BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

CASE NO. 2023010234
CASE NO. 2022120477

THE CONSOLIDATED MATTERS INVOLVING PARENT ON BEHALF OF STUDENT,

and

MT. DIABLO UNIFIED SCHOOL DISTRICT.

DECISION

JUNE 20, 2023

On December 16, 2022, the Office of Administrative Hearings, called OAH, received a due process hearing request from Mt. Diablo Unified School District, called Mt. Diablo, naming Student in case number 2022120477. On January 10, 2023, OAH received a due process request from Student naming Mt. Diablo in case number 2023010234. On January 17, 2023, OAH consolidated and continued the two cases, and identified Student's case as the primary case for determining statutory timelines.

Administrative Law Judge Robert G. Martin heard this matter by videoconference on March 21, 22, 23, 24, 27, 28, 29 and 30, 2023, and April 18, 19, 20, 21, and 25, 2023.

Student's Mother represented Student. Student did not attend the hearing but participated as a witness. Deborah Ettinger and Christine Huntoon represented Mt. Diablo. Ivanna Huthman, Assistant Director, Alternative Dispute resolution, attended all 13 hearing days on behalf of Mt. Diablo.

At the parties' request, the matter was continued to May 19, 2023, for written closing briefs. The parties submitted timely closing briefs. The record was closed, and the matter was submitted on May 19, 2023.

ISSUES

In accordance with the prehearing conference order in this case, the hearing was conducted in two phases. In phase one, the parties presented evidence on Mt. Diablo's prehearing motion to dismiss some of Student's issues based on the parties' prior settlement agreement. Following the presentation of phase one evidence, and oral argument by the parties, the ALJ issued an oral ruling on the record on March 22, 2023, that dismissed two of Student's issues and limited the relevant time period for Student's remaining issues. The hearing then proceeded immediately on Student's remaining issues, which were restated, and on Mt. Diablo's issues.

A detailed explanation of the phase one ruling was reserved for this written decision, and follows the statement of issues.

STUDENT'S ISSUES FOR PHASE 2

1. Did Mt. Diablo deny Student a free appropriate public education, called a FAPE, during the 2022-2023 school year, from September 2, 2022, to the filing of Student's due process hearing request on January 10, 2023, by:
    a. Failing to consider, revise Student's individualized education program, called an IEP, and implement the recommendations from Student's March 2022 feeding evaluation?
    b. Failing to consider, revise Student's IEP, and implement the recommendations from Student's April 2022 neuropsychological evaluation?
    c. Failing to consider, revise Student's IEP, and implement the recommendations from Student's May 2022 occupational therapy evaluation?
    d. Failing to assess Student in all areas of need before Student entered Mt. Diablo in August 2022?
    e. Failing to offer Student a revised reading goal at Student's May 2022 IEP team meetings?
    f. Failing to offer Student revised writing goals in writing endurance, anchoring, and sizing at Student's May 2022 IEP team meetings?
    g. Failing to offer Student a revised math goal at the May 2022 IEP team meetings?
    h. Failing to provide some educational benefit to Student in reading, writing, and math?

i. Predetermining Mt. Diablo's May 2022 offer of supports and services for Student?

j. Failing to have all required IEP team members present at Student's May 2022 IEP team meetings?

k. Impeding Parent's right to participate in the May 18, 2022 IEP meeting by predetermining the IEP offer and failing to consider Student's evaluations?

l. Failing to implement Student's October 2021 IEP when it failed to have a one-to-one aide in close proximity to Student on October 25, 2022?

m. Failing to offer Student appropriate goals in all areas of need at Student's November 2022 IEP?

n. Failing to revise Student's IEP to address Student's need for heated food?

o. Failing to implement Student's October 2021 and November 2022 IEP's related to permitting weekly video for Parent and the feeding provider?

p. Failing to implement Student's October 2021 and November 2022 IEP's related to parent meetings?

q. Failing to implement Student's October 2021 and November 2022 IEP's by failing to allow a paraprofessional to attend the parent meetings?

r. Failing to provide Parent progress reports in quarter one of Student's 2022-2023 school year?

s. Impeding Parent's right to participate in the IEP decision-making process by failing to provide weekly notes and allow observations more than once per month so that Parent could review and revise?

MT. DIABLO'S ISSUES

1. Can Mt. Diablo assess Student under its November 4, 2022 assessment plan without Parent's consent?
2. Can Mt. Diablo speak to Student's medical doctors and private providers, without Parent's consent?

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.) All future references to the Code of Federal Regulations are to the 2006 version. The main purposes of the IDEA are to ensure:

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

The IDEA affords parents and local educational agencies the procedural protection of an impartial due process hearing with respect to any matter relating to

the identification, assessment, or educational placement of the child, or the provision of a FAPE, to the child. (20 U.S.C. § 1415(b)(6) & (f); 34 C.F.R. § 300.511; Ed. Code, §§ 56501, 56502, 56505; Cal. Code Regs., tit. 5, § 3082.) The party requesting the hearing is limited to the issues alleged in the complaint, unless the other party consents, and has the burden of proof by a preponderance of the evidence. (20 U.S.C. § 1415(f)(3)(B); Ed. Code, § 56502, subd. (i); *Schaffer v. Weast* (2005) 546 U.S. 49, 57-58, 62 [126 S.Ct. 528, 163 L.Ed.2d 387]; and see 20 U.S.C. § 1415(i)(2)(C)(iii).) Here, Student bore the burden of proof. The factual statements in this Decision constitute the written findings of fact required by the IDEA and state law. (20 U.S.C. § 1415(h)(4); Ed. Code, § 56505, subd. (e)(5).)

Student was 11 years old and in sixth grade at the time of the hearing. Student resided with Parent within Mt. Diablo's geographic boundaries at all relevant times. Student was eligible for special education and related services under the categories of autism and speech and language impairment.

HEARING PHASE 1: EFFECT OF THE PARTIES' PRIOR SETTLEMENT AGREEMENT AND STUDENT'S WAIVER OF CLAIMS

On October 27, 2021, the parties entered into a settlement agreement resolving three due process hearing requests then pending before OAH. In negotiating the settlement agreement, Student was represented by an attorney. In this matter, Mt. Diablo contended that Parent on behalf of Student through the settlement agreement waived, among other things, any prospective claims that might arise from Mt. Diablo's conduct through the agreement's specified "Settlement Period" ending September 1, 2022.

Parent contended that Mt. Diablo breached the settlement agreement by failing to reimburse Parent for all transportation costs, and failing to develop an appropriate IEP for Student in May 2022, after Student gave notice of his intent to end his parentally-placed private schooling and return to Mt. Diablo for the 2022-2023 school year, as provided for in the settlement agreement. Parent contended Mt. Diablo could not enforce the settlement agreement because of its breach, or, alternatively, that Student was entitled under the settlement agreement to file a due process hearing request if the parties did not agree on an IEP for Student.

OAH's jurisdiction with respect to settlement agreements is limited. OAH does not have jurisdiction to determine whether a party failed to comply with the terms of an agreement settling IDEA claims. (*Wyner v. Manhattan Beach Unified Sch. Dist.* (9th Cir. 2000) 223 F.3d 1026, 1030.) 1028-1029.) Under the IDEA and Education Code, such a breach of a settlement agreement of IDEA claims is itself is a violation of the IDEA, but not a violation over which OAH has jurisdiction.

Instead, the IDEA confers on Federal district courts, and state courts of competent jurisdiction, subject matter jurisdiction to enforce written settlement agreements arrived at through IDEA resolution session or mediation procedures. (20 U.S.C. §§ (e)(1), (e)(2)(F)(iii), (f)(1)(B)(iii).) Additionally, the California Department of Education has broader jurisdiction to address complaints that a school district or other public agency has violated the terms of any settlement agreement relating to the provision of a FAPE, regardless of whether the settlement was arrived at through IDEA resolution session or mediation procedures. (Cal. Code Regs., tit. 5, §§ 3201, subd. (c)(1), and 3202 subd. (b)(1).) None of these statutory or regulatory provisions confer jurisdiction to OAH.

OAH, however, does have jurisdiction to decide whether a school district has denied a student a FAPE, and violated the IDEA, by failing to provide placement, services, goals, etc. outlined in a settlement agreement. (*Pedraza v. Alameda Unified School Dist.* (N.D. Cal. 2007, No. C 05-04977 VRW) 2007 WL 949603, at **4-5) (*Pedraza*).) OAH also may consider settlement terms as evidence to determine a FAPE denial, such as if the settlement agreement plainly specified that the term constituted a FAPE. (*See, e.g.*, Pedraza, *supra*, at *4 (citing settlement provision acknowledging that the services the district agreed to provide constituted a FAPE).) OAH will also review settlement terms to determine whether a party has waived a claim pursuant to the settlement. (See e.g., *Student v. San Diego Unified School District* (2020), OAH case number 2019120426; *Student v. East Side Union High School District and Santa Clara Office of Education* (2018), OAH Case 2018110789; *Student v. Carlsbad Unified School District* (2018), OAH case number 2018060509.

To decide whether a party has waived a claim pursuant to a settlement, OAH interprets the settlement agreement using the same rules that apply generally to interpretation of contracts. (*Vaillette v. Fireman's Fund Ins. Co.* (1993) 18 Cal.App.4th 680, 686, citing *Adams v. Johns-Manville Corp.* (9th Cir. 1989) 876 F.2d 702, 704.) "Ordinarily, the words of the document are to be given their plain meaning and understood in their common sense; the parties' expressed objective intent, not their unexpressed subjective intent, governs." (*Id.* at p. 686.)

The October 27, 2021 settlement agreement between Student and Mt. Diablo was ambiguous in regard to the claims waived by Student, because it contained both broad waiver language, and language regarding specific obligations, that is susceptible to multiple interpretations. On the one hand, the settlement agreement included a broad general release in which Parent on behalf of Parent and Student waived "any and

all claims, including educationally-related claims, against the District … which were raised or could have been raised and arising from Student's educational program and/or placement though the end of the Settlement Period." The parties agreed that the term "any and all claims" should be "interpreted liberally to preclude any further disputes, litigation, or controversy between Parties that could have been asserted through the end of the Settlement Period."

Parent also waived the protections of Civil Code section 1542, which provides that a general release does not extend to claims that were not known or suspected by the releasing party at the time they executed the release, that would have materially affected the settlement if known. Although the language of the above waivers refers in the past tense to claims which were or could have been raised or asserted at the time of the settlement, Parent agreed to extend the waiver of then existing unknown claims to include "now unknown or later discovered claims, fees, or costs concerning Student's education arising or occurring through the end of the Settlement Period."

On the other hand, the settlement agreement also contained extensive, specific provisions requiring Mt. Diablo to hold an IEP team meeting in May 2022, to develop an IEP for Student, if Student elected to return to Mt. Diablo for the 2022-2023 school year. Mt. Diablo promised to "cooperate fully and in good faith in … the completion of any additional actions that may be necessary or appropriate to give full force and effect to the terms and intent of this agreement." Contrary to the broad general release, and the waiver of unknown claims arising or occurring through the end of the Settlement Period on September 1, 2022, as stated above, the parties agreed that if they did not reach agreement with respect to Student's IEP, either party could seek a due process proceeding. Thus, the parties' settlement agreement language regarding waivers is ambiguous.

If the language in a contract is ambiguous, "it must be interpreted in the sense in which the promisor believed, at the time of making it, that the promisee understood it." (*Buckley v. Terhune* (9th Cir. 2006) 441 F.3d 688, 695, (citing Civ. Code § 1649.) The inquiry considers not the subjective belief of the promisor but, rather, the objectively reasonable expectation of the promise, as evidenced by the words of the contract (*ibid.*), and considers the disputed or ambiguous language in the context of the contract as a whole, and of the relevant surrounding circumstances. (*Id.* at 698.)

In cases of uncertainty not removed by the preceding rules, the language of a contract should be interpreted most strongly against the party who caused the uncertainty to exist. (*Ibid.*, citing Civ. Code § 1653.) The whole of the contract is to be taken together, to give effect to every part, if reasonably practicable, each clause helping to interpret the other. (Civ. Code, § 1641.) An interpretation which gives effect to all provisions of the contract is preferred to one which renders part of the writing superfluous, useless or inexplicable. (*R.W.L. Enterprises v. Oldcastle, Inc.* (2017) 17 Cal.App.5th 1019, 1026.)

Mt. Diablo's interpretation of the settlement agreement as barring Student from raising any claims arising from acts or omissions of Mt. Diablo though the Settlement Period is not objectively reasonable. By allowing Mt. Diablo to act, or refuse to act, with impunity during the Settlement Period, this interpretation would render superfluous, useless or inexplicable the detailed settlement agreement provisions requiring Mt. Diablo to cooperate fully and in good faith to hold an IEP team meeting in May 2022 to develop an IEP for Student's return to class in Mt. Diablo for the 2022-2023 school year. It would also nullify the parties' agreement that either party could seek a due process hearing if they did not reach agreement on an IEP.

While the settlement agreement obligated Mt. Diablo to develop an IEP for Student, it was clear that Parent and Student agreed Mt. Diablo had no obligation to provide Student a FAPE until after the end of the Settlement Period. The settlement agreement states that Mt. Diablo "does not have any obligation to provide a [FAPE] to Student, including, but not limited to, assessments, related services, placement, annual goals, or transportation through the Settlement Period."

All provisions of the settlement agreement are given force and effect if it is interpreted as allowing Student to raise claims arising from acts or omissions of Mt. Diablo in developing an IEP for Student within the Settlement Period, but only to the extent that they affected Student's educational program after the end of the Settlement Period and denied Student a FAPE.

Accordingly, at the end of phase one, the ALJ determined that under the settlement agreement, Student had waived all claims against Mt. Diablo arising from Mt. Diablo's conduct:

- occurring before the parties executed the settlement agreement on October 27, 2021; and
- from October 27, 2021, through the end of the Settlement Period on September 1, 2022, except to the extent that conduct during this period caused a FAPE denial to Student after the end of the Settlement Period.

Applying these determinations to Student's issues as stated in the Order Following Prehearing Conference, the ALJ dismissed Student's original Issues 1a and 1b, in which Student alleged that Mt. Diablo had predetermined Student's October 25, 2021 IEP and failed to offer Student appropriate goals in that IEP. The ALJ also restated Student's remaining claims that Mt. Diablo had denied Student a FAPE in the 2021-2022,

and 2022-2023 school years, limiting the claims to those set forth in the Issues section above, alleging FAPE denials occurring from September 2, 2022, to the filing of Student's complaint on January 10, 2023.

For phase two of the hearing, as discussed above, OAH has no jurisdiction to determine whether Mt. Diablo breached any settlement agreement provision. Determinations of Mt. Diablo's liability are therefore made solely based on whether Mt. Diablo denied Student a FAPE by violating the IDEA, Education Code, and implementing regulations.

HEARING PHASE 2: STUDENT'S ISSUES

Student was first found eligible for special education under the category of autism during preschool in 2014. Since then, he consistently showed needs in the areas of

- social skills and speech and language pragmatics,
- self-regulation,
- reading comprehension,
- writing,
- handwriting,
- executive functioning/organization, and
- feeding due to rigid and restricted eating habits.

In fifth grade, Student began having a need in math, as word problems were added to his math curriculum. Student's 2018 triennial evaluation yielded assessment results showing relative strengths in verbal comprehension, working memory, and visual perceptual skills, and weaknesses with his

- social interaction and pragmatic skills,
- memory of visual information,
- reasoning and problem-solving skills,
- processing speed, and
- social perception/cognition.

Student's 2020 triennial assessment showed Student's reasoning skills had improved and fluid reasoning had become an area of relative strength.

During the 2021-2022 year, Student was privately-placed and educated at home by Parent and service providers hired by Parent. For the 2022-2023 school year, Student began attending Mt. Diablo's Autism Magnet Program at Foothill Middle School on August 11, 2022. Mt. Diablo designed its Autism Magnet Program for students who are cognitively and behaviorally high functioning, at or near grade level academically, with needs mostly in social skills. In this program, Student attended all general education classes, except for one period of specialized academic instruction. Social skills instruction and occupational therapy supports to address needs related to Student's autism were embedded in Student's general education classes, and Student also received related services including a full-time one-to-one aide, and group speech and language services. Student was smart, enthusiastic, inquisitive, and well-liked by teachers and staff. He earned grades of A's and B's in his seven classes in the first semester of the 2022-2023 school year, which ended December 21, 2022.

The immediate trigger for these consolidated cases was a standoff over Mt. Diablo's refusal to allow Student or his one-on-one aide to use a microwave to heat Student's lunch, to address Student's need for heated foods arising from an eating disorder for which Student had an IEP goal. The parties' inability to resolve this seemingly minor matter without resorting to litigation is emblematic of their overarching problem of an almost complete inability to collaborate effectively to develop Student's educational program.

The Supreme Court has noted that the IDEA expects that parents and school districts will cooperate in the collaborative IEP process. "The core of the [IDEA] ... is the cooperative process that it establishes between parents and schools. ... The central vehicle for this collaboration is the IEP process." (*Schaffer v. Weast*, supra, 546 U.S. at p. 53.) This expectation of collaboration is not met here.

Parent complains that despite her near-daily emails to Mt. Diablo regarding issues with Student's program, multiple non-compliance complaints filed with the California Department of Education, a report of child endangerment filed with local law enforcement, multiple due process complaints filed, and multiple settlement agreements reached and breached, Mt. Diablo has never provided Student a FAPE since he began attending school in Mt. Diablo in 2014.

Mt. Diablo, for its part, openly assumes that there is nothing it can do that would satisfy Parent that Mt. Diablo is providing Student a FAPE. To avoid immediate conflict and reach agreement with Parent about how to serve Student, Mt. Diablo has not always been forthcoming regarding its intent in negotiations. For example, Mt. Diablo did not tell Parent that it intended that the Settlement Agreement's broad waiver provision

would bar Parent from raising any claims against Mt. Diablo for its conduct in developing the May 2022 IEP offer for Student's return to the school district.

The dysfunctional relationship between Parent and Mt. Diablo is a more extreme version of that of the parties in *Anchorage School Dist. v. M.P.* (9th Cir. 2012) 689 F.3d 1047 (*Anchorage*). In *Anchorage*, the parents filed four administrative complaints against the district, obtained a "stay put" order in connection with a pending administrative proceeding, then submitted extensive revisions to the district's draft IEP. The Ninth Circuit observed, "Here, it is beyond dispute that … parents were zealous advocates for their son," with ongoing concerns about the adequacy of the educational opportunities and services provided by the [district]. (*Id.* at p. 1056.) "Having reviewed the record, we are aware that this zealousness probably contributed to their strained relationship with the [district]." (*Ibid.*) The court held, however, that the IDEA does not permit an educational agency to abdicate its affirmative duties under the IDEA because of the parents' uncooperative attitude and litigious approach. (*Id.* at pp. 1051, 1056.) The court held the district had two options when it received the parents' extensive revisions to its draft IEP: "(1) continue working with M.P.'s parents in order to develop a mutually acceptable IEP, or (2) unilaterally revise the IEP and then file an administrative complaint to obtain approval of the proposed IEP." (*Id.* at p. 1056.) The court described this outcome as:

> "consistent with the manner in which Congress addressed the concern of overly demanding parents. See 20 U.S.C. § 1412(a)(10)(C)(iii)(III) (providing that a court may reduce or deny reimbursement for private school placement costs "upon a judicial finding of unreasonableness with respect to actions taken by the parents"); *id.* § 1415(i)(3)(B)(i)(II) (providing for an award of attorney's fees to a prevailing educational agency when the parent's attorney files or continues to litigate a frivolous, unreasonable,

> or baseless cause of action); *id.* § 1415(i)(3)(B)(i)(III) (permitting an award of attorney's fees to a prevailing educational agency and against either the parent or the parent's attorney when "the parent's complaint or subsequent cause of action was presented for any improper purpose, such as to harass, to cause unnecessary delay, or to needlessly increase the cost of litigation"); *id.* § 1415(i)(3)(F) (authorizing a court to reduce an award of attorney's fees in matters in which the parent or the parent's attorney "unreasonably protracted the final resolution of the controversy"). Each of these authorized sanctions penalizes the parents or their attorney – not their children. These safeguards provide a sufficient deterrent to unreasonably demanding or litigious parents.

(*Anchorage, supra,* 689 F.3d at 1057.) Although Mt. Diablo complained that its IEP team has had to "ben[d] over backwards to respond to Parent demands, accusations, complaints and threats," consistent with its duties as expressed in *Anchorage*, it did not contend that Parent's conduct prevented it from offering or implementing a FAPE for Student, with the exception of the issue that triggered this case.

For clarity, Student's Issues in this Decision are addressed in mostly chronological order, rather than numerical or alphabetical order.

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STUDENT'S ISSUE 1j: DID MT. DIABLO DENY STUDENT A FAPE BY FAILING TO HAVE ALL REQUIRED IEP TEAM MEMBERS PRESENT AT STUDENT'S MAY 2022 IEP TEAM MEETINGS?

Student contends Mt. Diablo violated the IDEA and Education Code by failing to have either a special education teacher or a regular education teacher attend Student's May 11, 2022 IEP team meeting, and by allowing the district's speech and language pathologist to leave Student's May 18, 2022 IEP team meeting early, without Parent's consent. As to Student's May 11, 2022 IEP, Mt. Diablo contends it satisfied the requirement to have a regular education teacher attend by having Student's private math tutor and private reading and English language arts teacher attend, as well as a former general education teacher. Further, it satisfied the special education teacher requirement by having Student's anticipated special education teacher attend. Mt. Diablo did not address Student's contention regarding the alleged early departure of its speech and language pathologist from the May 18, 2022 IEP.

A district's determination of whether a child has a disability, and the educational needs of the child, must be made by an IEP team consisting of a team of qualified professionals and the parent of the child. (20 U.S.C. § 1414(b)(4)(A).) The IDEA and Education Code require that certain individuals attend every IEP team meeting, including:

i. the parent of the child;

ii. not less than one regular education teacher of the child, if the child is or may be participating in the regular education environment;

iii. not less than one special education teacher, or where appropriate, not less than one special education provider of the child;

iv. a representative of the school district who is knowledgeable about the availability of the resources the district, is qualified to provide or supervise the provision of special education services and is knowledgeable about the general education curriculum;

v. an individual who can interpret the instructional implications of evaluation results;

vi. at the discretion of the parent or the district, other individuals who have knowledge or special expertise regarding the child, including related services personnel as appropriate; and

vii. whenever appropriate, the child with a disability. (20 U.S.C. § 1414 (d)(l)(B); Ed. Code, § 56341, subd. (b)(1)-(7).)

Neither the required regular education teacher, nor the special education teacher or provider, has to be currently working with the student. (*R.B. v. Napa Valley Unified Sch. Dist*. (9th Cir. 2007) 496 F.3d 932, 939 (*R.B. v. Napa Valley*).) The regular education teacher may be the current regular education teacher, a former regular education teacher, or a regular education teacher who has not previously taught the student but may be responsible for implementing a portion of the student's IEP, who can participate in discussions about how best to teach the child. (*Ibid*. [citing United States Department of Education Office of Special Education Programs (OSEP), Comments to Regulations, 34 C.F.R. Pt. 300 App.A – Question 26 (1999)].)

The special education teacher or provider must be a current or former special education teacher or special education related service provider who has actually taught the student. (*R.B. v. Napa Valley*, *supra*, at p. 940; see also, *Mahoney v. Carlsbad Unified*

School Dist. (9th Cir. 2011) 430 Fed.Appx. 562, 564 [speech and language provider who had worked with the student three years before the IEP at issue satisfied requirement for a special education provider].) The required regular education teacher, and the special education teacher or provider, may be school district employees , or they may be previous teachers or providers from a prior district or private school who have taught the student. (See, e.g., *W.G. v. Board of Trustees of Target Range School Dist. No. 23, Missoula, Mont*. (9th Cir. 1992) 960 F.2d 1479, 1484 (*Target Range*) (superseded by statute on other grounds) [Failure to invite the regular education teacher from the student's private school to participate in the student's IEP, where no district teacher had ever taught the student, led the district to propose "a preexisting, predetermined" IEP and refuse to consider alternatives.].)

A required IEP member may only be excused from attending an IEP team meeting if:

i. the parent agrees in writing with the district that the team member's attendance is not necessary, because the member's area of the curriculum or related services is not being modified or discussed in the meeting; or

ii. if the meeting involves a modification to, or discussion of, the member's curriculum area or related services, the team member may be excused if the parent consents in writing to the excusal, and the team member, before the meeting, provides parent and the IEP team written input into the IEP development. (20 U.S.C. § 1414 (d)1(C); 34 C.F.R. 300.304(e); Ed. Code, § 56341, subd. (f)-(h).)

Failure to comply with any of the above requirements are procedural violations of the IDEA and Education Code. Procedural compliance is closely scrutinized. "Congress placed every bit as much emphasis upon compliance with procedures giving parents and guardians a large measure of participation" at every step "as it did upon the measurement of the resulting IEP." (*Board of Education of the Hendrick Hudson Central School Dist. v. Rowley* (1982) 458 U.S. 176 at pp. 205–06 (*Rowley*).)

> "If the IEP team is improperly constituted, the reviewing court is ill-situated to know what the IEP would look like if the school district had included all the required participants on the IEP team …. A properly constituted IEP team is in the best position to develop an IEP that suits the peculiar needs of the individual student." (*R.B. v. Napa Valley*, *supra*, 496 F.3d at p. 941 [citing *Rowley*, *supra* 458 U.S. at 206 (explaining that procedural compliance would almost always achieve what Congress intended with respect to the substantive IEP provisions)].)

Student failed to meet his burden of proof on this issue. In their October 27, 2021 settlement agreement, Parent and Mt. Diablo agreed Student would be considered a parentally-placed private school Student through the end of the 2022 extended school year. If Student planned to return to Mt. Diablo for the 2022-2023 regular school year, Parent agreed to notify Mt. Diablo by March 15, 2022, in writing, so Mt. Diablo could begin the process of determining a prospective placement offer for the 2022-2023 school year. If Parent gave notice by March 15, 2022, Mt. Diablo agreed to convene an IEP meeting for Student by May 31, 2022, to review and discuss potential placement options for the 2022-2023 school year.

On February 8, 2022, Parent emailed Mt. Diablo's chief of pupil services Wendy Aghily written notice that Student would be returning to Mt. Diablo for the 2022-2023 regular school year.

On May 11 and 18, 2022, Mt. Diablo conducted Student's IEP team meeting by videoconference. Sixteen participants attended Student's May 11, 2022 IEP team meeting. This included Sabrina Causey, Student's private English Language Arts teacher since November 2021, and Sarah Talach, Student's private speech and language services provider since August 2021. Causey was a certified kindergarten through fifth grade teacher, who taught Student after her work at Oakland Unified School District. Causey satisfied the requirement that a regular education teacher attend Student's May 11, 2022 IEP team meeting. She was knowledgeable about Student, about programs and services available in the general education environment and familiar with the IEP process. Talach was a licensed speech and language pathologist, and satisfied the requirement that the May 11, 2022 IEP include a special education teacher or special education provider who had taught Student.

Mt. Diablo's speech and language pathologist Anastasia Smirnova attended Student's May 18, 2022 IEP team meeting. Student's complaint alleged that the IEP team meeting "minutes" indicated Smirnova "withdrew from the meeting to attend another appointment," but no "minutes" were offered in evidence. The notes for the May 18, 2022 IEP team meeting show Smirnova attended the meeting and participated in all IEP team discussions of Student's speech and language needs.

Even assuming Smirnova did attend but then left the May 18, 2022 IEP meeting early, Student failed to offer evidence how such a procedural violation, if it occurred, denied Student a FAPE. A procedural violation does not constitute a FAPE denial unless

the violation causes a loss of a student's educational opportunity, or seriously infringes the parents' opportunity to participate in the IEP formulation process. (*Target Range*, *supra*, 960 F.2d at p. 1484.)

Smirnova attended the May 11, 2022 meeting where Student's private speech and language provider Talach presented her evaluation of Student. She responded to Parent's questions about how Student would receive speech and language services at Foothill Middle School, explaining that the services could be push-in or pull-out and the service provider would avoid pulling Student from core subjects.

At the May 18, 2022 meeting, Smirnova and Parent discussed Talach's proposed speech and language goals. Smirnova said the proposed goals were clear and correlated with Talach's assessment results. She explained the proposed goals could be a baseline to work from, to be modified based on information from in-class observations after Student started school. Student presented no evidence that Smirnova's alleged early departure caused Student to lose educational opportunity, or left Parent with unanswered questions that seriously infringed Parents' opportunity to participate in the formulation of Student's IEP.

Mt. Diablo did not deny Student a FAPE by failing to have all required IEP team members present at Student's May 2022 IEP team meetings.

Mt. Diablo prevailed on Student's Issue 1j.

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STUDENT'S ISSUE 1d: DID MT. DIABLO DENY STUDENT A FAPE BY FAILING TO ASSESS STUDENT IN ALL AREAS OF NEED BEFORE STUDENT ENTERED MT. DIABLO IN AUGUST 2022?

Student contends Mt. Diablo denied Student a FAPE by failing to assess Student in any of his areas of need to prepare for Student's May 2022 IEP, and his return to class at Mt. Diablo in August 2022 for the 2022-2023 school year. Mt. Diablo contends that after conducting a triennial assessment in the spring of 2021, it was not required to reassess Student again until 2024, and could rely on Student's 2021 triennial assessment and private assessment reports provided by Parent, and avoid burdening Student by subjecting him to a second set of assessment tools in addition to those used by Student's private assessors.

MT. DIABLO'S OBLIGATIONS TO ASSESS STUDENT FOR THE MAY 2022 IEP

Having agreed to conduct an IEP for Student, Mt. Diablo was required to conduct it appropriately and make an appropriate FAPE offer. Although as part of parties' October 27, 2021 settlement agreement, Parent consented to Student's October 25, 2021 IEP and agreed the IEP could be applied as Student's educational program in the 2022-2023 school year, it was only stay put in the event Parent and Mt. Diablo could not reach agreement on a new IEP at Student's May 2022 IEP meetings.

The parties' clear intent demonstrated that the October 25, 2021 IEP would be superseded, if not at the May 2022 IEPs or in subsequent negotiations, then later through a due process hearing.

Once a student is found eligible for special education based on an initial assessment and initial IEP team meeting, the student must be reassessed

- if the school district determines that the educational or related services needs of the pupil warrant a reassessment,
- if the pupil's parents or teacher requests a reassessment, or,
- at a minimum, every three years in a triennial reassessment, unless the parent and the local educational agency agree in writing that a reassessment is unnecessary. (20 U.S.C. § 1414(a)(2)(A)(i) and (ii); Ed. Code, §§ 56381, subd. (a)(1) & (2).)

A reassessment can only be conducted more frequently than once a year if the parent and district agree. (20 U.S.C. § 1414(a)(2)(B)(i); Ed. Code, § 56381, subd. (a)(2).)

A school district must hold an IEP team meeting to review the existing IEP of a special education student enrolled in the district at least annually. (Ed. Code, § 56341.1, subd. (d).) However, it is not required to conduct a reassessment for any IEP that is not reviewing a triennial reassessment, but may instead consider the results of the student's initial assessment or most recent reassessment of the pupil. (Ed. Code, § 56341.1, subd. (a)(3).)

A district's violation of its obligation to assess a student is a procedural violation of the IDEA and the Education Code (*Park v. Anaheim Union High School Dist.* (9th Cir. 2006) 464 F.3d 1025, 1031-1033.)

The IDEA and Education Code do not establish any required procedure a district must follow to determine whether a district reassessment is warranted for an upcoming IEP. In an unpublished opinion which is instructive though not binding,

the Ninth Circuit in *M.S. v. Lake Elsinore Unified School District* (9th Cir. 2017) 678 Fed.Appx. 543 (*M.S. v. Lake Elsinore*), allowed the district unfettered discretion in its determination of whether to reassess, overturning a district court decision holding that the school district committed a procedural, and ultimately substantive, violation by failing to reassess a student whose new and worsening behaviors warranted reassessment. (*Id.* at p. 544; [See district court decision, *M.S. v. Lake Elsinore Unified School District* (C.D. Cal., July 24, 2015, No. 13CV01484CASSPX) 2015 WL 4511947, at *7.]) The court strictly interpreted 20 U.S.C. § 1414(a)(2), finding no duty to assess

> "because the local educational agency did not determine that reevaluation was necessary, M.S.'s parents did not request a reevaluation …, M.S.'s teacher did not request a reevaluation, and fewer than three years had elapsed since [the prior] evaluation." (*M.S. v. Lake Elsinore*, supra, 678 Fed.Appx. at p. 544.)

MT. DIABLO DID NOT COMMIT A PROCEDURAL VIOLATION BY FAILING TO ASSESS STUDENT FOR THE MAY 2022 IEP

Mt. Diablo chose not to assess Student as part of its preparations for Student's May 2022 IEP team meetings. The reasons for this decision are not clear. During the period between Parent's February 8, 2022 notice of Student's expected return, and the later, uncertain date before May 31, 2022 on which Mt. Diablo would not have been able to complete assessments in time for Student's IEP, Mt. Diablo was not legally required to, and did not,

- engage in any formal process to determine if it needed information from reassessments for Student's IEP,

- solicit information from Parent on whether additional assessments were needed, or
- explain its decision or reasoning to Parent.

The evidence presented at hearing does not support Mt. Diablo's explanation in its closing brief that, in lieu of conducting any district assessment, it chose to rely on the private assessment reports in the areas of occupational therapy, speech and language therapy, neuropsychological, and feeding, that Parent presented at the May, 2022 IEP meetings, and Student's previous triennial evaluation in 2021, and did not wish to burden Student with duplicate assessments. Parent did not provide Mt. Diablo any of the private reports until May 10, 2022, well past the date on which Mt. Diablo would have had to review them to decide whether to conduct its own assessments. Also, as discussed in the section below, Mt. Diablo did not actually consider the private assessment reports in developing its May 2022 IEP offer.

Mt. Diablo's Chief of Pupil Services Wendy Aghily, who was not a member of Student's IEP team, testified the district did not assess Student because Parent failed to give notice before April 2022 that Student would be returning, too late to give Mt. Diablo 60 days to complete assessments and hold an IEP team meeting by May 31, 2022. (Ed. Code, §§ 56043, subd. (f), 56344, subd. (a).) That contention was incorrect since Parent gave notice on February 8, 2022. Aghily also testified that district members of Student's IEP team decided not to assess Student because they wanted to assess Student in a school setting. That explanation was consistent with statements at Student's May 18, 2022 IEP team meeting by Mt. Diablo's assistant director for alternative dispute resolution, Ivanna Huthman, that Mt. Diablo wanted to see Student in a school setting before making changes to his October 25, 2021 IEP.

Whatever the reason for its decision not to conduct new assessments, Mt. Diablo was legally permitted to rely on its most recent reassessments of Student in the spring of 2021 instead of conducting new ones, even if there were arguably bases for the district to determine a reassessment was warranted. For example, there were several areas of Student's need that were known in the spring of 2021 assessments but not actually assessed by Mt. Diablo, because in-person assessments were suspended during distance learning. The psychoeducational and occupational therapy assessment reports, and Student's October 25, 2021 IEP, all mentioned challenges assessing and collecting data on Student using videoconferencing during distance learning. The 2021 psychoeducational assessment report stated the assessor was unable to assess Student's processing speed skills, which had been an area of weakness in prior assessments, or Student's motor manipulation of visually based tasks, and no testing was done in these areas. The IEP stated that during distance learning, Student usually had his video camera turned off or set a green screen, so that staff could not see him. When this occurred, it prevented staff from collecting data on the majority of his IEP goals.

However, all of these potential reasons for Mt. Diablo to reassess Student were documented and also known to Parent. Parent did not request Mt. Diablo reassess Student, but instead obtained private assessments. Parent did not contend, and, given Student's private placement in the 2021-2022 school year, could not credibly contend, that Mt. Diablo withheld any material information concerning Student that might reasonably have led Parent to request a district reassessment.

Accordingly, Mt. Diablo was not required to reassess Student for his May 2022 IEP's.

Mt. Diablo prevailed on Student's Issue 1d.

STUDENT'S ISSUES 1a, 1b, AND 1c: DID MT. DIABLO DENY STUDENT A FAPE BY FAILING TO CONSIDER, REVISE STUDENT'S IEP, AND IMPLEMENT THE RECOMMENDATIONS FROM STUDENT'S MARCH 2022 FEEDING EVALUATION, APRIL 2022 NEUROPSYCHOLOGICAL EVALUATION, AND MAY 2022 OCCUPATIONAL THERAPY EVALUATION?

Student contends Mt. Diablo denied Student a FAPE by failing to:

- consider the reports and recommendations from Student's private feeding therapist, and private neuropsychological and occupational therapy assessors;
- include them in Student's Amendment IEP date May 11, 2022; and
- implement them in Student's educational program.

Mt. Diablo contends Student's IEP team did consider Student's private assessments but was not required to adopt or implement the private assessors' recommendations.

If a parent obtains an independent assessment at public expense, or shares with the school district an evaluation obtained at private expense, the results of the evaluation must be considered by the school district, if it meets agency criteria, in any decision made with respect to the provision of a FAPE. (34 C.F.R. § 300.502(c)(1); Ed. Code §§ 56341.1, subd. (b)(1) and 56381, subd. (b).) The district is not required to adopt the conclusions of such an evaluation. (*Ibid.*; *Michael P. v. Department of Educ*. (9th Cir. 2011) 656 F.3d 1057, 1066 (*Michael P.*). Evidence that district IEP team members have considered a private evaluation include a lengthy discussion of the evaluation at an IEP team meeting (*Michael P.*, *supra*, at p. 1066), proposals by the IEP team to conduct further assessments in an area of need identified in the evaluation (*B.S. v. Placentia-*

Yorba Linda Unified School District (C.D. Cal., Aug. 1, 2007, No. SACV06847CJCMLGX) 2007 WL 9719115, at *3–4), or alteration of IEP provisions in response to suggestions made by the private assessor. (*Ibid.*)

STUDENT'S PRIVATE EVALUATIONS

Nicolette Zader is a clinic-based licensed occupational therapist whose practice for the last 10 years has focused on evaluating and treating children with complex feeding disorders. Zader conducted a feeding assessment of Student and prepared a report dated March 24, 2022. Parent provided Zader's feeding assessment report to Mt. Diablo on May 13, 2022.

Zader's report noted Student has a diagnosis of Avoidant Restrictive Food Intake Disorder (ARFID), and a history of extreme food aversion, extreme negative reactions to food, poor variety of food, limited intake of food per meal, and extreme anxiety regarding food and eating. The report also noted Student's history of food jagging, which Zader explained at hearing meant that Student would insist on eating the same food item, prepared the same way, every day until tiring of that food item and eliminating it from his diet completely.

Zader assessed Student's physical ability to chew and swallow and drink liquids and found he had adequate oral motor skills and ability to eat and drink. She tested his behavioral response to being offered preferred and non-preferred foods, and found he exhibited a stress response to all foods, and anxiety when presented non-preferred foods. Student was sensitive to food temperatures that were too warm or too cold, and extremely sensitive to food textures.

Overall, Student exhibited high anxiety, distress, and aversion to food. He had extreme sensory sensitivities to food textures, temperature, flavor, and appearance. Student found it very difficult take his first bite of a food item but was able after that to eat two or three more bites of the same food if he did not experience an extreme reaction to the texture of the food. He could not consistently eat more than two or three bites of a "sometimes" accepted food in one sitting. Student would only eat an appropriate serving size of food of a preferred food at home and would not eat in unfamiliar places. For his return to in-person learning at school, Zader recommended that a trained feeding therapist assist Student at lunch to ensure consistency with techniques and provide appropriate language and strategies to encourage eating. She also recommended supportive seating to stabilize his posture when eating, a quiet environment with low distractions, and extra time to eat lunch. Zader noted Student's recess time would be important for his mental health, sensory regulation, and peer interactions, and should not be reduced to allow more time for eating. Zader's report included five long term feeding goals she was working on with Student.

Clinical psychologist and neuropsychologist Lyndsay Dell, Psy.D., conducted a clinic-based neuropsychological evaluation of Student and prepared a report dated April 28, 2022. Student provided Dr. Dell's report to Mt. Diablo on May 13, 2022. Dr. Dell reviewed Student's medical records, Mt. Diablo's assessments, IEP's, and Student's report cards, and notes from his in-home schooling providers. She interviewed Parent, observed and interviewed Student, and administered standardized tests to determine Student's

- intellectual functioning,
- verbal comprehension,
- visual spatial abilities,
- fluid reasoning,

- auditory working memory,
- nonverbal cognitive ability,
- general intellectual ability,
- cognitive proficiency,
- executive functioning,
- processing speed,
- language fluency,
- learning memory, and
- academic achievement.

Dr. Dell found Student exhibited well above average intelligence, with a significant difference between his verbal comprehension and his fluid reasoning. He also struggled with some aspects of executive functioning and behavioral regulation. Dr. Dell's findings were consistent with Student's prior diagnoses of attention deficit and hyperactivity disorder, and autism spectrum disorder. His cognitive profile demonstrated variability in performance on tasks of attention, and particular weaknesses and distractibility on activities requiring sustained attention and requiring redirection to ensure timely success and completion.

Based on her assessment, Dr. Dell diagnosed Student as having a nonverbal learning disorder, a brain-based condition commonly seen in individuals with autism, characterized by poor visual, spatial, and organizational skills, difficulty recognizing and processing nonverbal cues, and poor motor performance. Dr. Dell recommended that Student be provided a one-on-one aide in a school environment, along with

occupational therapy, feeding therapy, adaptive life skills education and support, transportation, adapted physical education, social and emotional therapies, and strategies for managing symptoms arising from his ADHD and autism.

Clinic-based occupational therapist Liz Isono conducted Student's occupational therapy assessment documented in a report dated May 15, 2022. Parent provided Isono's report to Mt. Diablo on May 16, 2022. To address concerns with Student's self-regulation, executive functioning, attention, and writing, Isono assessed Student in the areas of gross, fine, visual perceptual, and visual motor skills. Isono also evaluated Student's sensory processing systems to determine Student's ability to functionally process and integrate environmental input and stimuli at school. Isono found Student presented with

- anxiety,
- attentional challenges,
- sensory challenges,
- proprioceptive deficits impacting his writing efficiency and motor planning, and
- visual motor challenges.

She recommended Student's IEP include

- 60 minutes per week of direct occupational therapy,
- one hour per month of consultation services;
- an occupational therapy designed self-regulation program,
- adapted paper, and
- that he be referred for an assistive technology (AT) evaluation.

MT. DIABLO DID NOT MEANINGFULLY CONSIDER STUDENT'S PRIVATE EVALUATIONS WHEN DEVELOPING STUDENT'S AMENDMENT IEP DATED MAY 11, 2022

Zader, Dell, and Isono each presented their assessment report to Student's IEP team at Student's May 18, 2022 IEP team meeting, Other participants at the May 18, 2022 IEP were neutral IEP facilitator Elaine Talley, and Parent and Student's private board certified behavior analyst Zahiah Sarsour on behalf of Student. On behalf of Mt. Diablo, the participants were

- assistant director for alternative dispute resolution Ivanna Huthman,
- behaviorist Jennifer Carvalho,
- occupational therapist Amanda Cereske,
- speech pathologist Anastasia Smirnova,
- Foothill Middle School principal Kimberly Vaiana,
- Foothill Middle School Vice Principal Crystal Stull,
- Contra Costa County Behavioral Health licensed marriage and family counselor Shennen Pugh, and
- Contra Costa County Behavioral Health Intensive Care Coordinator Denisse Tovar.

None of the Mt. Diablo IEP team participants had any questions for Zader, Dell, or Isono. Other than the presentations by the assessors, the only discussion of the reports was between Parent and the assessor giving the report. Mt. Diablo contends the May 18, 2022 IEP meeting notes reflect a robust discussion on Isono's occupational therapy findings, recommendations, and proposed goals, but that discussion occurred entirely between Isono and Parent.

At the end of the presentations, Mt. Diablo announced that it had no proposals to edit any of the goals from the October 25, 2022 IEP until after it had an opportunity to see Student in the comprehensive school environment. Huthman stated the district's position was that it would serve Student for 30 days and be able to come back with information about how he was doing and his present levels in the comprehensive school environment so they could propose and adopt or not adopt goals that were based on everyone being informed and seeing him in the comprehensive setting, taking into account all of the information provided by private assessors and providers. Thus, Staff would take Student's baseline data in the school setting while keeping account of the information provided by the outside assessors and Parent, and all of the information from the May 11 and 18, 2022 IEP team meetings to inform the 30-day IEP team.

Parent objected strenuously that Student was entitled at the start of the school year to an IEP that provided him a FAPE. She argued if there was to be an interim IEP while Mt. Diablo took Student's baseline data in the school setting, it should be based on the most current available data provided by the private assessors, Parent, and Student's in-person teacher and providers. Mt. Diablo disagreed and prepared an Amendment IEP dated May 11, 2022 that was essentially unchanged from the October 25, 2021 IEP that Parent consented to as part of the settlement agreement, except for placement at Foothill Middle School. None of the private assessors' input was incorporated in any way into the May 11, 2022 Amendment IEP.

The evidence clearly shows that Mt. Diablo procedurally violated the IDEA and Education code by not meaningfully considering Student's private evaluations in developing Student's Amendment IEP dated May 11, 2022.

MT. DIABLO WAS REQUIRED TO HAVE AN APPROPRIATE IEP IN PLACE FOR STUDENT AT THE START OF THE 2022-2023 SCHOOL YEAR

The IDEA, its implementing regulations, and the Education Code, do not set forth specific timing and procedures for a district to provide FAPE to a child with a disability who enrolls or re-enrolls into the district between academic years, as Student did here. When a student with an IEP transfers during the same academic year from one district to another in the same Special Education Local Plan Area, called a SELPA, the new district must provide the student a FAPE, including special education and related services "comparable" to those described in the student's last existing approved IEP, unless parents and district agree to develop a new IEP. (Ed. Code, § 56325, subd.(a)(2); 20 U.S.C. § 1414(d)(2)(C)(i)(I); 34 C.F.R., § 300.323(e).)

If the student has transferred to the new district from a district not within the new district's SELPA within the same academic year, the new district may implement special education and related services comparable to those in the existing IEP for no more than 30 days, by which time the district must either adopt the previously approved IEP, or develop, adopt, and implement a new IEP that is consistent with federal and state law. (Ed. Code, §§ 56325, subd. (a)(1); 56043, subd. (m)(1).)

In its Comments accompanying the 2006 IDEA Regulations, the United States Department of Education addressed whether it needed to clarify the regulations regarding the responsibilities of a new school district for a child with a disability who transferred during summer. The Department of Education stated that the IDEA is clear that each school district must have an IEP in place for a child at the beginning of the school year. (United States Department of Education, Analysis of Comments and

Changes to 2006 IDEA Part B Regulations, 71 Fed. Reg. 46593, 46682 (August 14, 2006) (Comments to 2006 IDEA Regulations), citing 20 U.S.C. § 1414(d)(2)(A); see also, 34 C.F.R. § 300.323(a) Ed. Code, § 56344, subd. (c).) Therefore,

> "if a child's IEP from the previous public agency was developed (or reviewed and revised) at or after the end of a school year for implementation during the next school year, the new public agency could decide to adopt and implement that IEP, unless the new public agency determines that an evaluation is needed." (Comments to 2006 IDEA Regulations, 71 Fed. Reg. at p. 46682.)

Although the IDEA and Education Code expressly do not require school districts to work on assessment plans or assessments during the days between regular school sessions, there is no similar exemption for the preparation of IEP's for students with disabilities who enroll in the district during the summer. To the contrary, the Comments to 2006 IDEA Regulations are firm that an IEP must be in place. They suggest that, in the absence of an acceptable existing IEP, "the newly designated IEP Team for the child in the new public agency could develop, adopt, and implement a new IEP for the child that meets the applicable requirements in §§ 300.320 through 300.324." (*Ibid.*)

The new district is not required to implement a former district's IEP or give the student services that are "comparable" to those offered by a former district, but the IEP must be reasonably calculated to provide the student a FAPE based on the information available to the district. (*Adams v. State of Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149, citing *Fuhrman v. East Hanover Board of Education* (3rd Cir. 1993) 993 F.2d 1031, 1041.)

Here, Mt. Diablo held an IEP, acknowledged that Student needed new assessments, but delayed the new assessments until after the start of the school year instead of preparing an appropriate interim IEP based on the best available information from Student's private assessors. Mt. Diablo therefore failed to have an appropriate IEP in place at the beginning of the school year. The failure to provide a transferring student an adequate IEP at the start of the school year is a procedural violation that is not cured by a district's promise to amend the IEP later in the school year. (*Cleveland Heights-University Heights City School Dist. v. Boss* (6th Cir. 1998), 144 F.3d 391, 398.)

Mt. Diablo's failure constituted a procedural violation.

MT. DIABLO'S FAILURE TO CONSIDER STUDENT'S PRIVATE EVALUATIONS DEPRIVED STUDENT EDUCATIONAL BENEFIT AND DENIED STUDENT A FAPE

As discussed above Mt. Diablo failed to meaningfully consider the private assessors' data and recommendations during the May 2022 IEPs to develop an interim, non-stay put IEP for the start of Student's 2022-2023 school year. This deprived Student of educational benefit and denied a FAPE as Student's IEP offer would have differed if Mt. Diablo had considered this information, as shown below. This FAPE denial extended from the start of the school year until September 7, 2022, when Mt. Diablo's FAPE offer in the May 11, 2022 Amendment IEP was superseded by Mt. Diablo's September 7, 2022 FAPE offer. Based

on Student's waiver of claims for any FAPE denial occurring through September 1, 2022, Student proved by the preponderance of the evidence that Mt. Diablo's conduct denied Student a FAPE for the three school days September 2, 5, and 6, 2022.

Student prevailed on Student's Issues 1a, 1b, and 1c.

STUDENT'S ISSUES 1i AND 1k: DID MT. DIABLO IMPEDE PARENT'S RIGHT TO PARTICIPATE IN THE MAY 18, 2022 IEP TEAM MEETING AND DENY STUDENT A FAPE BY PREDETERMINING MT. DIABLO'S MAY 2022 OFFER OF SUPPORTS AND SERVICES FOR STUDENT?

Student contends Mt. Diablo impeded Parent's right to participate in the development of Student's IEP at the May 18, 2022 IEP team meeting and denied Student a FAPE by predetermining its offer of supports and services for Student. Mt. Diablo argues that

- Parent and Mt. Diablo decided in the October 27, 2021 settlement agreement,
- that the Student would start the 2022-2023 school year with the October 25, 2021 IEP in place, and
- the May 2022 IEP team meeting purpose was to only discuss placement and services for the 2022-2023 school year.

The IDEA and Education Code require that a district must afford parents of a child with a disability the opportunity to participate in meetings with respect to the identification, assessment, educational placement, and provision of a FAPE to their child. (20 U.S.C. § 1414(d)(1)(B)(i); Ed. Code, §§ 56304, 56342.5.) The IEP team must consider

the concerns of the parent for enhancing the student's education, and information on the student's needs provided to or by the parent. (20 U.S.C. § 1414(d)(3)(A) and (d)(4)(A)(ii); 34 C.F.R. § 300.324(a)(1)(ii) & (b)(1)(ii)(C); Ed. Code, § 56341.1, subds. (a)(2), (d)(3) & (f).) The United States Supreme Court has recognized that parental participation in the IEP development is the cornerstone of the IDEA. (*Winkleman v. Parma City School Dist.* (2007) 550 U.S. 516, 524 [127 S.Ct. 1994, 167 L.Ed.2d 904] ["[T]he informed involvement of parents" is central to the IEP process.].) Parental participation in the IEP process is considered "[a]mong the most important procedural safeguards." (*Amanda J. v. Clark County School Dist.* (9th Cir. 2001) 267 F.3d 877, 882 (*Amanda J.*).)

A school district is required to conduct, not just an IEP team meeting, but a meaningful IEP team meeting. (*W.G. v. Board of Trustees of Target Range School Dist. No. 23* (9th Cir. 1992) 960 F.2d 1479, 1485, superseded on other grounds by statute (*Target Range*); *Fuhrmann v. East Hanover Board of Education* (3rd Cir. 1993) 993 F.2d 1031, 1036 (*Fuhrmann*).) "Participation must be more than a mere form; it must be *meaningful*." (*Deal v. Hamilton County Board of Education* (6th Cir. 2004) 392 F.3d 840, 858 (*Deal*) (emphasis in original).) A parent who has an opportunity to discuss a proposed IEP and suggest changes, and whose concerns are considered by the IEP team, has participated in the IEP development process in a meaningful way. (*Fuhrmann, supra*, 993 F.2d 1031, 1036.)

Predetermination occurs when an educational agency has decided on its offer before the IEP meeting, including when it presents one placement option at the meeting and is unwilling to consider other alternatives. (*H.B. v. Las Virgenes Unified School Dist.* (9th Cir. 2007) 239 Fed.Appx. 342, 344-345 [nonpub. opn.]; *K.D. ex rel. C.L. v. Department of Educ., Hawaii* (9th Cir. 2011) 665 F.3d 1110, 1123.) A school district predetermines the child's program when it does not consider the parents' requests with an open mind,

thereby denying their right to participate in the IEP process. (*Deal, supra,* 392 F.3d at p. 858.) School officials and staff can meet to review and discuss a child's evaluation and programming in advance of an IEP team meeting and may arrive at an IEP team meeting with a pre-written offer, but may not take a "take it or leave it" position. (*J.G. v. Douglas County School Dist*. (9th Cir. 2008) 552 F.3d 786, 801, fn. 10 [citing *Ms. S v. Vashon Island School Dist*. (9th Cir. 2003) 337 F.3d 1115, 1131, superseded on other grounds by 20 U.S.C. § 1414(d)(1)(B)].)

To avoid a finding of predetermination, there must be evidence the district has an open mind and might possibly be swayed by the parents' opinions and support for the IEP provisions they believe are necessary for their child. (See *Deal*, *supra*, 392 F.3d at p. 858.)

> ("Despite the protestations of the Deals, the School System never even treated a one-on-one ABA program as a viable option. Where there was no way that anything the Deals said, or any data the Deals produced, could have changed the School System's determination of appropriate services, their participation was no more than after the fact involvement.").

A state can make this showing by, for example, evidence that it "was receptive and responsive at all stages" to the parents' position, even if it was ultimately rejected. *Doyle v. Arlington Cnty. Sch. Bd.*, 806 F.Supp. 1253, 1262 (E.D.Va.1992), aff'd 39 F.3d 1176 (4th Cir.1994) (unpublished per curiam). But those responses should be meaningful responses that make it clear that the state had an open mind about and actually considered the parents' points. (*R.L. v. Miami-Dade County School Bd*. (11th Cir. 2014)

757 F.3d 1173, 1188–1189.) This inquiry is inherently fact-intensive but should identify those cases where parental participation is meaningful and those cases where it is a mere formality. (*Ibid*.)

Procedural violations that interfere with parental participation in the IEP formulation process undermine the very essence of the IDEA. (*Amanda J. v. Clark County School Dist. (9th Cir. 2001) 267 F.3d 877,* 267 F.3d 877, 892.) Predetermination is an automatic violation of a parent's right of participation under the IDEA. Where predetermination has occurred,

> "regardless of the discussions that may occur at the meeting, the school district's actions would violate the IDEA's procedural requirement that parents have the opportunity 'to participate in meetings with respect to the identification, evaluation, and educational placement of the child.'" (*H.B. v. Las Virgenes*, *supra*, 239 Fed.Appx. at p. 344, quoting 20 U.S.C. § 1415(b)(1).)

Substantive harm occurs when parents are denied meaningful participation in a student's IEP development. (*Deal, supra,* 392 F.3d 840 at pp. 857-858.) Predetermination also causes a deprivation of educational benefits where, absent the predetermination, there is a strong likelihood that alternative educational possibilities for the student would have been better considered. (*M.S. v. Los Angeles Unified School Dist.* (C.D. Cal. September 12, 2016, Case No. 2:15-cv-05819-CAS-MRW) 2016 WL 4925910 at p.12. (citing *Doug C., supra*, 720 F.3d 1038, 1047).) A student is not required to prove that his placement or services would have been different but for the predetermination. (*Ibid*.)

Mt. Diablo's contention that the parties jointly agreed that Student would begin the 2022-2023 school year with the October 25, 2021 IEP in place is unpersuasive and contrary to the October 27, 2021 settlement agreement's language, which stated that the purpose of Parent giving notice to Mt. Diablo that Student would be re-enrolling was to allow Mt. Diablo "to begin the process of determining a prospective placement offer for the 2022-2023 school year." The settlement agreement also clearly stated the parties would be discussing and trying to reach agreement on Student's placement and services at the May 2022 IEP team meeting, stating,

> "In the event the parties do not agree as to the services offered by the District following the May 31, 2022 IEP meeting referenced in Paragraph C.3 of this Agreement, the Parties agree Exhibit A constitutes Stay Put for the 2022·2023 school year, until an agreement is reached."

The notes for the May 18, 2022 IEP team meeting state at the outset, "The district has every intention of presenting an offer of FAPE at this meeting. The district team members have received assessments and reviewed them ahead of the meeting today." Nowhere in the May 11 and 18, 2022 IEP team meetings notes is there any language expressing that the parties had already agreed the FAPE offer would be the October 25, 2022 IEP. Thus, Mt. Diablo's contention fails. Mt. Diablo predetermined the May 11, 2022 IEP offer.

Mt. Diablo's predetermination of its May 11, 2022 IEP offer was not excused by prior consent of Parent, and constituted a procedural violation that denied Parent meaningful participation in Student's IEP development and caused substantive harm to

Student from the start of the 2022-2023 school year. Student proved that Mt. Diablo is liable to Student in accordance with the waiver provisions of the parties' settlement agreement for the period from September 2 through 6, 2022.

Student prevailed on Student's Issues 1i and 1k.

STUDENT'S ISSUES 1e, 1f, AND 1g: DID MT. DIABLO DENY STUDENT A FAPE AT STUDENT'S MAY 2022 IEP TEAM MEETINGS BY FAILING TO OFFER STUDENT A REVISED READING GOAL; WRITING GOALS IN WRITING ENDURANCE, ANCHORING, AND SIZING; AND A REVISED MATH GOAL?

Student's reading, writing and math goals in the May 11, 2022 Amendment IEP were unchanged from those in the October 25, 2021 IEP. Mt. Diablo offered Student new reading, writing and math goals in the September 7, 2022 IEP that Parent consented to on November 3, 2022, with exceptions.

Student contends Mt. Diablo denied Student a FAPE by failing to offer the revised reading, writing and math goals in Student's May 11, 2022 IEP. Mt. Diablo contends it was not required to develop new goals for Student until 30 days after the start of the school year, and that Parent agreed at the May 18, 2022 IEP team meeting that the best course of action was for the IEP team to wait to update Student's goals until it had an opportunity to observe Student in the classroom setting.

Mt. Diablo cited to Education Code, section 56325, subdivision (a)(1) for the proposition that it was not required to develop, adopt, or implement a new IEP for Student until 30 days after the start of the 2022-2023 school year, and could legally implement Student's existing IEP without review until then. Based on the August 11,

2022 start of classes, this would have allowed Mt. Diablo until September 10, 2022 to revise Student's IEP and goals. However, as discussed above with respect to Student's Issues 1a, 1b, and 1c, section 56325, subdivision (a)(1) specifically applies only to students transferring into a district between the start and finish of an academic year. Student re-enrolled in Mt. Diablo after the end of the 2021-2022 school year, and before the start of the 2022-2023 school year.

Mt. Diablo's obligations to Student were governed by Education Code section 56344, subd. (c), which required Mt. Diablo to have a new IEP in place for Student at the beginning of the school year, because the October 25, 2021 IEP was not developed at or after the end of the 2022 school year for implementation during the 2023 school year. Mt. Diablo could have satisfied section 56344, subd. (a)(1) by reviewing or revising the October 25, 2021 IEP at or after the end of 2022 school year, but it was required to have an appropriate IEP in place on August 11, 2022, and was not legally entitled to wait an additional 30 days.

At the May 18, 2022 IEP team meeting, Parent did not agree to wait until after the start of the 2022-2023 school year to update Student's goals. To the contrary, Parent argued vigorously that they should be updated on an interim basis in the May 11, 2022 Amendment IEP based on the information provided by Parent and Student's private assessors, and then revised again after Student's IEP team had observed him in the school setting.

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Mt. Diablo's failure to update Student's goals before the start of the 2022-2023 school year denied Student a FAPE from August 11, 2022 until September 7, 2022, when Mt. Diablo offered updated goals. Based on Student's waiver of claims for denial of FAPE occurring through September 1, 2022, Mt. Diablo's conduct denied Student a FAPE for the three school days September 2, 5, and 6, 2022.

Student prevailed on Student's Issues 1e, 1f, and 1g.

STUDENT'S ISSUE 1h.: DID MT. DIABLO DENY STUDENT A FAPE BY FAILING TO PROVIDE SOME EDUCATIONAL BENEFIT TO STUDENT IN READING, WRITING, AND MATH?

Parent contends Student made no progress in his core academic courses in the areas of reading, writing and math, and obtained no educational benefit in those areas from the start of the school year until the filing of Student's due process hearing request on January 10, 2023. Mt. Diablo contends Student made good progress in general curriculum classes in those areas, and received demonstrable educational benefit.

In general, a child eligible for special education must be provided access to specialized instruction and related services which are individually designed to provide educational benefit through an IEP reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances. (*Board of Education of the Hendrick Hudson Central School Dist. v. Rowley* (1982) 458 U.S. 176, 201-204 (*Rowley*); *Endrew F. v. Douglas County School Dist. RE-1* (2017) 580 U.S. 386, 403.) There is no one test for measuring the adequacy of educational benefits conferred under an IEP. (*Rowley*, supra, 458 U.S. at pp. 202, 203, fn. 25.) But the factual showing required to establish that a pupil has received some educational benefit under *Rowley* is not

demanding. For a pupil in a mainstream class, such as Student, "the attainment of passing grades and regular advancement from grade to grade are generally accepted indicators of satisfactory progress." (*Walczak v. Florida Union Free Sch. Dist*. (2d Cir. 1998) 142 F.3d 119, 130; see also *Rowley*, *supra*, 458 U.S. at pp. 202-20.)

During the time period relevant to this case, from September 2, 2022 to January 10, 2023, Student demonstrated both academic progress and IEP goal progress in the areas of reading, writing, and math. By one month into the school year, at Student's September 7, 2022 IEP team meeting, Student's teacher for English and history reported that he was working well in class and completed and turned in assignments. His math teacher reported that he was doing well with support in breaking down math problems. Student's science teacher reported Student was very inquisitive about the science topics and agenda items, very eager to learn, and succeeded in remaining on task, with prompting. None of his teachers expressed any academic concerns at the September 7, 2022 IEP team meeting or subsequent October 6, 2022 IEP team meeting.

At Student's November 2, 2022 IEP team meeting where Parent indicated she intended to consent to Student's September 7, 2022 IEP, with exceptions, Parent questioned whether Student needed more specialized academic instruction to assist Student with his new goals in English and especially with math word problems. Student's special education teacher noted that for math, Student achieved an 82 percent on his Unit A review test and scored a 93 percent on his last quiz. Student's math teacher agreed Student was working at grade level in his general education classroom. None of his teachers raised concerns over his academic performance at his November 30, 2022 IEP team meeting.

On November 3, 2022, Parent consented to 12 of the goals developed for Student's September 7, 2022 IEP, including an English goal, two math goals, a writing goal, and a handwriting goal. As of Student's January 9, 2023 progress report towards his goals, Student had made significant progress over his September 2022 baseline and towards his annual goals to be reached by August 2023. In English, Student began the year reading and comprehending grade-level literature independently with 50 percent accuracy as evidenced by work samples and teacher records.

By January 9, 2023, Student had already exceeded his annual goal to read and comprehend literature, including stories, dramas, and poems, at his instructional reading level, with no more than 1 prompt per trial, on 4 out of 5 trials with 80 percent accuracy. In math, Student had made progress on his goals of reducing the number of guiding questions and prompts he needed to break down, write out, and solve

- word problems,
- algebraic equations, and
- equations involving fractions, decimals, percents, and graphing.

In writing, Student began the year independently writing well-constructed responses appropriate to the task, audience, and purpose 30 percent of the time. By January 2023, Student was able to produce clear and coherent writing in which the development, organization, and style were appropriate to task, purpose, and audience at 78 percent accuracy, which was near his annual goal.

For the first semester of the 2022-2023 school year, Student's grades showed he had achieved significant academic progress. Student earned A grades in his world history, PE, and special education academic success classes, and B's in English, math, science, and 21st century skills classes.

Student made significant progress in his core academic courses in the areas of reading, writing and math, from the start of the 2022-2023 school year to the filing of the complaint. Student failed to prove that Mt. Diablo denied Student a FAPE by failing to provide Student educational benefit in those areas.

Mt. Diablo prevailed on Student's Issue 1h.

STUDENT'S ISSUE 1l.: DID MT. DIABLO DENY STUDENT A FAPE BY FAILING TO IMPLEMENT STUDENT'S OCTOBER 2021 IEP WHEN IT FAILED TO HAVE A ONE-TO-ONE AIDE IN CLOSE PROXIMITY TO STUDENT ON OCTOBER 25, 2022?

Student contends Mt. Diablo denied Student a FAPE by failing to implement a requirement in Student's October 25, 2021 IEP that Student have a designated one-to-one aide in close proximity to Student throughout the school day. Parent contends that because of this failure, Student was hit by a basketball during recess on October 25, 2021, and suffered a broken arm.

Mt. Diablo contends there is insufficient evidence to prove Student's arm injury happened at school, and even if that was the case, the undisputed evidence showed that the aide was a reasonable distance from Student when the injury allegedly occurred. Further, no evidence demonstrated that the aide could have prevented the injury described even if he were closer to Student.

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To provide a student a FAPE, a school district must deliver special education and related services "in conformity with" the student's IEP. (20 U.S.C. § 1401(9)(D).)

> "IEPs are clearly binding under the IDEA, and the proper course for a school that wishes to make material changes to an IEP is to reconvene the IEP team under the statute – not to decide on its own no longer to implement part or all of the IEP." (*Van Duyn v. Baker School Dist*. 5J (9th Cir. 2007) 502 F.3d 811, 821 (*Van Duyn*) (citing 20 U.S.C. §§ 1414(d)(3)(F), 1415(b)(3)).)

A school district that fails to implement an IEP exactly does not violate IDEA

> "unless it is shown to have materially failed to implement the child's IEP. 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." (*Van Duyn*, 502 F.3d at p. 815.)

In *Van Duyn*, the court found the district's failure to provide five hours of math tutoring per week out of the 10 hours specified in the student's IEP was a material failure to implement the IEP. (502 F.3d at p. 823.) The court rejected the student's argument that the district's failure to implement the student's IEP as specified was a procedural violation amounting to re-writing the IEP without parental participation. (*Id*. at p. 819.) The court also rejected the district's argument that the student was required to prove the district's failure to implement his IEP caused him to lose educational benefits. "Because the parties debate whether Van Duyn's skills and

behavior improved or deteriorated during the 2001–02 school year, we clarify that the materiality standard does not require that the child suffer demonstrable educational harm in order to prevail." (502 F.3d at p. 822.)

Student's October 25, 2021 IEP included intensive individual services of a one-to-one applied behavior analysis-trained designated aide to assist Student throughout the school day. The IEP's parent concerns and notes section indicated Parent wanted the aide to support Student's academics by reteaching in the moment, help Student make transitions between activities throughout the day, and help Student socialize with peers. There is nothing in the IEP pointing to Student having any safety concerns requiring an aide "in close proximity," and the IEP contains no provisions regarding the distance the aide was required to maintain from Student. Notably, Student presented no evidence on the distance Student's aide was to maintain while Student was engaged in play with peers during recess.

Based on the evidence at hearing, Student did not prove by a preponderance of the evidence that the injury to Student's arm occurred on October 25, 2022 at school. Student did not complain of any injury that day, and neither Student's aide, nor anyone else, saw Student struck by a basketball. Parent also failed to mention the injury at Student's November 2, 2022 IEP team meeting.

Even assuming that a basketball struck Student at school on October 25, 2022, the injury was not the result of any failure by Mt. Diablo to implement Student's IEP. The October 25, 2021 IEP is silent on the distance to be maintained by Student's aide, and the aide was neither offered nor implemented to address a concern that Student was unusually susceptible to physical injury, and required an aide close by for safety reasons. Testimony by Student placed the aide near one corner of the school basketball

playground, approximately 30 feet away from where Student stated he was hit by the basketball. That distance was close enough for the aide to intercede if a dispute arose between Student and a peer, or if Student started to elope from the campus, but not so close as to stigmatize Student and inhibit his interactions with peers. It would have been impractical and highly intrusive for Student to have an aide guard Student from being struck by a basketball while he was playing basketball with his peers. And the aide specified in Student's IEP was not intended for that purpose.

Student failed to prove that Mt. Diablo denied Student a FAPE by failing to implement Student's IEP, specifically by failing to have a one-to-one aide in close proximity to Student on October 25, 2022.

Mt. Diablo prevailed on Student's Issue 1l.

STUDENT'S ISSUE 1m.: DID MT. DIABLO DENY STUDENT A FAPE BY FAILING TO OFFER STUDENT APPROPRIATE GOALS IN ALL AREAS OF NEED AT STUDENT'S NOVEMBER 2022 IEP?

Student contends Mt. Diablo denied Student a FAPE by failing to offer Student a social skills goal for friendships, conflict resolution, and perspective taking, and a handwriting endurance goal in the IEP dated September 7, 2022, as amended November 2, 2022. Mt. Diablo contends the November 2, 2022 does, in fact include the goal for friendships, conflict resolution, and perspective taking that Parent requested. Mt. Diablo also contends Student's handwriting endurance does not adversely affect his ability to access his education and is not an area of need.

For areas in which a special education student has an identified need, the IEP team must develop annual goals that are based upon the child's present levels of

academic achievement and functional performance, and which the child has a reasonable chance of attaining within a year. (Ed. Code, § 56345, subd. (a)(2); *Letter to Butler* (OSERS March 25, 1988).) An IEP must contain a statement of measurable annual goals designed to: (1) meet the individual's needs that result from the individual's disability to enable the pupil to be involved in and make progress in the general curriculum; and (2) meet each of the pupil's other educational needs that result from the individual's disability. (20 U.S.C. § 1414(d)(1)(A)(i)(II); 34 C.F.R. § 300.320(a)(2)(i); Ed. Code, § 56345, subd. (a)(2).)

The purpose of goals is to permit the IEP team to determine whether the pupil is making progress in an area of need. (Ed. Code, § 56345; see also, 64 Fed. Reg. 12,471 (1999).) In developing the IEP, the IEP team must consider

- the strengths of the child,
- the concerns of the parents for enhancing the education of their child,
- the results of the initial evaluation or most recent evaluation of the child and
- the academic, functional, and developmental needs of the child. (20 U.S.C. § 1414(d)(3)(A); 34 C.F.R. § 300.324(a).)

The IEP team need not draft IEP goals in a manner the parents find optimal, if the goals are sufficiently measurable. (*Bridges ex rel. F.B. v. Spartanburg County School Dist. Two* (D.S.C., Sept. 2, 2011, No. 7:10-cv-01873-JMC) 2011 WL 3882850, at *6.)

An IEP is not required to contain every goal from which a student might benefit. *Capistrano Unified School District v. S.W.* (9th Cir. 2021) 21 F.4th 1125, 1133, cert. denied sub nom. *S.W. v. Capistrano Unified School District* (2022) 214 L.Ed.2d 20 [143 S.Ct. 98].

Student's October 25, 2021 IEP contained a pragmatic speech and language goal to improve his skills in maintaining friendships by recognizing the perspective of others. The goal stated that Student, in real life situations involving a problem between one to two peers, would work toward developing meaningful friendships by explaining the intention/perspective of each participant and propose an appropriate solution to the problem that will ensure they remain friends in four of five real life incidences on two separate probes over a one-month period.

The October 25, 2021 IEP also included a fine motor skills goal of being able to complete classroom assignments either by typing them, or handwriting them legibly using supports such as adaptive paper or a handwriting checklist. In her May 15, 2022 report, private occupational therapy assessor Isono recommended student be given a goal in handwriting endurance to enable him to neatly handwrite a two-page essay with only two rest breaks.

Mt. Diablo's September 7, 2022 IEP offer deleted the perspective taking goal from the October 25, 2022 IEP, and re-wrote the fine motor skills goal as a goal to improve Student's independence in editing handwritten assignments by using a checklist to review handwritten final assignments written on lined paper for accuracy in alignment, spacing and legibility. The offer did not adopt Isono's recommended handwriting endurance goal. District occupational therapist Megan Giacomino testified persuasively at hearing that Isono's proposed handwriting endurance goal made sense as a clinical-based, non-educational occupational therapy goal but was not necessary to allow Student to access his curriculum at school, because Student was an excellent typist who could take notes and complete assignments on his computer, and therefore did not have an educational need to his handwriting endurance. The rewritten fine motor skill's goal was sufficient to address Student's school-based handwriting need.

When Parent accepted Mt. Diablo's September 7, 2022 IEP offer on November 3, 2022, with exceptions, she asked in her exceptions that Mt. Diablo restore Student's previous perspective taking goal to Student's IEP. On November 25, 2022, Mt. Diablo sent Parent a prior written notice that included notice of its decision to grant the request to restore the perspective taking goal, and it was included in the November 30, 2022 Amendment IEP Mt. Diablo prepared to incorporate the agreed-upon Parent exceptions into a single IEP document.

Student failed to prove that Mt. Diablo's November 2022 IEP denied Student a FAPE by failing to include a perspective taking goal, because it did. Student further failed to meet his burden by failing to demonstrate that Student needed a handwriting endurance goal, or that Mt. Diablo's rewritten fine motor skill's goal failed to address Student's handwriting needs.

Mt. Diablo prevailed on Student's Issue 1m.

STUDENT'S ISSUE 1n: DID MT. DIABLO DENY STUDENT A FAPE BY FAILING TO REVISE STUDENT'S IEP TO ADDRESS STUDENT'S NEED FOR HEATED FOOD?

Parent contends Mt. Diablo denied Student a FAPE by failing to revise Student's IEP to address Student's need for heated foods, after Parent advised Mt. Diablo in August 2022 that Student required heated food at school. Mt. Diablo contends it addressed Parent's request for heated food for Student through collaboration with Student's feeding therapist, IEP team meetings, and a plan to assess Student's feeding needs, but its efforts to assist Student were obstructed by Parent's behavior.

The "educational benefit" that must be provided to a child requiring special education is not limited to addressing the child's academic needs, but also social and emotional needs that affect academic progress, school behavior, and socialization. (*County of San Diego v. California Special Education Hearing Office, et al*. (9th Cir. 1996) 93 F.3d 1458, 1467.) A child's unique needs are to be broadly construed to include the child's academic, social, health, emotional, communicative, physical and vocational needs. (*Seattle Sch. Dist. No. 1 v. B.S.* (9th Cir. 1996) 82 F.3d 1493, 1500, citing H.R. Rep. No. 410, 1983 U.S.C.C.A.N. 2088, 2106.)

Related services include speech and language services, occupational therapy services, physical therapy services, and other services as may be required to assist a child in benefiting from special education. (20 U.S.C. § 1401(26)(A); Ed. Code, § 56363, subd. (a); *Irving Independent School Dist. v. Tatro* (1984) 468 U.S. 883, 891 [104 S.Ct. 3371, 82 L.Ed.2d. 664]; *Union School Dist. v. Smith,* (9th Cir. 1994) 15 F.3d 1519, 1527 (*Union*).) Related services shall be provided "when the instruction and services are necessary for the pupil to benefit educationally from his or her instructional program." (Ed. Code, § 56363, subd. (a).)

When developing a pupil's IEP, an IEP team must consider whether assistive technology devices and services are needed for the child's education. (20 U.S.C. § 1414(d)(3)(B)(v).) An "assistive technology device" is defined as "any item, piece of equipment or product system [other than a surgically implanted device] … that is used to increase, maintain or improve functional capabilities of an individual with exceptional needs." (20 U.S.C. § 1401(1); Ed. Code, § 56020.5.) Assistive technology devices or services may be required as part of the child's special education services, related services, or supplementary aids and services. (34 C.F.R. § 300.105.)

STUDENT'S EATING DISORDER

Mt. Diablo does not dispute that Student has an eating disorder. Mt. Diablo was aware Student had issues eating at least as early as Student's January 1, 2020 IEP team meeting, when Parent provided the team a copy of a letter from physician Keith White stating, "[Student] is a patient in my practice who suffers from Avoidant Restrictive Food Intake Disorder ("ARFID"), a disorder described in the American Psychiatric Association's Diagnostic and Statistical Manual V."

Based on information from Parent, Dr. White, and other outside providers working with Student on his feeding issues, Student's IEP team acknowledged Student's eating disorder that was impacting his educational performance by limiting his food intake during school. Mt. Diablo included a self-help/behavioral goal in Student's February 26, 2020 IEP to address Student's eating disorder and increase the number of bites of preferred foods Student would eat during his school lunch period. Mt. Diablo continued to update that goal in subsequent IEP's based on input from Parent, Student's private feeding therapists, and other outside providers, without conducting any district assessments.

The difficulty Student had eating more than a few bites of his preferred foods even after two years of feeding therapy is apparent from the feeding goal in Student's May 18, 2022 IEP,

> "[Student] will be presented with 5 bites each of 2 mastered foods (as defined by home program staff) across the 20 minute lunch period and will chew and swallow all 5 bites with no more than 3 total prompts as measured by staff collected data."

The IEP contained feeding supports for Student including collaboration with Student's home-based feeding therapist Zader, keeping a log of the foods Student ate, the amounts eaten, and the number of prompts given by Student's one-to-one aide during each feeding session. Student's IEP required Mt. Diablo to take daily feeding data and share the feeding log weekly with Parent. The IEP stated the data "[m]ay include video samples (once per week) of eating opportunities for the purposes of collaboration and input with parent and home-based feeding support provider." As part of her collaboration, Zader provided two video training sessions to Student's one-to-one aide in September 2022 on how to assist Student with feeding.

STUDENT'S NEED FOR HEATED FOODS

When Student started attending Foothill Middle School in August 2022, most of his preferred foods that he would willingly eat were foods that were served warm or hot. Parent sent Student's lunch warm or hot to school each day in a thermos, but noticed when Student came home that he was drinking the liquids from the thermos at school but leaving most of the solids when eating soups, and leaving most of the food uneaten when she tried packing him foods that were all solids.

Parent asked Student's one-to-one aide if he could microwave Student's food. Unlike some of Parent's subsequent interactions with Mt. Diablo concerning Student's feeding, this was a casual request, not a demand. During elementary school, before remote learning, Student's food had sometimes been heated in a microwave. However, after speaking with his superiors, Student's aide told Parent he could not heat Student's food in a microwave because it was a health and safety issue.

On August 17, 2022, Parent gave Mt. Diablo a letter from private food therapist Zader stating Student did not have enough preferred room temperature or cold foods in his current diet to put together a balanced school lunch, and it was imperative that food be presented at a temperature he would accept. She explained that meant "food traditionally served warm/hot should be presented warm/hot at lunch time." Zader recommended that Student's food be warmed at school and presented to him warm or hot. She explained that it was not feasible to use a thermos to maintain temperature because the changes to the visual presentation and texture caused by sitting in a thermos until lunch time rendered the food unacceptable to Student. Zader invited Mt. Diablo to call with any questions. Mt. Diablo did not have any questions about Zader's August 17, 2022 letter.

At Student's September 7, 2022 IEP team meeting, Parent expressed concerns that the school was refusing to heat Student's food, and that Student was being reduced to a liquid diet because that was the only item that worked in a thermos. Based on an in-school observation, Parent also expressed concern that Student was not able to open his own food containers, which she said was done by his aide. Parent provided the IEP team a letter dated September 6, 2022, from Zader, who was unable to attend the meeting. Zader explained that as a clinic-based therapist she would not be able to come to school to observe Student, but recommended the following feeding supports for Student, including her prior August 17, 2022 recommendation for heating food:

- Heat Student's food at school to present it warm/hot at lunch time.
- Have credentialed staff with training related to feeding, such as a registered nurse, occupational therapist, speech, and language therapist, or applied behavior analysis therapist with Student's feeding, alternating days with his trained aide.

- Allow Parent to observe lunch time to ensure all feeding techniques are being followed at school and implemented by credentialed staff and aide.
- Provide videos of Student's feeding to Parent to monitor behaviors and implementation of appropriate strategies and techniques.
- Have Student complete a daily log of what he ate during lunch and snack for feeding therapist records.

Mt. Diablo declined to add heated food or any of Zader's other suggestions to Student's existing feeding supports but agreed to collaborate with Zader to draft a revised feeding goal. Student's baseline from the first month of school was that he was eating from 30 percent to 70 percent of his lunch each day. Based on testimony and photographic evidence, the portions presented to Student were not large, probably six ounces or less of solids. The revised feeding goal, arrived at collaboratively on September 16, 2022, was that Student, "by August 2023, with accommodations (visual aids, timer, verbal prompts) [Student] will initiate and consume 80 percent of a provided amount of food within 20 minutes 80 percent of the time within a two-week period."

Student's one-to-one aide did not attend the IEP, but confirmed at hearing that Student would not eat cold foods and would typically eat no more than two spoonfuls of solid food from his thermos after drinking the liquids. He disagreed with Parent's statement that Student could not open his food containers.

MT. DIABLO'S FEEDING ASSESSMENT PLAN

Rather than continuing to rely on information from Parent and Student's private feeding providers, as it had previously, Mt. Diablo decided to conduct its own feeding assessment of Student. On September 27, 2022, Mt. Diablo emailed Parent a feeding

assessment plan for her consent. Parent emailed back immediately that Mt. Diablo had enough information on Student's feeding issues and did not need to conduct an assessment. Parent reminded Mt. Diablo that Student had a lawsuit already pending against the district, and an assessment would just add 60 days more FAPE denial to Student's claims. On September 29, 2022, Parent emailed Mt. Diablo asking how long the assessment would take, and "what do you want it for, exactly?" "It can't be to determine need, because that has been amply established."

Much of Student's October 6, 2022 IEP team meeting was devoted to a discussion of Mt. Diablo's proposed feeding assessment and Student's need for heated food. Parent believed Mt. Diablo wanted to conduct the assessment so it could be used to deny Student services, and she was unwilling to agree to a feeding assessment unless there was an interim plan in place to heat Student's food until the assessment was completed. Mt. Diablo responded that during the assessment period it could only provide what was in Student's last consented-to IEP, from October 25, 2021. That IEP did not include any provision for heating Student's food.

STUDENT'S USE OF A BENTO BOX TO HEAT FOODS

The October 6, 2022 feeding discussion ended on a hopeful note. Elliett Alomar, a Medical Social Worker with Contra Costa County Health Plan attending the IEP on behalf of Student, announced she had been researching possible solutions to the problem of heating Student's food, and discovered that it was possible to buy a battery powered lunchbox that could be turned on at lunch to heat separate items of food inside to different degrees of warm and hot. Parent was more enthusiastic about a

microwave, but Mt. Diablo declined her offer to purchase one for the school cafeteria for Student's use. Alomar agreed to send Parent the information she had found on battery powered bento boxes.

Sometime after the October 6, 2022 IEP team meeting, Parent purchased a bento box to heat Student's lunches. Student began bringing the bento box to school in October 2022. Student's aide helped him open the bento box on at least one occasion, but Student was generally able to open it himself.

On October 25, 2022, Parent provided Mt. Diablo a letter from Zader recommending that Student be allowed to use the bento box as a food heating option, with his one-to-one aide turning it on for him before lunch.

On November 1, 2022, Parent called the Mt. Diablo police department to report that the district was endangering Student by denying him access to heated foods. The police department told Parent to contact the Mt. Diablo, which replied to Parent that it would discuss the issue as part of the IEP and assessment process.

Student's IEP team discussed the bento box the next day at Student's IEP meeting on November 2, 2022. Parent stated that in elementary school Student heated his food with a microwave all the time and it was okay. She continued to request access to a microwave.

Parent explained the electric bento box was a battery-powered re-heating device that took five to ten minutes to warm Student's food. She stated that if the bento box was not turned on before lunch, Student would run off to play basketball while his food was being heated and his aide probably wouldn't be able to get him back to eat. She stated that if the aide would turn on the bento box five to ten minutes before lunch, that

should solve the issue of heating Student's food. Mt. Diablo proposed Student use the bento box so that no district staff was handling Student's food, and Parent agreed.

The IEP team agreed that Student's aide would remind him five to ten minutes before lunch each day to turn on his bento box so the food inside would be warm and ready for him to eat at the start of lunch. However, Mt. Diablo would not permit its staff to touch Student's food or operate the bento box, which Student would need to be able to operate himself. Parent agreed, saying, "okay, that's fine." There was no indication as of the November 2, 2022 IEP team meeting that Student had not been able to open the bento box he had been bringing to school.

Parent stated at the November 2, 2022 IEP team meeting that she would be signing the September 7, 2022 IEP with exceptions but was not sure what she would do with respect to Mt. Diablo's ongoing request that she consent to a district feeding assessment. Mt. Diablo sent Parent a second copy of the feeding assessment plan, this one dated November 3, 2022.

On November 14, 2022, Parent provided Mt. Diablo a letter from Student's occupational therapist Elena Javier. Javier stated that Student currently lacked the strength and coordination needed to open his bento box. She recommended that Mt. Diablo provide Student either assistance opening his bento box, or access to a microwave to heat his food.

On November 25, 2022, Parent provided Mt. Diablo a letter from feeding therapist Zader. Zader confirmed Student was able to eat from his bento box and eat a larger variety of foods now that they can be warmed in the box. However, the bento box Parent had purchased for Student was designed for adults, and Zader described its latches as extremely tight and difficult to open. She stated that Student was unable to

open the latches and became very frustrated attempting to do so. She recommended Student receive assistance from his aide to push the button to heat the box and then to unlatch the box, as he had worked very hard to accept heated food in this new manner.

After receiving the letters from Javier and Zader regarding Student's difficulties opening his bento box, Mt. Diablo occupational therapist Giacomino tested Student's ability to open containers. Giacomino reported on her tests at Student's next IEP team meeting on November 30, 2022. Giacomino explained that she had reviewed the letters from Javier and Zader regarding Student's difficulties opening his bento box and had tested Student's ability to open containers. She explained she had brought a collection of 11 different containers with different latches and twists and asked Student to try to open them. Some of the containers were very old and hard for Giacomino to open because the latches were very tight, but Student was able to open them all. Student had not bought his bento box to school on the day Giacomino conducted her test, so she was unable to confirm his ability to open that his bento box, but she found no fine motor limitations like lack of finger strength that would interfere in any way with Student opening latches.

Parent objected that Giacomino had not tested Student's bento box, which was designed to heat food, unlike the containers Giacomino tested. Giacomino acknowledged that Zader had written that Student's bento box was designed for adults, and stated that if that particular box was difficult for Student to open, there were many heated boxes designed for children. Giacomino stated that she was familiar with the use of heated bento boxes at school and had seen many students bringing them into school. Giacomino suggested Parent could explore finding an appropriate box for Student with her team of private feeding providers. Parent

responded she had already spent 100 dollars on the existing bento box, and if Mt. Diablo was proposing that Student should get a different bento box that Student could open, then it should offer to do that.

Parent brought Student into the room where she was attending the IEP team meeting by videoconference and had him try to open his bento box on camera. No recording of this event was offered in evidence, but the IEP meeting notes indicate Student said, "Here let me open my bento box. "He put his fingers on the latches, then said "Ooh, I opened one of them, but these are ... ahh." Parent stated Student was able to open one of them but not the other ones. She reiterated Mt. Diablo was free to offer to purchase a different bento box for Student. Parent introduced into evidence a similar video of Student attempting to open his bento box on January 23, 2023. In the video, a provider working with Student on his feeding issues showed him how to open the bento box latches using both hands, then asked Student to try. Student started to position the bento box as shown by his provider, at which point Parent prompted Student, "Tell me if you start feeling your fingers being sore." Student immediately said, "Ah, my fingers are sore," then put down the bento box, and walked away.

Student's attempts to open his bento box in the presence of Parent during the November 30, 2022 IEP team meeting and in the January 23, 2023 video in evidence do not establish that Student was unable to open his bento box at school. The preponderance of the evidence instead shows that Student was able to open his bento box at school. Student continued to bring his bento box to school through the end of the first semester of school on December 21, 2022, and again for a time during the second semester that began on January 9, 2023, the day before Student filed his due process hearing request. Student's one-to-one aide testified credibly that Student was

able to open his bento box at school the entire time. Parent did not contend, or present any evidence, that Student was bringing his bento box home each day after school unopened.

On December 16, 2022, Mt. Diablo filed its due process hearing request with OAH, seeking an order allowing it to conduct a feeding assessment of Student pursuant to the November 4, 2022 assessment plan, without Parent's consent. Parent signed consent to the feeding assessment plan the same day, but subject to numerous conditions not acceptable to Mt. Diablo. Mt. Diablo has not conducted a feeding assessment of Student.

MT. DIABLO'S OBLIGATION TO SUPPORT STUDENT'S NEED FOR HEATED FOODS

Mt. Diablo was put on notice by Zader's August 17, 2022 letter that Student had a need for warm or hot foods at lunch that could not be satisfied by the use of a thermos. Student's one to one aide confirmed that Student would not eat cold foods, and would eat only one or two spoonfuls of solid food after drinking the liquid in his thermos.

As discussed with respect to Mt. Diablo's Issue 1, below, Mt. Diablo had a right to conduct its own feeding assessment of Student. Mt. Diablo first presented Parent with a feeding assessment plan on September 27, 2022. Assuming Parent took 15 days to sign the assessment plan (Ed. Code, § 56321, subd. (a)), and Mt. Diablo took 60 days to complete the assessment and hold an IEP to discuss the results (Ed. Code, §§ 56043, subd. (f), 56344, subd. (a)), the IEP team would have met on December 11, 2022, to discuss the results of Mt. Diablo's assessment.

Mt. Diablo's position at the October 6, 2022 IEP team meeting that it would provide Student no support with heating his food during the assessment period was not reasonable. Given the unresolved dispute regarding Student's ability to open the bento box, and assuming the observations of the private feeding therapist and Mt. Diablo's own one-to-one aide regarding Student's need for warm or hot foods were correct, not heating Student's food or assisting with his bento box until Mt. Diablo completed an assessment might have left Student on a diet limited to what he would eat from his thermos, and potentially under-nourished at school, for almost four months.

Once Mt. Diablo became aware that a lack of appropriate heated foods was, or might be, impeding Student's ability to make progress on his feeding goal, as well as Student's nutrition at school, Mt. Diablo was obligated to convene an IEP meeting to consider strategies, including use of assistive technology devices, to support Student's need for heated food arising from his eating disorder. Nothing in the IDEA or Education Code prevented Mt. Diablo from including at least interim, non-stay put supports, in Student's IEP, until Mt. Diablo could complete a feeding assessment as Parent requested at Student's October 6, 2022 IEP team meeting.

These interim supports could have included use of a microwave or a heated bento box provided by Mt. Diablo, and assistance from Student's one-to-one aide, if Student required it. Mt. Diablo never cited to any specific law, regulation or even school policy that prevented use of a microwave on health and safety grounds. Its alternative position that it could not implement use of a microwave per Zader's suggestion because she did not specify the exact temperatures she meant by the terms warm and hot is not well taken. The use of a microwave to achieve a range of food temperatures from what

is generally considered warm to what is generally considered hot is a matter of common knowledge, and Mt. Diablo did not express its confusion on this point until cross-examining Zader at hearing. Occupational therapist Giacomino was familiar with the use of heated bento boxes even before they were brought up as a possible solution by a participant at Student's October 6, 2022 IEP team meeting, and presumably could have quickly found and tested a suitable one with Student.

Mt. Diablo's failure to provide at least interim supports and assistive technology in Student's IEP to address his need for heated foods was a procedural violation of the IDEA. It was not a substantive denial of an appropriate education only because Parent purchased a bento box for Student at her expense, and the evidence is that Student was able to, and did open it, to obtain hot food for his lunch.

However, requiring Parent to purchase a bento box for Student meant that the assistive technology Student required was neither free nor public. Student was therefore substantively denied a FAPE. Student met his burden of proof that Mt. Diablo denied him a FAPE when it failed to revise the IEP to address Student's need for heated food.

Student prevailed on Student's Issue 1n.

STUDENT'S ISSUE 1o: DID MT. DIABLO DENY STUDENT A FAPE BY FAILING TO IMPLEMENT STUDENT'S OCTOBER 2021 AND NOVEMBER 2022 IEP'S RELATED TO WEEKLY VIDEOS FOR PARENT AND THE FEEDING PROVIDER?

Student contends Mt. Diablo denied Student a FAPE by failing to implement the support provision in Student's IEP regarding providing weekly videos of Student eating.

Mt. Diablo contends that Student's IEP gave Mt. Diablo discretion to provide videos, and the one video of Student eating on December 16, 2022 materially satisfied any obligation Mt. Diablo had to provide such videos.

IEP LANGUAGE REGARDING PROVISION OF FEEDING VIDEOS

The same feeding support language was included in all of Student's IEPs dated from February 26, 2020, onward, including Student's October 2021 and November 2022 IEP's. The supports included Mt. Diablo keeping a log of the foods Student ate, the amounts eaten, and the number of prompts given by Student's one-to-one aide during each feeding session. Data was to be taken daily and the log shared with Parent weekly.

The provision regarding weekly videos of Student stated: "May include video samples (once per week) of eating opportunities for the purposes of collaboration and input with parent and home-based feeding support provider." Neither Parent nor Mt. Diablo sought to implement this provision before Student returned to Mt. Diablo in person. While Student was at home, either as a Mt. Diablo student in distance learning due to COVID 19, or as a privately placed Student, Parent did not need to see videos of Student eating, and Mt. Diablo did not ask Parent to provide any.

Once Student returned to school and began eating there, the language regarding weekly videos became a significant issue. Parent interpreted the language as requiring Mt. Diablo to provide Parent a weekly video of Student eating at school, if Parent requested it. Mt. Diablo interpreted the language as giving Mt. Diablo sole discretion

to decide whether, and when, it would provide Parent any videos of Student eating at school. Chief of pupil services Aghily testified that Mt. Diablo agreed to retain that language in the October 25, 2021 IEP

> "only because I knew if we didn't, we'd end up [in a due process hearing]. I would never agree to video of a child eating. I put it in the IEP to get [Student] on screen because [Parent] would not put [Student] on screen. So, it was only put in there for you to put [Student] on screen … The language does not say we will provide video to you. I would never have written that in an agreement. I would have never, ever written in an agreement that we would provide videos of a child eating lunch in a crowded school or in a Middle School."

INTERPRETATION OF THE IEP LANGUAGE REGARDING VIDEOS

Few cases discuss disputes over how to interpret language contained in an IEP. In *Van Duyn v. Baker School Dist. 5J* (9th Cir. 2007) 502 F.3d 811 (*Van Duyn*), the court rejected the parents' contention that state law regarding interpreting contracts should be applied to resolve ambiguities in the IEP against the district as drafter. The court held that an IEP is entirely a federal statutory creation and observed that courts have rejected efforts to frame challenges to IEPs as breach-of-contract claims. (*Id.* at page 820 [citing *Ms. K. v. City of South Portland*, 407 F.Supp.2d 290, 301 (D.Me.2006) ("[A]n IEP is not a legally binding contract.")].) Although the court stated, "[a]n IEP is not a contract" (*ibid.*), it went on to analyze the IEP the parents' contention using contract principles. It first found that the parents played an active role in drafting the IEP, so it

was not clear the district should be deemed the drafter, then found that even if the court were to construe ambiguity against the district, "the terms Van Duyn cites as ambiguous simply do not mean what he claims." (*Ibid.*)

Similarly, in *M.C. v. Antelope Valley Union High School District* (9th Cir. 2017) 858 F.3d 1189 (*M.C. v. Antelope Valley*), the court found that an IEP is "like a contract." (*Id.* at p. 1197.) An IEP "may not be changed unilaterally. It embodies a binding commitment and provides notice to both parties as to what services will be provided to the student during the period covered by the IEP." (*Ibid.*)

The absence in the IDEA and its implementing regulations of specific rules for interpreting IEP language does not mean there are no rules. The fact that a common sense principle coincides with a rule of contract interpretation is neither surprising nor a basis for precluding its use to interpret an agreement like an IEP, which is similar to, if not exactly, a contract.

As *M.C. v. Antelope Valley* noted above, the purpose of an IEP is to give both parties notice of what services the district is committing to provide to the student. When a support is included in an IEP offer, the objectively reasonable expectation of a parent is that the district intends to provide the support to the student, subject to whatever conditions or limitations are stated unambiguously. (*Buckley v. Terhune* (9th Cir. 2006) 441 F.3d 688, 695 [regarding interpretation of contracts].) Particularly where, as here, a district negotiates ambiguous language such as "may include" for the undisclosed purpose of avoiding a commitment to the Student, it would be unreasonable, unfair, unjust, and inequitable to interpret the IEP as giving the district sole discretion to decide whether to provide the offered support. (See, *e.g.*, *Sayble v. Feinman* (1978) 76 Cal.App.3d 509, 513 ["W]here one construction would make a contract unusual and

extraordinary and another construction, equally consistent with the language employed, would make it reasonable, fair, and just, the latter construction must prevail"]; (*Strong v. Theis* (1986) 187 Cal.App.3d 913,920 ["The court must avoid an interpretation which will make a contract extraordinary, harsh, unjust, or questionable"]) (*Strong v. Theis* (1986) 187 Cal.App.3d 913, 920.)

Under the specific facts in this case, including Mt. Diablo's admitted surreptitious intent in drafting ambiguous IEP language, a reasonable and equitable interpretation of Student's IEP is that Diablo committed to providing Parent approximately 14 weekly videos of Student eating lunch at school during the 14-week period from September 2, 2022, to the filing of Student's complaint.

EFFECT OF MT. DIABLO'S FAILURE TO IMPLEMENT WEEKLY VIDEOS

As already stated above, a school district that fails to implement an IEP exactly does not violate IDEA unless it is shown to have materially failed to implement the child's IEP, through more than a minor discrepancy between the services the district provided and those required by the Student's IEP. (*Van Duyn*, *supra*, 502 F.3d at p. 815.)

Mt. Diablo provided Parent just one video of Student eating at school, from a December 16, 2022, session with Giacomino. As with Giacomino's prior session with Student that she reported to the IEP team on November 30, 2022, Student had not brought his bento box to school that day. The video is also without sound, so Student's comments and any prompts were unrecorded. However, the video, which is not continuous and but divided into three separate parts, begins with Student opening his thermos and drinking the liquid inside in about three minutes. In the second segment, Student takes plastic wrap off the top of a metal container and,

using a fork, eats in five bites all of what appears to be a two or three ounce piece of beef inside, again within about three minutes. In the third segment, student eats two spoonfuls of what looks like strawberry puree in about a minute, before putting on a face mask and leaving. Even without sound or the bento box, the video shows Student eating an almost complete lunch without apparent difficulty. But it is only one video out of 14 Parent was entitled to and falls materially short of implementing the weekly video support in Student's IEP.

Because the evidence demonstrates that Student was receiving adequate nutrition and able to work towards his IEP feeding goal at school, Student failed to establish that Mt. Diablo's failure to provide Parent weekly videos of Student's feeding sessions impeded Student's right to a FAPE or deprived Student of educational benefit. It did however, significantly impede Parent's right to participate in the IEP process. As explained in *M.C. v. Antelope Valley*, *supra:*

> Under the IDEA, parental participation doesn't end when the parent signs the IEP. Parents must be able to use the IEP to monitor and enforce the services that their child is to receive. When a parent is unaware of the services offered to the student—and, therefore, can't monitor how these services are provided—a FAPE has been denied, whether or not the parent had ample opportunity to participate in the formulation of the IEP.

M.C. v. Antelope Valley, *supra* 858 F.3d at p. 1198. In *M.C. v. Antelope Valley*, the district failed to disclose to parent that it had unilaterally corrected an error it discovered in Student's IEP by adding substantially more minutes of visual impairment services than were originally included, without telling the parents it had done so. The parents didn't discover the increased amount of services

offered until noticing it in a district document production on the first day of hearing. The court expressed strong disapproval of the district's failure to tell the parents of the additional services, because doing so might have avoided the due process hearing entirely. (*M.C. v Antelope Valley*, 858 F.3d. at p. 1196-1197.)

Here, providing weekly videos to Parent showing Student eating his lunch without difficulty might well have prevented Student from filing his due process hearing, as well as leading Parent to consent to a district assessment of Student. Thus, Student established that Mt. Diablo's failure to provide weekly videos of Student's feeding sessions denied Student a FAPE by significantly impeding Parent's participation in the IEP process.

Student prevailed on Student's Issue 1o.

STUDENT'S ISSUES 1p AND 1q: DID MT. DIABLO DENY STUDENT A FAPE BY FAILING TO IMPLEMENT STUDENT'S OCTOBER 2021 AND NOVEMBER 2022 IEP'S RELATED TO PARENT MEETINGS, INCLUDING BY FAILING TO ALLOW A PARAPROFESSIONAL TO ATTEND THE PARENT MEETINGS?

Student contends Mt. Diablo denied Student a FAPE by failing to hold progress/team meetings between Parent, Student's case manager, and the Foothill Middle School site administrator as required by Student's IEP, and by failing to allow a paraprofessional to attend. Mt. Diablo contends it materially complied with its obligation to hold four progress/team meetings with Parent as required under the IEP, and, if it did not, the failure to hold progress/team meetings was immaterial, in light of the four, more comprehensive, IEP team meetings held during the first semester.

All of Student's IEP's from October 25, 2021 forward, including the IEP Parent consented to on November 3, 2022 IEP, have as a Student support "[p]rogress/team meetings between parent, case manager and site administrator regarding student progress 4 times per year for 60 minutes maximum each meeting." The IEP states these progress/team meetings "[m]ay include in-class support staff (e.g. paraprofessional), related service providers, and home-based providers when necessary." Mt. Diablo scheduled the first of these meetings in March 2023.

District's failure to schedule any progress/team meetings during the first of the school year's two semesters is a material failure to implement Student's IEP. (See *Van Duyn*, *supra*, 502 F.3d at pp. 815, 823.) Any parent would reasonably expect that four meetings to discuss their child's progress would be spaced out more or less evenly throughout the year. Taken to its extreme, Mt. Diablo's argument that Mt. Diablo was only required to hold four progress/team meetings with Parent before the end of the school year would allow Mt. Diablo to satisfy this obligation by holding four one-hour meetings with parent in the last month, week, or even day of school. Thus, Student established a procedural violation.

However, Mt. Diablo is correct that its failure to hold progress/team meetings with Parent did not significantly impede Parent's participation in the IEP process, because the four IEP team meetings held for Student in the first semester of the year each included discussions of Student's academic and IEP goal progress.

Further, Student failed to present evidence that paraprofessional participation was necessary, and the IEP language did not mandate paraprofessional participation.

Accordingly, Student failed to meet his burden of proof that Mt. Diablo denied Student a FAPE when it failed to implement parent meetings as required by Student's IEP, and failed to include paraprofessionals at the parent meetings.

Mt Diablo prevailed on Student's issues 1p and 1q.

STUDENT'S ISSUE 1r: DID MT. DIABLO DENY STUDENT A FAPE BY FAILING TO PROVIDE PARENT PROGRESS REPORTS IN QUARTER ONE OF STUDENT'S 2022-2023 SCHOOL YEAR?

Student contends Mt. Diablo denied Student a FAPE by failing to provide Parent any progress reports for Student during the first quarter of the 2022-2023 school year. Mt. Diablo contends it timely provided Student's first and second quarter progress reports to Parent, before the filing of Student's complaint on January 10, 2023.

A student's IEP must state when the district will provide periodic reports on the progress the student is making toward meeting his annual goals, such as through the use of quarterly or other periodic reports, together with report cards. (20 U.S.C. § 1414(d)(1)(A)(III); 34 C.F.R. § 300.320(a)(3)(ii); Ed. Code, § 56345, subd. (a)(3).)

Student's IEP's from October 25, 2021 forward, all stated that Mt. Diablo would inform Parent quarterly of Student progress towards meeting his annual goals, through progress summary reports. Below each annual goal, the IEP's showed entries for progress reports 1, 2 and 3, and an annual review, which was the fourth reporting period. The evidence showed Mt. Diablo complied with the IEP's timelines. Following Student's September 7, 2022 annual IEP, Mt. Diablo sent Parent a draft IEP that included the progress report on each of Student's previous annual goals, bearing the annual

review date of September 7, 2022. Mt. Diablo sent Parent a quarterly progress report for each of Student's goals for the second quarter on January 9, 2023, in a progress report identified as progress report 1. Progress reports two and three were blank, to be completed at the end of the third and fourth quarters of the school year, after this case was filed.

Student did not meet his burden of showing Mt. Diablo committed a procedural violation by failing to provide Parents with a timely progress report for the first quarter of the 2022-2023 school year. Mt. Diablo prevailed on Student's Issue 1r.

STUDENT'S ISSUE 1s: DID MT. DIABLO DENY STUDENT A FAPE BY IMPEDING PARENT'S RIGHT TO PARTICIPATE IN THE IEP DECISION-MAKING PROCESS BY FAILING TO PROVIDE WEEKLY NOTES AND ALLOW OBSERVATIONS MORE THAN ONCE PER MONTH SO THAT PARENT COULD REVIEW AND REVISE?

Student contends Mt. Diablo denied Student a FAPE by failing to provide Parent weekly notes with data graphing and comments on Student's performance on goals, as required in his IEP supports, and by failing to allow Parent to observe Student at school more frequently than once per month. Parent contends this impeded her ability to review and revise Student's IEP. Mt. Diablo maintains it provided Parent the weekly notes and parental observations required by Student's IEP, and Parent was able to fully participate in the IEP process.

The IDEA and Education Code require that districts afford parents of a child with a disability the opportunity to participate in meetings with respect to the identification, assessment, educational placement, and provision of a FAPE to their child. (20 U.S.C.

§ 1414(d)(1)(B)(i); Ed. Code, §§ 56304, 56342.5.) A district must ensure that the parent of a student who is eligible for special education and related services is a member of any group that makes decisions on the educational placement of the student. (Ed. Code, § 56342.5.)

Among the most important procedural safeguards are those that protect the parents' right to be involved in the development of their child's educational plan. (*Amanda J. v. Clark County Sch. Dist*. (9th Cir. 2001) 267 F.3d 877, 882.) However, a parent's right to be involved in the development of their child's IEP does not include any right, in statute or regulation, to obtain weekly notes on their child's progress. Similarly, although the Education Code provides for classroom observations by independent evaluators (Ed. Code, § 56329, subd. (b)), there is no similar provision giving a parent such a right. Any parental right to conduct classroom observations, or obtain weekly notes, must come from the provisions of the child's IEP, and is limited to the scope of those provisions.

WEEKLY NOTES

The supports in Student's October 25, 2021 and November 3, 2022 IEP's each included "weekly notes with data graphing and comments on [Student's] performance on goals for the week." Mt. Diablo produced weekly notes with graphing data and comments for Parent. Special education teacher Courtney Turner took several hours each week to prepare the weekly notes, using daily tracking sheets of data on Student's progress on each of his goals collected by Student's one-to-one aide, and session notes prepared by the speech and language pathology assistant working with Student.

Parent objected to the weekly notes prepared by Turner because they were in a different format from those that she had received while Student was attending elementary school through the 2020-2021 school year. The weekly notes from elementary school notes included a page of comments from Student's

- autism facilitator,
- general education teacher,
- special education teacher,
- speech and language pathologist, and
- occupational therapist.

It also included a page of data collected on Student's performance towards each of his goals, for instance, number of prompts to comply with directions. Parent complained that Turner's weekly notes included only data and charting, but not comments.

An IEP team is not required to provide weekly notes in a format preferred by Parent. (See, e.g., *Student v. San Dieguito Union High Sch. Dist.*, *supra,* Case No. 2022030378 ["To the extent daily observation by experienced teachers and staff did not provide a progress report as detailed as written data, the IDEA does not require perfect adherence to an IEP."]; *T.K. v. Mercer Island Sch. Dist*. (W.D. Wash. March 17, 2020) 2020 WL 1271519, *9 ["Neither the IDEA nor its regulations require school districts to supply parents with raw data about their child's progress."].) Similarly, the IDEA does not require adopting the 'specific form of data collection preferred by' … parents." (*Capistrano Unified Sch. Dist. v. B.W.* (9th Cir. 2021) 21 F.4th 1125, 1133-1135.) Goals can be measured "ordinally (e.g., no improvement, some improvement/significant improvement), quantitatively, or in some other way." (*Id*. at 1134.)

Although Parent might have preferred the format of the weekly notes provided in elementary school, Parent did not demonstrate that the weekly notes provided by Turner deprived Parent of material information by not including comments.

Parent also devoted a great deal of time at hearing and in Student's closing brief to Mt. Diablo's failure to produce the daily tracking notes of Student's aide and the daily session notes of Student's speech and language provider in response to Student's request for educational records. However, after the ALJ ultimately ordered Mt. Diablo to produce the notes as educational records, Student identified no instance when the daily data contained material information not contained in the weekly data summaries that Mt. Diablo had provided to Parent.

Student did not prove that Mt. Diablo materially failed to implement its obligation to provide Parent weekly notes concerning Student's performance towards his goals, or that any failure to provide data or comments impeded Parent's participation in the IEP process, or denied Student a FAPE.

CLASSROOM OBSERVATIONS

The supports in Student's October 25, 2021 and November 2, 2022 IEP's provided that Parent may observe Student once a month for 30 minutes, in settings across his school day, per the school administrator's scheduling and accompaniment, on 24 hours notice.

Parent did not contend that Mt. Diablo failed to implement this provision of the IEP. Instead, Parent argued that 30 minutes per month of observation was insufficient for Parent to obtain the information Parent required to review and revise Student's IEP.

However, Parent failed to identify what information she needed from classroom observation that could not be obtained from the agreed upon 30 minutes per month.

Student failed to demonstrate that Mt. Diablo impeded Parent's participation in the development of Student's IEP, or deny Student a FAPE, by not agreeing to provide Parent more classroom observation time than the requisite 30 minutes in Student's IEP. Mt. Diablo prevailed on Student's Issue 1S.

MT DIABLO'S ISSUES:

MT. DIABLO'S ISSUE 1: CAN MT. DIABLO ASSESS STUDENT UNDER ITS NOVEMBER 4, 2022 ASSESSMENT PLAN WITHOUT PARENT'S CONSENT?

Mt. Diablo contends that it is entitled to conduct a district feeding assessment to determine Student's educational and related service needs with respect to feeding and the provision of heated foods. Parent contends a feeding assessment is not warranted because Parent has already provided Mt. Diablo a private feeding assessment and information from medical providers that describes Students' feeding need.

Parent also contends she cannot give informed consent to the proposed assessment without first receiving progress monitoring, data, notes, and testing results concerning the current status of Student's feeding program. Additionally, Parent maintains Mt. Diablo did not advise, explain, or put in writing to Parent the purpose and full scope of the proposed feeding assessment.

Without an order after a due process hearing, reassessments require parental consent. (20 U.S.C. § 1414(c)(3); Ed. Code, § 56381, subd. (f)(1).) To start the process of obtaining parental consent for a reassessment, the school district must provide proper

notice to Parents. (20 U.S.C. §§ 1414(b)(1), 1415(b)(3) & (c)(1); Ed. Code, §§ 56321, subd. (a), 56381, subd. (a).) The notice consists of the proposed assessment plan and a copy of parental procedural rights under the IDEA and companion State law. (*Id.*) The assessment plan must

- appear in language easily understood by the public and in the native language of the student,
- explain the types of assessments that the district proposes to conduct, and
- provide that the district will not implement an IEP without the consent of the parent. (Ed. Code, § 56321, subds. (b)(1)-(4).)

The school district must give the parents and/or student 15 days to review, sign, and return the proposed assessment plan. (Ed. Code, § 56321, subd. (a).)

Parents who want their child to receive special education services must allow reassessment if conditions warrant it. In *Gregory K. v. Longview School Dist*. (9th Cir. 1987) 811 F.2d 1307, the court stated that "if the parents want [their child] to receive special education under the Act, they are obliged to permit such testing." (See, e.g., *Patricia P. v. Board of Educ. of Oak Park and River Forest High School Dist. No. 200* (7th Cir. 2000) 203 F.3d 462, 468; *Johnson v. Duneland School Corp*. (7th Cir. 1996) 92 F.3d 554, 557-558.) In *Andress v. Cleveland Independent School Dist*. (5th Cir. 1995) 64 F.3d 176, 178 (*Andress*), the court concluded, "a parent who desires for her child to receive special education must allow the school district to evaluate the child ... [T]here is no exception to this rule."

Parents who want their children to receive special education services cannot force the district to rely solely on an independent evaluation. (*Johnson v. Duneland Sch. Corp*. (7th Cir.1996) 92 F.3d 554, 558; *Andress* 64 F.3d at pp. 178-79; *Dubois v. Conn. State Bd.*

of Ed. (2d Cir.1984) 727 F.2d 44, 48.) A school district has the right to evaluation by an assessor of its choice. (*M.T.V. v. DeKalb County School Dist*. (11th Cir. 2007) 446 F.3d 1153, 1160.)

As long as statutory requirements for assessments are satisfied, parents may not put conditions on assessments. The U.S. Department of Education, Office of Special Education Programs advises that selection of particular testing or evaluation instruments is left to the discretion of State and local educational authorities. (*Letter to Anonymous* (OSEP Sept. 17, 1993) 20 IDELR 542, 20 LRP 2357; *M.W. v. Poway Unified School Dist*. (SD Cal. Aug. 14, 2013) (unpub.) citing *K.S. v. Fremont* (ND Cal., 2009 679 F.Supp.2d 1046, 61 IDELR 250, 113 LRP 33620.) Moreover, the right to assess belongs to school districts, and parents have no right to insist on outside assessors. (See, *Andress*, supra, 64 F.3d at p. 179.) In *G.J. v. Muscogee County Sch. Dist*. (M.D. Ga. 2010) 704 F.Supp.2d 1299, affd. (11th Cir. 2012) 668 F.3d 1258), the parents purported to agree to reassessments, but attempted to require that particular assessors conduct them. The district court affirmed a due process decision determining that consent was not given. "With such restrictions, [parents'] purported consent is not consent at all." (*Id*., 704 F.Supp.2d at p. 1309.) In affirming the district court's decision, the Eleventh Circuit observed that the parents' conditions "vitiated any rights the school district had under the IDEA for the reevaluation process ...." (*Id*., 668 F.3d at p. 1264.)

Similarly, in *Student R.A. v. West Contra Costa Unified Sch. Dist*. (N.D. Cal., Aug. 17, 2015, Case No. 14-cv-0931-PJH) 2015 WL 4914795 [nonpub. opn.] (*R.A.*), a parent approved an assessment plan on the modest condition that she be allowed to observe the assessment when conducted. The District Court found that condition vitiated the

mother's consent: "[t]he request to observe the assessment amounted to the imposition of improper conditions or restrictions on the assessments, which the District had no obligation to accept or accommodate." (*Id.* at p. 3.)

If a parent does not consent to a reassessment plan, the school district may conduct the reassessment without parental consent if it shows at a due process hearing that conditions warrant reassessment of the student and that it is lawfully entitled to do so. (20 U.S.C. § 1414(c)(3); 34 C.F.R. § 300.300(c)(ii); Ed. Code, §§ 56381, subd. (f)(3), 56501, subd. (a)(3).) Therefore, a school district must establish that (1) the educational or related services needs of the child warrant reassessment of the child, and that (2) the district has complied with all procedural requirements to obtain parental consent.

Mt. Diablo proved that its November 4, 2022 assessment plan met all legal requirements for notice. On November 4, 2022, Mt. Diablo provided Parent the feeding assessment plan, dated November 3, 2022, along with a copy of parental procedural rights. (Ed. Code, §§ 56043, subd. (a); 56321, subd, (a).) The November 4, 2022 assessment plan was written in English, the language Parents used to communicate with Mt. Diablo. It was written clearly in terms understandable by the general public. The plan explained no special education services would be provided to Student without Parent's written consent. The assessment plan explained the type of assessment to be conducted, a school-based feeding assessment, to be conducted by an occupational therapist, feeding therapist, or speech and language therapist. It explained that the assessment was needed because Student's clinic-based feeding therapist was unable to support Student in the school setting, and the district wanted to conduct its own assessment to determine Student's eligibility, services, and school-based needs.

The plan explained the information being sought through the assessment, including specific areas, and described the possible tests and procedures to be conducted, which included observation, interviews, and consultation with outside providers. (Ed. Code, § 56321(b)(3).) The statutory requirements for notice were met, and the November 4, 2022 assessment plan complied with applicable statutes. Consent means that the parent has been fully informed of all relevant information regarding the proposed action, understands and agrees in writing to the proposed action, and understands that the granting of consent is voluntary and may be revoked, although any revocation is not retroactive. (Ed. Code, § 56021.1; 34 C.F.R. § 300.9.)

Mt. Diablo's description of its proposed assessment as a school-based feeding assessment adequately informed Parent of the nature and scope of the assessment, particularly where Parent had herself obtained several such assessments for Student, the last by feeding therapist Zader in March 2022. Accordingly, Mt. Diablo proved that its assessment plan met all statutory requirements, and Mt. Diablo is entitled to conduct a school-based feeding assessment of Student.

Parent's December 16, 2022 consent to Mt. Diablo's proposed feeding assessment plan contained numerous impermissible conditions. For example, Mt. Diablo could only use heated foods in the assessment, had to use an outside assessor, and had to allow allowing observation by Parent and Student's private provider. The conditions imposed by Parent invalidated any purported consent to Mt. Diablo's District's reassessment.

Mt. Diablo may conduct its feeding assessment without implementing any of the limitations or conditions raised by Parent, with one exception.

As discussed in the section below, Mt. Diablo is not legally entitled to interview or communicate with Student's medical doctors or private providers without Parent's

consent. Therefore, Mt. Diablo is entitled to conduct a school-based feeding assessment of Student according to its November 4, 2022 assessment plan, without Parent's consent, except that it may not conduct interviews of, or engage in any communications with, Student's medical doctors or private providers without Parent's consent.

MT. DIABLO'S ISSUE 2: CAN MT. DIABLO SPEAK TO STUDENT'S MEDICAL DOCTORS AND PRIVATE PROVIDERS, WITHOUT PARENT'S CONSENT?

Mt. Diablo contends it is entitled to communicate with Student's feeding therapist and medical providers who previously provided information to Mt. Diablo at Parent's request concerning Student's feeding disorder and needs, to obtain information from them as one of the assessment tools to be used in Mt. Diablo's feeding assessment of Student.

Student contends Mt. Diablo and the feeding assessor are barred from contacting any of Student's medical providers without Parent's consent, which Parent is entitled to withhold under the Health Insurance Portability and Accountability Act (HIPAA), a 1996 Federal law that restricts access to individuals' private medical information, and the Family Educational Rights and Privacy Act (FERPA), a Federal law that protects the privacy of student education records.

A school district must base its IEP decisions about Student on a wide variety of data identified by statute in order to determine his educational needs. (20 U.S.C. § 1414(c)(1), (2).) Its assessors must use a variety of tools and strategies to obtain "relevant functional, developmental and academic information" that may assist the IEP team in the content of the student's program. (20 U.S.C. § 1414(b)(2)(A).) A

developmental history must be obtained when appropriate (Ed. Code, § 56320, subd. (f)).) An assessor's report must contain "educationally relevant health and development, and medical findings …" (Ed. Code, § 56327, subd. (e).) Since Mt. Diablo has not previously assessed Student's eating disorder, the information currently available is controlled by Parent and possessed by Parent, and Student's medical doctors and private providers.

During the 2022-2023 school year, at Parent's request, pediatricians Olga Kelly, M.D. and Durga Deshpande, M.D. and cardiologist Scott Soifer, M.D. all provided Mt. Diablo information concerning Student's feeding needs, and recommendations that Mt. Diablo should provide Student foods heated in a microwave. Mt. Diablo requested Parent sign a release of information authorization allowing Mt. Diablo to communicate with medical providers Dr. Kelly and Dr. Soifer concerning Student's health and nutrition. Parent authorized releases of information from Dr. Kelly and Dr. Soifer, but any communication with Dr. Soifer was subject to the condition that "all communication shall be in writing only and cc'd to Parent."

OAH does not have subject matter jurisdiction to determine or enforce Student's individual rights under HIPAA or FERPA. OAH also does not have personal jurisdiction over any of Student's medical providers and cannot order them to provide private medical information to Mt. Diablo over Parent's objection.

However, an ALJ can authorize a school district to conduct its own medical examination of a student over the parents' objection that it would intrude on the child's right to privacy. (See, e.g., *Shelby S v. Conroe Ind. Sch. Dist.* (5th Cir. 2006) 454 F.3d 450, 454, cert. denied, (2007) 549 U.S. 1111 (*Shelby*) ["where a school district articulates

reasonable grounds for its necessity to conduct a medical reevaluation of a student, a lack of parental consent will not bar it from doing so"].) This decision has already determined Mt. Diablo may proceed with its proposed feeding assessment. Parent is free to decline special education under the IDEA rather than submit Student for the feeding assessment. (*Shelby*, *supra*, 454 F.3d at pp. 454-455.)

Mt. Diablo is not entitled to communicate with Student's medical doctors and private providers without Parent's consent.

Student prevailed on Mt. Diablo's Issue 2.

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.

STUDENT'S ISSUES

ISSUE 1a:

Student proved Mt. Diablo denied Student a FAPE by failing to consider, revise Student's individualized education program, called an IEP, and implement the recommendations from Student's March 2022 feeding evaluation.

Student prevailed on Student's Issue 1a.

ISSUE 1b:

Student proved Mt. Diablo denied Student a FAPE by failing to consider, revise Student's IEP, and implement the recommendations from Student's April 2022 neuropsychological evaluation.

Student prevailed on Student's Issue 1b.

ISSUE 1c:

Student proved Mt. Diablo denied Student a FAPE by failing to consider, revise Student's IEP, and implement the recommendations from Student's May 2022 occupational therapy evaluation.

Student prevailed on Student's Issue 1c.

ISSUE 1d:

Student failed to prove Mt. Diablo denied Student a FAPE by failing to assess Student in all areas of need before Student entered Mt. Diablo in August 2022.

Mt. Diablo prevailed on Student's Issue 1d.

ISSUE 1e:

Student proved Mt. Diablo denied Student a FAPE by failing to offer Student a revised reading goal at Student's May 2022 IEP team meetings.

Student prevailed on Student's Issue 1e.

ISSUE 1f:

Student proved Mt. Diablo denied Student a FAPE by failing to offer Student revised writing goals in writing endurance, anchoring, and sizing at Student's May 2022 IEP team meetings.

Student prevailed on Student's Issue 1f.

ISSUE 1g:

Student proved Mt. Diablo denied Student a FAPE by failing to offer Student a revised math goal at the May 2022 IEP team meetings.

Student prevailed on Student's Issue 1g.

ISSUE 1h:

Student failed to prove Mt. Diablo denied Student a FAPE by failing to provide some educational benefit to Student in reading, writing, and math.

Mt. Diablo prevailed on Student's Issue 1h.

ISSUE 1i:

Student proved Mt. Diablo denied Student a FAPE by predetermining Mt. Diablo's May 2022 offer of supports and services for Student.

Student prevailed on Student's Issue 1i.

ISSUE 1j:

Student failed to prove Mt. Diablo denied Student a FAPE by failing to have all required IEP team members present at Student's May 2022 IEP team meetings.

Mt. Diablo prevailed on Student's Issue 1j.

ISSUE 1k:

Student proved Mt. Diablo denied Student a FAPE by impeding Parent's right to participate in the May 18, 2022 IEP meeting by predetermining the IEP offer and failing to consider Student's evaluations.

Student prevailed on Student's Issue 1k.

ISSUE 1L:

Student failed to prove Mt. Diablo denied Student a FAPE by failing to implement Student's October 2021 IEP when it failed to have a one-to-one aide in close proximity to Student on October 25, 2022.

Mt. Diablo prevailed on Student's Issue 1l.

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ISSUE 1m:

Student failed to prove Mt. Diablo denied Student a FAPE by failing to offer Student appropriate goals in all areas of need at Student's November 2022 IEP.

Mt. Diablo prevailed on Student's Issue 1m.

ISSUE 1n:

Student proved Mt. Diablo denied Student a FAPE by failing to revise Student's IEP to address Student's need for heated food.

Student prevailed on Student's Issue 1n.

ISSUE 1O:

Student proved Mt. Diablo denied Student a FAPE by failing to implement Student's October 2021 and November 2022 IEP's related to permitting weekly video for Parent and the feeding provider.

Student prevailed on Student's Issue 1o.

ISSUE 1p:

Student failed to prove Mt. Diablo denied Student a FAPE by failing to implement Student's October 2021 and November 2022 IEP's related to parent meetings.

Mt. Diablo prevailed on Student's Issue 1p.

ISSUE 1q:

Student failed to prove Mt. Diablo denied Student a FAPE by failing to implement Student's October 2021 and November 2022 IEP's by failing to allow a paraprofessional to attend the parent meetings.

Mt. Diablo prevailed on Student's Issue 1q.

ISSUE 1r:

Student failed to prove Mt. Diablo denied Student a FAPE by failing to provide Parent progress reports in quarter one of Student's 2022-2023 school year.

Mt. Diablo prevailed on Student's Issue 1r.

ISSUE 1s:

Student failed to prove Mt. Diablo denied Student a FAPE by impeding Parent's right to participate in the IEP decision-making process by failing to provide weekly notes and allow observations more than once per month so that Parent could review and revise.

Mt. Diablo prevailed on Student's Issue 1S.

MT. DIABLO'S ISSUES

ISSUE 1:

Mt. Diablo proved its assessment plan was legally compliant such that it can assess Student under its November 4, 2022 assessment plan without Parent's consent.

Mt. Diablo prevailed on Mt. Diablo's Issue 1.

ISSUE 2:

Mt. Diablo failed to prove that it is legally entitled to speak to Student's medical doctors and private providers, without Parent's consent.

Student prevailed on Mt. Diablo's Issue 2.

REMEDIES

Courts have broad equitable powers to remedy the failure of a school district to provide a FAPE to a disabled child. (20 U.S.C. § 1415(i)(1)(C)(iii); Ed. Code, § 56505, subd. (g); see *School Committee of the Town of Burlington, Massachusetts v. Dept. of Education* (1985) 471 U.S. 359, 369 [105 S.Ct. 1996, 85 L.Ed.2d 385] (*Burlington*).) This broad equitable authority extends to an ALJ who hears and decides a special education administrative due process matter. (*Forest Grove, supra,* 557 U.S. 230, 244, n. 11.)

When a school district fails to provide a FAPE to a student with a disability, the student is entitled to relief that is "appropriate" in light of the purposes of the IDEA. (*Burlington, supra*, 471 U.S. at p. 369-371.) Parents may be entitled to reimbursement for the costs of placement or services that they have independently obtained for their

child when the school district has failed to provide a FAPE. (*Id*; *Student W. v. Puyallup School District* (9th Cir. 1994) 31 F. 3d 1489, 1496 (*Puyallap*).) A school district also may be ordered to provide compensatory education or additional services to a student who has been denied a FAPE. (*Id*. at p. 1496.) 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 pp. 1496-1497.) The conduct of both parties must be reviewed and considered to determine whether equitable relief is appropriate. (*Id.* at p. 1496.) 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. District of Columbia (Reid)* (D.D.C. Cir. 2005) 401 F.3d 516, 524, citing *Student W. v. Puyallup School District* (9th Cir. 1994) 31 F.3d 1489,1497.) The award must be fact-specific and be "reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place." (*Reid* , supra, 401 F.3d 516 at] 524.)

STUDENT'S REMEDIES

FAILURE TO DEVELOP AN APPROPRIATE IEP FOR THE START OF THE 2022-2023 SCHOOL YEAR

Student prevailed on Issues 1a, 1b, 1c, 1e, 1f, 1g, 1i, and 1k arising from Mt. Diablo's predetermination that the May 2022 IEP would make no changes to the October 25, 2021 IEP that the parties made stay put in their October 27, 2021 settlement

agreement. As a result of Mt. Diablo's failure to develop an appropriate IEP for Student for the start of the 2022-2023 school year, Student was deprived of the educational benefit he would have realized from having an updated IEP in place.

As it is impossible to know the terms of the interim IEP Student's IEP team might have developed in May 2022 based on the available input from Parent and Student's private assessors, Student's lost benefit must be best estimated based on the differences between Student's October 25, 2021 IEP and the September 7, 2022 IEP that Parent ultimately consented to, with exceptions, on November 4, 2022.

The differences between the two IEP's are primarily in the revised and additional goals found in the IEP as consented to on November 4, 2022 IEP. Student's eligibility and placement did not change. With respect to related services, both IEP's provided Student a full time one-to-one aide, and 300 minutes per year of occupational therapy consultation. Student's specialized academic instruction was increased by 15 minutes per day, and his speech and language services were changed from 60 minutes per week of group pullout services, and 30 minutes per week of individual pull out, to 60 minutes per week of small group with no more than two peers with similar goals and needs.

Student's September 7, 2022 IEP, as consented to, added a writing goal to develop Student's skills in producing clear and coherent writing, where no writing had existed in the October 25, 2021 IEP. The new IEP also added

- an additional math goal to develop Student's skills in breaking down and solving algebraic equations,

- a new speech and language goal to develop Student's skills at understanding figurative language, and
- a new executive functioning goal to develop Student's skills at putting his things away after lunch or class.

In addition to these four new goals, the new IEP updated Student's other nine goals in English language arts, math, speech and language, occupational therapy, and feeding.

Because Student's teachers and in-school service providers were unable to work on Student's new goals at the start of the year, Student was deprived of educational benefit. For purposes of calculating an equitable remedy, Mt. Diablo is liable for the resulting deprivation of benefits over the short period from September 2, 2022 through September 6, 2022. Student was making academic progress during this period, as indicated by his A and B grades for the first quarter of the school year ending October 7, 2022.

However, his progress towards the new, appropriate IEP goals contained in the September 7, 2022 IEP cannot be measured, as his performance from September 2 through 6, 2022 is the baseline for those goals. In the absence of a precise method for calculating Student's lost academic benefit over three days, this decision finds it equitable to award Student a block of compensatory education equivalent to approximately half the six hour school day for each of the three days, or a total of nine hours of compensatory education. This block of compensatory education may be applied at Parent's discretion to address Student's needs in any of the areas of English language arts, math, writing, speech and language, occupational therapy, or feeding.

FAILURE TO PROVIDE STUDENT ASSISTIVE TECHNOLOGY SUPPORT FOR HEATED FOODS, AND WEEKLY FEEDING VIDEOS

Student prevailed on Student's Issue 1n, proving that Mt. Diablo denied Student a FAPE by failing to provide him assistive technology on at least an interim basis to support Student's need for heated foods pending a district assessment. The evidence established that, as a remedy, Parent is entitled to reimbursement of the $100 paid by Parent for a bento box for Student. Student is also entitled to an order directing Mt. Diablo to inspect the bento box purchased by Parent, test Student's ability to open it, and, if the bento box purchased by Parent is not functional or cannot be opened by Student, to select and purchase at district expense a bento box Student can open.

Student also prevailed on Student's Issue 1o, proving that Mt. Diablo significantly impeded Parent's participation in the IEP process by failing to implement the IEP support of providing Parent a weekly feeding video of Student eating his lunch at school. Student is entitled to an order directing Mt. Diablo to implement the weekly videos unless and until Parent directs otherwise in writing, or the IEP team changes or removes the support. In implementing the weekly feeding video support, Mt. Diablo may take steps to prevent the video from capturing sounds and images of other Students, including having Student eat his lunch in a location away from other Students. All other relief requested by Student is denied.

MT. DIABLO'S REMEDIES

Mt. Diablo prevailed on Mt. Diablo's Issue 1. Mt. Diablo is entitled to conduct a school-based feeding assessment of Student according to its November 4, 2022

assessment plan, without Parent's consent, except that it may not conduct interviews, or engage in any communications with, Student's medical doctors or private providers without Parent's consent.

All other relief requested by Mt. Diablo is denied.

ORDER

1. Mt. Diablo must provide Student a block of nine hours of compensatory education by a non-public agency, to be applied at Parent's discretion to address Student's needs in any of the areas of English language arts, math, writing, speech and language, occupational therapy, or feeding. The compensatory education must be used by Student by August 1, 2024, or forfeited.

2. Within 30 days of the date of this order, Mt. Diablo must pay $100.00 to Parent, as reimbursement for the battery operated bento box previously purchased by Parent.

3. To ensure that Student has assistive technology in place as soon as possible following the start of the 2023-2024 school year to support Student's need for heated food, Parent must provide Mt. Diablo the bento box previously purchased by Parent within 10 days of receipt of reimbursement, for inspection and testing by Mt. Diablo.

4. Within 10 days after the start of the 2023-2024 school year, unless Student is not attending school, Mt. Diablo must test Student's ability to open the bento box previously purchased by Parent. If the bento box purchased by Parent is not functional or cannot be opened by Student, Mt. Diablo will within 10 additional days select and purchase at district expense a bento box Student can open.

5. Beginning at the start of the 2023-2024 school year, Mt. Diablo must provide Parent a video once per week of Student eating his lunch at school, unless and until Parent directs otherwise in writing, or the IEP team changes or removes the support. In implementing the weekly feeding video support, Mt. Diablo may take steps to prevent the video from capturing sounds and images of other Students, including having Student eat his lunch in a location away from other Students.

6. Mt. Diablo may conduct a school-based feeding assessment of Student according to its November 4, 2022 assessment plan, without Parent's consent, except that it may not conduct interviews, or otherwise communicate with Student's medical doctors or private providers without Parent's consent.

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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.

Robert G. Martin
Administrative Law Judge
Office of Administrative Hearings