only requested reimbursement for the summer 2022 Lindamood-Bell program.

Palm Springs argued that if any remedy is awarded it should be compensatory education, not reimbursement, because Student declined Palm Springs' compensatory offer. Additionally, Palm Springs contended that the Lindamood-Bell program was inappropriate and Student failed to provide proof of payment, prospective Lindamood-Bell relief is improper because it is not a non-public agency, one-to-one aide support is too restrictive, and extended school year is unwarranted.

Courts have broad equitable powers to remedy the failure of a local educational agency to provide a FAPE to a child with a disability. (20 U.S.C. § 1415(if)(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]; *Parents of Student W. v. Puyallup School Dist.*, No. 3 (9th Cir. 1994) 31 F.3d 1489, 1496 (*Puyallup*.) The conduct of both parties must be reviewed and considered to determine whether equitable relief is appropriate. (*Id.* at p. 1496.) This broad equitable authority extends to an ALJ who hears and decides a special education administrative due process matter. (*Forest Grove Sch. Dist., v. T.A.* (2009) 557 U.S. 230, 240 [129 S.Ct. 2484, 174 L.Ed.2d 168].)

FAILURE TO MATERIALLY IMPLEMENT SPEECH SERVICES

Student proved that Palm Spring denied him a FAPE by failing to materially implement Student's speech services from September 27, 2020, through April 30, 2021, Issue 1i. Student failed to submit any evidence that addressed compensatory education including amounts and duration. Ultimately, the undersigned relied upon equitable judicial discretion to craft an appropriate compensatory education remedy.

An administrative law judge can award compensatory education as a form of equitable relief. (*Park v. Anaheim Union High Sch. Dist., et al.* (9th Cir. 2006) 464 F.3d 1025, 1033.) School districts may be ordered to provide compensatory education or additional services to a student who has been denied a FAPE. (*Ibid.; Puyallup, supra*, 31F.3d at p.1496.) These are equitable remedies that courts may employ to craft "appropriate relief" for a party. An award of compensatory education need not provide a "day-for-day compensation." (*Id.* at p. 1497.) The conduct of both parties must be reviewed and considered to determine whether equitable relief is appropriate. (*Id.* at p. 1496.) Compensatory education is a prospective award of educational services designed

to catch-up the student to where the student should have been absent the denial of a FAPE. (*Brennan v. Regional Sch. Dist. No. 1* (D. Conn. 2008) 531 F.Supp.2d 245, 265.)

An award to compensate for past violations must rely on an individualized assessment, just as an IEP focuses on the individual student's needs. (*Reid ex rel. Reid v. Dist. of Columbia* (D.D.C. Cir. 2005) 401 F.3d 516, 524.) The award must be fact-specific and "reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place." (*Ibid.*)

Student was entitled to 30 minutes, eight times monthly, of group speech and language services from September 27, 2020, through the end of the 2020-2021 school year. The evidence proved that Student was not provided 22 of the 56, 30 minutes sessions, during this time. Palm Springs failed to provide 11 hours out of the 28 hours of group speech services from September 27, 2020, through April 30, 2021. Robley-Spencer conceded that Student's speech and language progress was negatively impacted during this time, although Student made progress. Compensatory one-to-one speech and language services will be awarded, not group services, and the amount will be reduced considering that Palm Springs failed to implement group, not one-to-one, speech services. Accordingly, Palm Springs is ordered to provide 7 hours of one-to-one speech and language services for its failure to materially implement Student's speech services in Student's Issue 1i.

The next determination is which entity, Palm Springs, or a non-public agency, should provide the compensatory services. Here, Parent preferred Student's private provider, Chandler, from Milestones Speech and Language Therapy, to provide speech and language services. No evidence showed that Milestones Speech and Language Therapy was a non-public agency. Additionally, the evidence established that Student

made educational progress through Palm Springs speech and language services. Palm Springs can also utilize the same curriculum and methodologies implemented that have proven successful with Student. Accordingly, the compensatory services ordered can be provided by Palm Springs. They must be provided outside of the regular school day and in addition to Student's IEP offered services. Palm Springs must work with Parent to find a mutually agreeable schedule for the ordered compensatory services. The compensatory services must be completed by May 31, 2024.

FAILURE TO OFFER APPROPRIATE COMPENSATORY ACADEMIC INSTRUCTION

Student proved that Palm Springs failed to offer appropriate compensatory academic instruction due to learning loss from distance learning. Student did not request compensatory education including amounts and duration. Instead, Student requested reimbursement for attending the summer 2022 Lindamood-Bell program.

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); *School Committee of Burlington v. Department of Education* (1985) 471 U.S. 359, 369-371 [1055 S.Ct. 96] (*Burlington*).) When a school district fails to provide a FAPE to a pupil with a disability, the pupil is entitled to relief that is "appropriate" in light of the purposes of the IDEA. ALJ's have broad latitude to fashion equitable remedies appropriate for a denial of a FAPE. (*Id.* at 369-370; 20 U.S.C. § 1415(i)(2)(C)(3).)

The ruling in *Burlington* is not so narrow as to permit reimbursement only when the placement or services chosen by the parent are found to be the exact proper placement or services required under the IDEA. (*Alamo Heights Independent School Dist. v. State Bd. of Educ.* (5th Cir. 1986) 790 F.2d 1153, 1161.) Although the parents' placement need not be a "state approved" placement, it still must meet certain basic requirements of the IDEA, such as the requirement that the placement address the child's needs and provide student with an educational benefit. (*Florence County School Dist. Four v. Carter* (1993) 510 U.S. 7, 13-14, [114 S.Ct. 361, 126 L.Ed.2d 284] (*Carter*).) Parents may receive reimbursement for the unilateral placement if it is appropriate. (34 C.F.R. § 300.148(c)(2006); Ed. Code, § 56175; *Carter, supra*, 510 U.S. at pp. 7, 15-16].) The appropriateness of the private placement is governed by equitable considerations. (*Ibid.*) The determination of whether to award reimbursement and how much to award is a matter within the discretion of the hearing officer. (*School Committee of Burlington v. Department of Ed. supra*, 471 U.S. at p. 369.)

In *C. B. v. Garden Grove Unified School Dist.* (9th Cir. 2011) 635 F.3 1155 (*Garden Grove*), the Ninth Circuit set forth the standards to be applied in determining whether a private placement is appropriate for the purpose of reimbursement. There, a student had benefited substantially from a private placement, but parents had been awarded only partial reimbursement because the placement did not address all the student's special education needs. (*Id.* at pp. 1157-1158.) The Court of Appeals held that parents were entitled to full reimbursement because the IDEA "does not require that a private school placement provide all services that a disabled student needs in order to permit full reimbursement." (*Id.* at p. 1158.) In reaching this conclusion, the Ninth Circuit relied upon a standard set forth by the Second Circuit. The Court concluded that, for a parent to qualify for reimbursement, parents need not show that a private placement furnishes

every special service necessary to maximize their child's potential. They need only to demonstrate that the placement provides educational instruction specially designed to meet the unique needs of a child with a disability, supported by such services as are necessary to permit the child to benefit from instruction. (*Id.* at p. 1159 [quoting *Frank G. v. Bd. of Education* (2d. Cir. 2006) 459 F.3d 356, 365 (citations and emphases omitted)]).)

The conduct of both parties must be reviewed and considered to determine whether relief is appropriate. (*Puyallup, supra*, 31 F.3d at p. 1496.) Factors to be considered when considering the amount of reimbursement to be awarded include the existence of other, more suitable placements; the effort expended by the parent in securing alternative placements; and the general cooperative or uncooperative position of the school district. (*W.G. v. Board of Trustees of Target Range Sch. Dist. No 23* (9th Cir. 1992), 960 F.2d at 1487; *Glendale Unified School Dist. v. Almasi* (C.D.Cal. 2000) 122 F.Supp.2d 1093, 1109.)

Lindamood-Bell is not certified by the state of California as a nonpublic school or agency. Student enrolled in Lindamood-Bell instruction and curriculum during the summer 2022. The Lindamood-Bell program offered one-to-one tutoring using a specific instructional methodology, and, as far as Parent was concerned, its primary emphasis would be improving his reading skills and reading comprehension.

On March 4, 2022, Lindamood-Bell Learning Center conducted a learning ability evaluation of Student. Student's scores on the testing instruments ranged in grade equivalency from kindergarten to third grade and seven months.

Forough Azimi, the former Director of Lindamood-Bell in Los Angeles, explained that Student participated in the Talkies program for seven weeks, totaling 140 hours.

The Talkies program is a primer program to its Verbalization and Visualizing language comprehension program. No evidence was presented that the Talkies program was based on a peer reviewed and scientifically research validated program. There is no published research that Talkies is effective in teaching any skills. The Talkies program is an oral language comprehension and expression program, not a reading or reading comprehension program. Student worked on concept imagery such as how to use words to describe pictures and events, not reading. Azimi believed that the Talkies program was necessary first before the language comprehension program, Visualizing and Verbalizing, because Student's scores were so low. While expressive and receptive speech and language is a need for Student, the Talkies program did not target what Parent requested and what the evidence showed Student needed for his learning loss during distance learning.

On August 8, 2022, after Student completed the Summer 2022 Lindamood-Bell program, it retested Student with the same instruments it tested Student with earlier that year. The evidence showed some progress in some academic areas, no progress in some, and a decline in other areas after completing the Talkies program.

Student attended the Lindamood-Bell summer 2022 program for seven weeks totaling 140 hours. He attended four hours per day, five days a week, or 20 hours a week. According to Parent, it cost \$3140 per week, or \$157 per hour, plus \$100 testing fee totally \$22,080. Parent provided no documentary evidence in support of the cost. Parent stated her father took out a loan through Lindamood-Bell to pay for it and provided an unclear loan document as evidence. Parent further stated she needed to pay back her father for the cost but provided no evidence to support her contention.

While there was little evidence that the Lindamood-Bell program provided significant benefit to Student, some of Student's scores showed academic progress. Thus, Student received some educational benefit. Parent is not an educator, and she believed at the time the program would substantially benefit Student. Parent did not have the benefit of the follow-up testing until after Student completed the program and could not have known what was shown at hearing. Additionally, the program was costly and excessive in hours. Parent had other cost-effective alternatives.

On March 30, 2022, Palm Springs offered 100 hours of group compensatory education for its spring and summer learning loss programs that were generalized programs and not targeted to Student's specific needs of reading comprehension, written expression, and math problem solving. Thus, for Palm Springs failure to offer appropriate compensatory academics, Palm Springs will reimburse in the amount of the actual cost of 60 hours of the Lindamood Bell summer 2022 tuition not to exceed \$9420.

FAILURE TO OFFER EXTENDED SCHOOL YEAR REMEDY

Student requested as a remedy that OAH order that Student requires future extended school year services in his complaint but reimbursement for Lindamood-Bell tuition in his closing brief. Student failed to establish at hearing that Palm Springs failed to offer extended school year for summer 2023. The evidence established that Palm Springs convened IEPs in September and October 2022 and did not offer extended school year services for summer 2023 but no information was presented after October 2022.

The minimal amount of time a California school district can offer extended school year is 20 days. (5 C.C.R. § 3043, subd. (d).) For Palm Springs failure to offer extended

school year services for summer 2022, Palm Spring will reimburse Student for an additional 20 hours of actual cost of the Lindamood Bell summer 2022 tuition not to exceed \$3140.

ORDER

1. Within 30 days of this Decision, Parent must provide to Palm Springs the proof of tuition amount, proof of payment, the loan document between Parent's father and Lindamood-Bell, and proof of loan or responsibility to reimburse between Parent and Parent's father.
2. Within 60 days of receipt of the above documents, Palm Springs will reimburse Parent for the actual cost of 80 hours of the summer 2022 Lindamood-Bell program not to exceed \$12,560.
3. Palm Springs must provide Student 7 hours of district provided, in-person, compensatory speech and language services. The compensatory services must be provided to Student by the end of the 2023-2024 school year.
4. All of Student's other requests for relief are denied.

RIGHT TO APPEAL THIS DECISION

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

Cynthia Fritz

Administrative Law Judge

Office of Administrative Hearings