

BEFORE THE  
OFFICE OF ADMINISTRATIVE HEARINGS  
STATE OF CALIFORNIA

CASE NO. 2023020691

PARENT ON BEHALF OF STUDENT,

and

ASPIRE INSKEEP ACADEMY CHARTER, ASPIRE CENTENNIAL  
COLLEGE PREPARATORY ACADEMY, AND ASPIRE PUBLIC  
SCHOOLS.

DECISION

August 10, 2023

On February 21, 2023, the Office of Administrative Hearings, called OAH, received a due process hearing request from Parent on behalf of Student, naming Aspire Public Schools and Aspire Inskeep Academy Charter. On March 17, 2023, OAH granted Student's motion to file an amended complaint naming Aspire Public Schools, Aspire Inskeep Academy Charter, and Aspire Centennial College Preparatory Academy, collectively referred to as Aspire. On April 4, 2023, Aspire filed a response to Student's

amended complaint. Administrative Law Judge Ted Mann heard this matter by videoconference in Los Angeles in 14 days of hearing on May 16, 17, 18, 23, 24, 25, 30 and 31, 2023 and June 2, 5, 6, 7, 8 and 13, 2023.

Attorney N. Jane DuBovy represented Student. Mayra Loza assisted attorney DuBovy for most days of the hearing. Student's mother, referred to in this decision as Parent, attended almost every day of the hearing. Attorney Heather Edwards represented Aspire. Meghann Cazale, Aspire's Senior Director of Special Education, attended almost every day of the hearing on Aspire's behalf.

At the parties' request the matter was continued to July 10, 2023 for written closing briefs. The record was closed, and the matter was submitted on July 10, 2023.

## STUDENT'S ISSUES

At the May 5, 2023 prehearing conference in this matter, the parties and ALJ discussed the issues for hearing at length, and the ALJ drafted the agreed-upon issues. On May 8, 2023, OAH issued the order following prehearing conference documenting the agreed-upon issues for the hearing. The Order stated that a party must immediately file a written request for relief if the issues, as stated in the Order, did not reflect their understanding of the issues as clarified at the prehearing conference.

On May 15, 2023, Student filed a notice of removed issues and a revised statement of issues. Referencing the issues listed and ordered in the order following prehearing conference, Student removed Issues Nos. 1, 2, 3, 4, 5a, 5d, 5e, 6, 7a, 7c, 7d, 7e, 7k, 8a, 8d, 8e, 9c, 9d, 9e, 9f, 9h, 10, 11c, 11i, 12d, 12g, and 13. Student kept the

original numbering from the first amended complaint, and retained and/or revised Issues 5b, 5c, 5f, 7b, 7f, 7g, 7h, 7i, 7j, 8b, 8c, 8f, 9a, 9b, 9g, 11a, 11b, 11d, 11e, 11f, 11g, 11h, 12a, 12b, 12c, 12e, and 12f.

At the start of the hearing on May 16, 2023, the parties and ALJ clarified and rephrased the issues based upon Student's filing the previous day. The issues were renumbered, and non-deleted portions of sub issues were retained and renumbered by the ALJ per Student's notice. The administrative law judge has authority to renumber and redefine a party's issues, so long as no substantive changes are made. (*J.W. v. Fresno Unified Sch. Dist.* (9th Cir. 2010) 626 F.3d 431, 442-443.)

On May 24, 2023, Student's attorney on the record narrowed the renumbered Issue 5 to define the period at issue as the 2022-2023 regular school year from start to March 14, 2023, the date of filing of Student's first amended complaint. On June 6, 2023, the ALJ issued a revised Order finalizing hearing issues.

The issues following Student's removal and revision of the issues listed in the order following prehearing conference, and as discussed with the parties on the first day of hearing, along with the limitation of the period at issue in the newly numbered Issue 5, and as confirmed in the revised Order finalizing hearing issues, are listed below. A free appropriate public education is called a FAPE and an individualized education program is called an IEP.

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## ISSUES

1. Did Aspire deny Student a FAPE in the development of the April/May 2021 and June 2021 IEPs by:
  - a. Not including adequate statements of measurable annual goals in all areas of need?
  - b. Not considering Parent's concerns in the development of the IEP?
  - c. Predetermining its offer of placement and services?
  
2. Did Aspire deny Student a FAPE, for the 2021-2022 regular school year and extended school year by failing to:
  - a. Implement consented-to portions of the most recent agreed-to IEP?
  - b. Offer and implement appropriate specialized academic instruction for in-person instruction?
  - c. Offer appropriate related services in occupational therapy, language and speech, counseling, behavior support, and social skills?
  - d. Offer and implement positive behavioral interventions and supports, behavior intervention plan, and behavior support plan to address behaviors that interfered with Student's learning?
  - e. Offer and implement one-to-one aide support, with supervision by a board-certified behavioral analyst?
  - f. Offer and implement inclusion specialist services?

3. Did Aspire deny Student a FAPE in the development of the September 2021 and October 2021 IEPs by:
  - a. Not including adequate statements of measurable annual goals in all areas of need?
  - b. Not considering Parent's concerns in the development of the IEP?
  - c. Predetermining its offer of placement and services?
4. Did Aspire deny Student a FAPE in the development of the June 2022 IEP by:
  - a. Failing to timely complete Student's annual review?
  - b. Not including adequate statements of measurable annual goals in all areas of need?
  - c. Predetermining its offer of placement and services?
5. Did Aspire deny Student a FAPE, for the 2022-2023 regular school year through March 14, 2023 by failing to:
  - a. Have an IEP in place by the start of the school year?
  - b. Implement consented-to portions of the IEP?
  - c. Offer and implement appropriate specialized academic instruction for in-person instruction?
  - d. Offer appropriate related services in occupational therapy, language and speech, counseling, behavior support, and social skills?
  - e. Offer and implement positive behavioral interventions and supports, behavior intervention plan, and behavior support plan to address behaviors that interfered with Student's learning?

- f. Offer and implement one-to-one aide support, with supervision by a board-certified behavioral analyst?
  - g. Offer and implement inclusion specialist services?
- 6. Did Aspire deny Student a FAPE in the development of the September 2022 reconvened IEP and October 2022 amendment IEP by:
  - a. Failing to consider the results of the independent educational evaluations in decisions regarding the provision of FAPE?
  - b. Not considering Parent's concerns in the development of the IEP?
  - c. Not including adequate statements of measurable annual goals in all areas of need?
  - d. Failing to revise the IEPs to address learning loss during school closures in the 2020-2021 school year?
  - e. Predetermining its offer of placement and services?

On July 10, 2023, Student filed their Closing Brief. The Closing Brief sought to raise issues that were not part of the issues listed in the Revised Order Finalizing Issues for Hearing. To the extent that evidence potentially relating to these claims was introduced at hearing, Student's counsel represented at hearing that the evidence was relevant to, and offered to prove, Student's claims as listed in the revised Order. Accordingly, Aspire did not question witnesses with respect to the new claims raised in Students' closing brief, nor address these claims in its closing brief. This Decision does not address claims raised for the first time in Student's closing brief, since both sides did not have an opportunity to

question witnesses and argue the new claims in their closing briefs. (See, e.g., *H.B. v. Las Virgenes Unified School Dist.* (9th Cir. 2007) 239 Fed.Appx. 342, 344-345 [nonpub. opn.].) No issues were added to the hearing at any time during the hearing, and the decision decides only those issues that were agreed-upon, as related in the Revised Order Finalizing Issues for Hearing.

## JURISDICTION

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

- all children with disabilities have available to them a 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 free appropriate public education, referred to as FAPE, to the child. (20 U.S.C.

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

At all relevant times, Student resided within Aspire Public Schools' geographical boundaries and attended one of its schools. Aspire Public Schools is a charter management organization which operates multiple charter schools, including Aspire Inskeep Academy Charter, and Aspire Centennial College Preparatory Academy. Both of these are public charter schools operating as their own local educational agency for special education purposes. Student attended Aspire Inskeep Academy Charter for fifth and sixth grade in the 2020-2021 and 2021-2022 school years, and was 12 years old and in seventh grade for the 2022-2023 school year at Aspire's Centennial College Preparatory Academy at the time of hearing.

Student was eligible for special education under the autism eligibility category, with a history of difficulties with communication, behavior, and socialization, and needs in the areas of

- social communication,
- behavior,
- English language development,



- reading,
- writing, and
- math.

Student attended general education classes and received a general education curriculum, with supports and accommodations.

## LEGAL FRAMEWORK

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

In general, a child eligible for special education must be provided access to specialized instruction and related services which are individually designed to provide educational benefit through an IEP reasonably calculated to enable the child to make progress appropriate in light of the child's circumstances. (*Board of Education of the Hendrick Hudson Central School Dist. v. Rowley* (1982) 458 U.S. 176, 201-204; *Endrew F. v. Douglas County School Dist. RE-1* (2017) 580 U.S. 386, 401.)

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ISSUE 1a: DID ASPIRE DENY STUDENT A FAPE IN THE DEVELOPMENT OF THE APRIL/MAY 2021 AND JUNE 2021 IEPs BY NOT INCLUDING ADEQUATE STATEMENTS OF MEASURABLE ANNUAL GOALS IN ALL AREAS OF NEED?

Student contends Aspire denied Student a FAPE by not including adequate statements of measurable annual goals in all areas of need in the development of the April/May 2021 and June 2021 IEPs. Aspire contends that the goals from those IEPs did include adequate statements of measurable annual goals in all areas of need.

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).) The annual IEP must contain a statement of measurable annual goals related to meeting the child's needs that result from the child's disability to enable the child to be involved in and progress in the general curriculum and meeting each of the child's other educational needs that result from the child's disability. (20 U.S.C. § 1414(d)(1)(A); 34 C.F.R. § 300.320(a)(1) & (2); Ed. Code, § 56345, subd. (a)(1) & (2).) The IEP must also contain a statement of how the goals will be measured. (20 U.S.C. § 1414(d)(1)(A); 34 C.F.R. § 300.320(a)(3); Ed. Code, § 56345, subd. (a)(3).) The IEP must show a direct relationship between the present levels of performance, the goals, and the educational services to be provided. (Cal. Code Regs, tit. 5, § 3040, subd. (c).)

However, the IDEA does not require an IEP to contain every goal from which a student may benefit. (*Capistrano Unified School Dist. V. B.W.* (9th Cir. 2021) 21 F.4th 1125, 1133.) In California, an IEP need not contain additional information, beyond that explicitly required by the IDEA. (Ed. Code, § 56345, subd. (i).)

Once a student is found eligible for special education based on an initial assessment and initial IEP team meeting, they 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).)

Student was enrolled at Aspire Inskip Academy Charter for fifth grade during the 2020-2021 school year. Aspire delivered Student's educational program through distance learning for the entire school year due to the COVID-19 pandemic. Student was due for a triennial reassessment, and annual IEP, in Spring 2021. When the assessments were delayed for reasons not at issue here, the IEP team proceeded with Student's annual IEP based upon information already available. To complete the IEP, Aspire held IEP team meetings, on April 6, 2021, April 21, 2021 and May 5, 2021. The IEP team included:

- Parent
- Mayra Loza, Parent's Advocate
- Ana Escalante, Aspire Special Education Director
- Lauren Sargent, Aspire Program Specialist
- Charlie Heaton, School Principal
- Jocelyn Ayala, School Vice Principal
- Ruth Garcia, Education Specialist and Case Manager
- Leslie Padron, Aspire School Psychologist
- Chalsey Miller, School Counselor
- India Banks, Aspire Speech Language Pathologist

- Erica Marquez, General Ed Teacher
- Claudia Castillo, General Ed Teacher
- Viviann Mendez, Interpreter for Parent

The IEP, dated April 6, 2021, contained detailed present levels of performance in

- English language development,
- reading,
- writing,
- mathematics,
- social emotional,
- language, and
- behavior support.

The IEP contained statements of measurable annual goals related to meeting Student's needs resulting from their disability. These were adequate to enable Student to be involved in and progress in the general curriculum, and meet each of the Student's other educational needs that resulted from their disability.

The nine goals were in the areas of

- English language development,
- behavioral support,
- reading,
- writing,
- math fluency,

- social emotional,
- expressive language,
- language function, and
- math word problems.

Parent and Loza both had input on the drafting and formulation of the goals during the IEP meetings. Each goal was objectively measurable and included methods of evaluation, along with incremental objectives related to the goal. The goals were reasonably based upon Student's present levels of performance.

For example, Student's present levels of performance in English language development, reading and writing and the needs identified in those areas were aligned with the English language development, reading and writing goals, respectively. Each of those three goals were objectively measurable, and included clear methods of evaluation.

In particular, Student's reading goal focuses on Student's difficulties identifying the theme of grade level literature and providing supporting details regarding the theme that was identified as a need in the reading present levels for Student. Student's annual goal number two states: "By April 2022, when given grade level literature, [Student] will identify the theme and provide 1-2 supporting details orally or in a written response as measured by teacher created rubric in 4 out of 5 trials." The goal, as stated, is both objectively measurable and includes a clear measure of Student performance.

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Aspire completed its triennial reevaluation of Student in early June 2021, and Student's IEP team met on June 9, 2021 and June 15, 2021 to consider the new assessments and update Student's IEP. The June 9, 2021 IEP contained detailed present levels of

- performance in health,
- reading,
- writing,
- mathematics,
- general ability,
- social emotional functioning,
- behavior intervention,
- English language development,
- recreation therapy,
- speech and language function, and
- occupational therapy.

The IEP contained statements of measurable annual goals related to meeting the child's needs that result from the child's disability to enable the child to be involved in and progress in the general curriculum and meeting each of the child's other educational needs that result from the child's disability.

The sixteen goals were in the areas of

- English language development,
- behavioral support,
- reading,

- writing,
- math fluency,
- social emotional,
- expressive language,
- language function,
- math word problems,
- recreation therapy,
- occupational therapy fine motor,
- occupational therapy social,
- occupational therapy sensory,
- reading comprehension,
- language function and
- recreation therapy.

Each goal was objectively measurable and included methods of evaluation, along with incremental objectives related to the goal. The goals were reasonably based upon Student's present levels of performance. Parent and Loza both had input on the drafting and formulation of the goals during the IEP meetings.

For example, Student's present levels of performance in English language development, reading and writing and the needs identified in those areas were aligned with the English language development, reading and writing goals, respectively. Each of those three goals were objectively measurable, and included clear methods of evaluation.

Parent argues that the goals were not objectively measurable, but each of the goals have a means of measuring Student progress, and Student's argument is not

supported by the evidence. Aspire's personnel explained the goals during the IEP meetings and described how Student's performance would be measured. At hearing, Aspire's educational professionals described how the goals fit into Student's needs and how teachers and service providers were able to gather data and information from Student to determine progress on goals under the appropriate rubric.

Here, Parent failed to meet their evidentiary burden in establishing that Aspire failing to include adequate statements of measurable goals in all areas of need in the April 6, 2021 and June 9, 2021 IEPs. Therefore, Aspire prevailed on Student's Issue 1a.

#### ISSUE 1b: DID ASPIRE DENY STUDENT A FAPE IN THE DEVELOPMENT OF THE APRIL/MAY 2021 AND JUNE 2021 IEPs BY NOT CONSIDERING PARENT'S CONCERNS IN THE DEVELOPMENT OF THE IEP?

Student contends that Aspire denied Student a FAPE by not considering Parent's concerns in the development of the April/May 2021 and June 2021 IEPs. Aspire contends that the various IEPs teams did consider Parent's concerns in the development of the IEPs.

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 mere form; it must be meaningful." (*Deal v. Hamilton County Board of Educ.* (6th Cir. 2004) 392 F.3d 840, 858 [citations omitted] ("*Deal*").) 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.)

For the combined five sessions of the April 6, 2021 and June 9, 2021 IEPs, Parent and Loza engaged in extensive discussions with the IEP teams for each meeting. Meeting notes document the detailed back and forth between them. Both Parent and Loza, as the advocate for Student, had opportunity to express their thoughts and concerns, and engage with the IEP team. Aspire's personnel testified believably and convincingly that Parent and Loza were able to fully present Parent's concerns for her child, including for his safety, behavioral support and ability to engage with his education.

Here, Student primary concerns boil down to Parent's concerns not being adopted by the IEP team rather than being considered by the team. Parent also focused on issues she observed during distance learning, but those issues were not related to Student's classroom behavior or performance for many reasons. The IEP teams engaged in extensive discussions with Parent and Loza over five IEP team meetings wherein Parent and Loza detailed their concerns about the Student. However, nothing requires the IEP team to adopt a Parents concerns after the concerns are considered. Parent failed to establish by a preponderance of the evidence that the IEP team did not consider Parent's concerns regarding Student. Therefore, Aspire prevailed on Student's Issue 1.b.

#### ISSUE 1c: DID ASPIRE DENY STUDENT A FAPE IN THE DEVELOPMENT OF THE APRIL/MAY 2021 AND JUNE 2021 IEPs BY PREDETERMINING ITS OFFER OF PLACEMENT AND SERVICES?

Student contends that Aspire denied Student a FAPE by predetermining its offer of placement and services in the development of the April/May 2021 and June 2021 IEPs. Aspire contends that the IEP teams did not predetermine their offers of placement and services in the indicated IEPs.

A school cannot independently develop an IEP, without meaningful participation, and then present the IEP to the parent for ratification. (*Target Range, supra*, 960 F.2d at p. 1484.) A school district that predetermines the child's program, and does not consider parents' requests with an open mind, has denied the parents' right to participate in the IEP process. (*Deal, supra*, 392 F.3d at p. 858; *Ms. S., supra*, 337 F.3d at p. 1131.)

For IEP team meetings, predetermination occurs when an educational agency has decided on its offer prior to the meeting and is unwilling to consider other alternatives.

(*Deal, supra*, 392 F.3d at p. 857-858; *H.B. v. Las Virgenes Unified School Dist.* (July 3, 2007, No. 05-56486) (9th Cir. 2007) 239 Fed. Appx. 342, 344-345 [nonpub. opn.].) A district may not arrive at an IEP team meeting with a "take it or leave it" offer. (*JG v. Douglas County School Dist.* (9th Cir. 2008) 552 F.3d 786, 801, fn.10.) Although school district personnel may bring a draft of the IEP to the meeting, the parents are entitled to bring to an IEP team meeting their questions, concerns, and recommendations as part of a full discussion of a child's needs and the services to be provided to meet those needs before the IEP is finalized. (*Assistance to States for the Education of Children Disabilities* (March 12, 1999) 64 Fed. Reg. 12478-12479.) School officials may permissibly form opinions prior to IEP team meetings. However, if the district goes beyond forming opinions and becomes "impermissibly and deeply wedded to a single course of action," this amounts to predetermination. (*P.C. v. Milford Exempted Village Schools* (S.D. Ohio, January 17, 2013, No. 1:11-CV-398) 2013 WL 209478, \*7.)

Evidence the district has an open mind and might possibly be swayed by the parents' opinions is sufficient to avoid a finding of predetermination. (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 district 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); *R.L. v. Miami-Dade County School Bd.* (11th Cir. 2014) 757 F.3d 1173, 1188–1189 (the question of predetermination is inherently fact-intensive but should identify those cases where parental participation is meaningful and those cases where it is a mere formality).) (*Ibid.*)

As is common practice, Aspire did prepare draft IEPs to facilitate the IEP team meeting process for the April, May and June IEP meetings in question. Otherwise, the IEP team meetings allowed for extensive discussion and review of Student's abilities, needs and potential programmatic and service solutions. Parent and Loza questioned Aspire personnel point by point, and notes of the IEP meeting in tandem with hearing testimony show that there was discussion and consideration of concerns and alternatives offered on behalf of Student. Aspire also adopted changes proposed by Parent and Loza in numerous circumstances.

Student asserts that because Aspire did not adopt Parent's request for an all-day one to one aide that Aspire pre-determined the IEP outcome, but the record shows that the IEP team considered Parent's request, but ultimately did not believe that an all-day, one-to-one aide was needed by Student or in the Student's best interests. Indicative of the IEP team's "open mind" were the thoughtful reasons why a one-to-one aide was not believed to be appropriate, rather than a categorical dismissal of the concern.

In sum, Student failed to demonstrate by a preponderance of the evidence that Aspire pre-determined the offers of placement and services that arose from the April, May, and June IEPs. Student did not meet their burden of proof with regard to this issue. Therefore, Aspire prevailed on Student's Issue 1c.

ISSUE 2a: DID ASPIRE DENY STUDENT A FAPE, FOR THE 2021-2022 REGULAR SCHOOL YEAR AND EXTENDED SCHOOL YEAR, BY FAILING TO IMPLEMENT CONSENTED-TO PORTIONS OF THE MOST RECENT AGREED-TO IEP?

Student received in-person instruction at Aspire Inskip Academy Charter for his sixth grade 2021-2022 school year. Student contends that Aspire denied Student a FAPE, for the 2021-2022 regular school year and extended school year, by failing to implement consented-to portions of the most recent agreed-to IEP, in particular the number of daily or weekly behavioral support services. Aspire contends that it materially implemented the consented-to portions of the most recent agreed-to IEP.

A school district must implement all components of a student's IEP. (20 U.S.C. § 1414(d)(2)(A); 34 C.F.R. § 300.323(c).) When a student alleges the denial of a FAPE based on the failure to implement an IEP, in order to prevail, the student must prove that any failure to implement the IEP was "material," which means that the services provided to a disabled child fall "significantly short of the services required by the child's IEP." (*Van Duyn v. Baker School Dist. 5J* (9th Cir. 2007) 502 F.3d 811, 822 (*Van Duyn*).) A minor discrepancy between the services provided and the services required in the IEP is not enough to amount to a denial of a FAPE. (*Ibid.*) "There is no statutory requirement of perfect adherence to the IEP, nor any reason rooted in the statutory text to view minor implementation failures as denials of a free appropriate public education." (*Ibid.*) A brief gap in the delivery of services, for example, may not be a material failure. (*Sarah Z. v. Menlo Park City School Dist.* (N.D.Cal., May 30, 2007, No. C 06-4098 PJH) 2007 WL 1574569 at p. 7.)

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

The methodology used to implement an IEP is left up to the district's discretion so long as it meets a student's needs and is reasonably calculated to provide meaningful educational benefit to the child. (*Rowley, supra*, 458 U.S. at p. 208; *Adams v. State of Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149-1150; *Pitchford v. Salem-Keizer School Dist.* (D. Or. 2001) 155 F.Supp.2d 1213, 1230-32; *T.B. v. Warwick School Committee* (1st Cir. 2004) 361 F.3d 80, 84 (*citing Roland M. v. Concord School Committee* (1st Cir. 1990) 910 F.2d 983, 992.) Parents, no matter how well motivated, do not have a right to compel a school district to provide a specific program or employ a specific methodology in providing education for a disabled student. (*Rowley, supra*, 458 U.S. at pp. 207-208.) However, once a service, system, or device is included in a student's IEP, then the district is obligated to provide that component. (Ed. Code, § 56345, subd. (c).) Following the development of the IEP, the district must provide required services as soon as possible. (34 C.F.R. § 300.323(c)(2).)

At the start of the 2021-22 school year, Student' operative IEP was the IEP dated June 9, 2021. The June 9, 2021 IEP included, among other special education and

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related services, 150 minutes per week of resource behavior support during the regular school year. On June 22, 2021, Parent provided written correspondence consenting to implementation of the

- goals,
- accommodations,
- behavior intervention plan,
- resource services for English language arts and English language development and math services,
- counseling and guidance,
- language and speech,
- occupational therapy, and
- recreational therapy services as set forth in the June 9, 2021 IEP.

Parent also stated her lack of consent to “the proposed change in Behavior Support services...” and that her “most recent consent as to this related service continues to be 150 minutes daily.” However, as discussed below, Aspire was not proposing a change in behavior support services, but to continue the same level of support that had been offered previously.

Parent contends that Student’s resource behavior support services at the start of the 2021-22 school year consisted of 150 minutes per day based upon the last-consented to IEP of May 14, 2020. Parent had provided consent for implementation about 10 months later on March 29, 2021. The summary of services portion of the May 14, 2020 IEP lists Student’s behavioral support services at 150 minutes per day. The additional discussion section of the IEP states that the behavior support was offered for 150 minutes per week as a push-in service. Aspire personnel Ana Escalante, Ruth

Garcia and Charlie Heaton all testified clearly and convincingly that the summary of services listing was a clerical error, and that the June 9, 2021 IEP continued the amount of behavioral support as 150 minutes per week. Once notified of the mistake by Loza on March 29, 2021, Aspire explained the error to Parent and Loza.

Student asserts that they relied on the error and that the 150 minutes per day had been consented to by Parent. However, Student failed to demonstrate by a preponderance of the evidence that Parent had consented to the erroneous 150 per day. Student did not meet their burden of proof with regard to this issue. Therefore, Aspire prevailed on Student's Issue 2a.

#### ISSUE 2b: DID ASPIRE DENY STUDENT A FAPE, FOR THE 2021-2022 REGULAR SCHOOL YEAR AND EXTENDED SCHOOL YEAR, BY FAILING TO OFFER AND IMPLEMENT APPROPRIATE SPECIALIZED ACADEMIC INSTRUCTION FOR IN-PERSON INSTRUCTION?

Student contends that Aspire denied Student a FAPE, for the 2021-2022 regular school year and extended school year, by failing to offer and implement appropriate specialized academic instruction for in-person instruction. Aspire contends that it offered and materially implemented appropriate specialized instruction for in-person instruction.

A claim that an IEP failed to offer a FAPE is evaluated in light of information available at the time the IEP was developed; the IEP is not judged in hindsight. (*Adams v. State of Oregon* (9th Cir. 1999) 195 F. 3d 1141, 1149.) An IEP is a snapshot, not a retrospective. (*Ibid.*, citing *Fuhrmann, supra*, 993 F.2d at p. 1041.) It must be evaluated in terms of what was objectively reasonable when the IEP was developed. (*Ibid.*)



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

A school District must provide "related services" to a special education student "when the instruction and services are necessary for the pupil to benefit educationally from his or her instructional program." (Ed. Code, § 56363, subd. (a); 34 C.F.R. § 300.34(a).) "Related services" means transportation, and developmental, corrective, and other supportive services 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*).) Such services may include

- speech-language pathology,
- audiology services,
- interpreting services,
- psychological services,
- physical and occupational therapy,
- recreation, including therapeutic recreation,
- social work services,
- school nurse services,
- counseling services,

- speech and language services,
- occupational therapy services,
- physical therapy services,
- orientation and mobility services, and
- medical services. (20 U.S.C. § 1401(26)(A); Ed. Code, § 56363, subd. (a).)

Student's June 9, 2021 IEP offered Student an increased level of specialized academic instruction from 120 minutes to 180 minutes per week related to English language development. The IEP also offered an increased level of specialized academic instruction from 150 minutes to 180 minutes per week related to math fluency and word problems. Lastly, the June 9, 2021 IEP continued to offer 150 minutes per week of behavioral intervention. The three services pieces were provided in Student's general education classes following a push-in model and utilizing a fully qualified special education teacher that would provide the services. Special education teacher Garcia testified clearly and credibly at hearing both the services were appropriate for Student and that the services were provided to Student with fidelity. Garcia's testimony was supported by credible testimony from Student's fifth grade English language arts teacher, Claudia Castillo, that the services were appropriate for Student and maximized his time in general education.

Student asserted, based primarily on testimony by Parent, that Student required more purely individualized service delivered in a pull-out model. Parent's testimony was less persuasive because Parent was not a trained educational professional and based their testimony primarily upon Student's performance at home during distance learning.

Student failed to demonstrate by a preponderance of the evidence that the specialized academic instruction offered to Student and implemented by Aspire's personnel failed to provide Student with a FAPE. Student did not meet their burden of proof with regard to this issue. Therefore, Aspire prevailed on Student's Issue 2b.

ISSUE 2c: DID ASPIRE DENY STUDENT A FAPE, FOR THE 2021-2022 REGULAR SCHOOL YEAR AND EXTENDED SCHOOL YEAR, BY FAILING TO OFFER APPROPRIATE RELATED SERVICES IN OCCUPATIONAL THERAPY, LANGUAGE AND SPEECH, COUNSELING, BEHAVIOR SUPPORT AND SOCIAL SKILLS?

Student contends that Aspire denied Student a FAPE, for the 2021-2022 regular school year and extended school year, by failing to offer appropriate related services in

- occupational therapy,
- language and speech,
- counseling,
- behavior support and
- social skills.

Aspire contends that it offered appropriate related services in occupational therapy, language and speech, counseling, behavior support and social skills.

Student did not offer evidence at hearing related to the appropriateness of the offers of services in the areas of occupational therapy, social skills, or counseling services. Student did not call any professional witnesses regarding these services areas, nor did Parent offer testimony related to these areas. Student therefore failed

to demonstrate by a preponderance of the evidence that the services offered in the three areas were not appropriate for them. Student did not meet their burden of proof with regard to this issue. Therefore, Aspire prevailed on these three areas of Student's Issue 2c.

Student's June 9, 2021 IEP offered Student 90 minutes per week of direct language and speech services during the regular school year by a licensed or credentialed provider. 60 minutes weekly used a pull-out model, and 30 minutes weekly were push-in. The same IEP offered 45 minutes per week of direct language and speech services during the extended school year by a licensed or credentialed provider using a pull-out model. Both versions of the language and speech services addressed Student's goals in expressive language and language function.

The service model and minutes were consistent with the recommendations in Aspire's May 26, 2021 speech/language assessment report prepared by speech/language pathologist India Banks. Student made reasonable progress in speech and language during the 2021-2022 school year and his developing skills were corroborated by Renee Jeremiah, Aspire's contract speech/language pathologist for Aspire Centennial. Dr. Heaton also testified credibly and clearly that the prescribed language and speech services were appropriate for Student.

Student asserts that they did not make progress during the 2021-2022 school year based upon the testimony of Student's expert speech/language pathologist, Susan Hollar. Hollar reported that Student's score on the Clinical Evaluation of Language Fundamentals had gone down over the 2021-2022 school year. However, Aspire established that testing in a location unfamiliar to Student, attributing the decline to

the use of a speech language pathology assistant, along with a failure to consider the effect of Student missing 28 days of school for the year undermined the value of Hollar's testimony on this issue.

Student raised the issue of behavior support in Issue 2.c. and in Issue 2d. The issue of behavioral support is therefore addressed in the stand-alone Issue 2d.

In sum, Student failed to demonstrate by a preponderance of the evidence that they were denied a FAPE for the 2021-2022 school year and extended school year in the indicated areas. Student did not meet their burden of proof with regard to this issue. Therefore, Aspire prevailed on Student's Issue 2c.

**ISSUE 2d: DID ASPIRE DENY STUDENT A FAPE, FOR THE 2021-2022 REGULAR SCHOOL YEAR AND EXTENDED SCHOOL YEAR, BY FAILING TO OFFER AND IMPLEMENT POSITIVE BEHAVIORAL INTERVENTIONS AND SUPPORTS, BEHAVIOR INTERVENTION PLAN AND BEHAVIOR SUPPORT PLAN TO ADDRESS BEHAVIORS THAT INTERFERED WITH STUDENT'S LEARNING?**

Student contends that Aspire denied Student a FAPE for the 2021-2022 regular school year and extended school year, by failing to offer and implement positive behavioral interventions and supports, a behavior invention plan, and a behavior support plan, to address behaviors that interfered with Student's learning. Aspire contends it offered and implemented positive behavioral interventions and supports, a behavior invention plan and a behavior support plan to address behaviors that interfered with Student's learning.

Educational benefit is not limited to academic needs. Behavioral and emotional needs must be addressed through an IEP if they affect academic progress, school behavior, or socialization. (*County of San Diego v. California Special Educ. Hearing Office* (9th Cir. 1996) 93 F.3d 1458, 1467 (*County of San Diego*).) When a child's behavior impedes his learning or that of others, the IEP team must consider strategies, including positive behavioral interventions, and supports, to address that behavior. (20 U.S.C. § 1414(d)(3)(B)(i); 34 C.F.R. § 300.324(a)(2)(i); Ed. Code, § 56341.1, subd. (b)(1).) An IEP that does not appropriately address behaviors that impede a child's learning denies the child a FAPE. (*Neosho R-V School Dist. v. Clark* (8th Cir. 2003) 315 F.3d 1022, 1028-1029; *County of San Diego, supra*, 93 F.3d at pp. 1467-68.)

For the 2021-2022 school year, the operative IEP for Student was the IEP dated June 9, 2021, as amended in the September 16, 2021 IEP, following the completion of Aspire's functional behavior assessment of Student once Student returned to in-person education. The IEP's offered 150 minutes per week of resource-based, push-in behavioral support, along with a behavior intervention plan targeted to Student's off-task behavior, and a new behavior goal in the September IEP. The behavioral plans, services and goals were implemented with fidelity during the 2021-2022 school year.

Student asserted that Student's behaviors were interfering with his education and that of others and that Student's safety was affected as well. Claudia Castillo, one of Student's general education teachers, testified clearly and convincingly that Student did not exhibit the range or magnitude of problems claimed by Parent. Student was able to work in class, work with others, and had social relationships with other children at school. Castillo further testified that Student did not display behaviors that interfered with others. Castillo's testimony was accorded significant weight.

Student failed to demonstrate by a preponderance of the evidence that the behavioral supports, services and goals offered to Student and implemented by Aspire's personnel failed to provide Student with a FAPE. Student did not meet their burden of proof with regard to this issue. Therefore, Aspire prevailed on Student's Issue 2d.

**ISSUE 2e: DID ASPIRE DENY STUDENT A FAPE, FOR THE 2021-2022 REGULAR SCHOOL YEAR AND EXTENDED SCHOOL YEAR, BY FAILING TO OFFER AND IMPLEMENT ONE-TO-ONE AIDE SUPPORT, WITH SUPERVISION BY A BOARD-CERTIFIED BEHAVIORAL ANALYST?**

Student contends that Aspire denied Student a FAPE, for the 2021-2022 regular school year and extended school year, by failing to offer and implement one-to-one aide support, with supervision by a board-certified behavioral analyst. Aspire contends that a one-to-one aide with support by a board-certified behavioral analyst was not necessary for Student to receive a FAPE.

Student made reasonable progress academically during the 2021-2022 school year as demonstrated by his grades, teacher comments, progress on goals, standardized tests and as described through the credible testimony of his teachers and services providers for the school year. Student did not demonstrate behaviors that were dangerous to himself or others. Student did have issues with feeling unattended and in attending or staying focused, but the combination of services he received allowed him to access his education and make progress.

In contrast, Parent's and Loza's concerns regarding Student related significantly to his behavior and performance during distance learning, behaviors and performance Student did not demonstrate in person in the "brick and mortar" classroom. Students

were back in school in person beginning in the Fall of 2021, the beginning of the 2021 - 2022 school year. Student's expert, clinical psychologist and neuropsychologist Nancy Blum, opined that Student needed a full-time daily aide to "close the gap" regarding Student's grade levels versus his neurotypical peers. However, that is not the standard applicable under the IDEA.

Significantly, none of Aspire's personnel thought that Student needed such a full-time aide. Instead, their credible testimony was that such a level of support was both unnecessary and actually potentially detrimental to Student. Student did testify at hearing that he wanted a full-time aide, but Student's opinion was belied by the testimony of the educational experts, as well as his mirroring of Parents testimony on the subject.

Student failed to demonstrate by a preponderance of the evidence that Student was denied a FAPE by Aspire's not providing Student with an all-day, full-time aide at school. Student did not meet their burden of proof with regard to this issue. Therefore, Aspire prevailed on Student's Issue 2e.

#### ISSUE 2f: DID ASPIRE DENY STUDENT A FAPE, FOR THE 2021-2022 REGULAR SCHOOL YEAR AND EXTENDED SCHOOL YEAR, BY FAILING TO OFFER AND IMPLEMENT INCLUSION SPECIALIST SERVICES?

Student contends that Aspire denied Student a FAPE, for the 2021-2022 regular school year and extended school year, by failing to offer and implement inclusion specialist services. Aspire contends that inclusion specialist services beyond those already included in Student's program were not necessary for Student to receive a FAPE.



Heaton and Escalante testified clearly and credibly that Aspire utilized inclusion strategies throughout the school and that all Student's program had inclusion services embedded throughout the school day, and Student's program and services. Student's expert, Dr. Blum, appeared to condition the services of an inclusion specialist upon Dr. Blum's recommendation that Student have a full-time, all-day aide. In light of Student not having such an aide, there was no other basis for such inclusion services advanced by Student at hearing. More significantly, Aspire already embedded inclusion into its educational model, practices and school day.

Student failed to demonstrate by a preponderance of the evidence that Aspire needed to offer or implement inclusion specialist services in order provide Student with a FAPE. Student did not meet their burden of proof with regard to this issue. Therefore, Aspire prevailed on Student's Issue 2f.

### ISSUE 3a: DID ASPIRE DENY STUDENT A FAPE IN THE DEVELOPMENT OF THE SEPTEMBER 2021 AND OCTOBER 2021 IEPs BY NOT INCLUDING ADEQUATE STATEMENTS OF MEASURABLE ANNUAL GOALS IN ALL AREAS OF NEED?

Student contends that Aspire denied Student a FAPE by not including adequate statements of measurable annual goals in all areas of need in the development of the September 2021 and October 2021 IEPs. Aspire contends that the goals from those IEPs did include adequate statements of measurable annual goals in all areas of need so as to provide Student with a FAPE.

Aspire held an IEP team meeting for Student on September 16, 2021, to review a functional behavior assessment conducted at Parent's request by Aspire school

psychologist Padron. The section on behavior support included details from Padron's assessment, along with Parent's concerns and input regarding Student's behavior. Based on Padron's assessment, the IEP team updated Student's present levels of performance in the area of behavior to indicate that his only area of need was off-task behavior during small group activities with peers. The IEP team also added a new behavior goal that by September 2022, during academic activities, instead of displaying off-task behaviors such as looking around the room, or playing with items, Student would ask a clarifying question or request a break.

The IEP, dated September 16, 2021, contained detailed present levels of performance in

- English language development,
- reading,
- writing,
- mathematics,
- recreation therapy,
- language function,
- occupational therapy,
- social emotional, and
- behavior support.

The IEP was drafted based upon information available to the IEP team at the time. The IEP contained statements of measurable annual goals related to meeting the child's needs that result from the child's disability to enable the child to be involved in and progress in the general curriculum and meeting each of the child's other educational needs that result from the child's disability.

The 16 goals were in the areas of

- English language development,
- behavioral support,
- reading,
- writing,
- math fluency,
- expressive language,
- language function,
- math word problems,
- recreation therapy,
- occupational therapy,
- reading comprehension, and
- social emotional.

Each goal was objectively measurable and included methods of evaluation, along with incremental objectives related to the goal. The goals were reasonably based upon Student's present levels of performance. Parent and Loza both had input on the drafting and formulation of the goals during the IEP meetings.

For example, Student's present levels of performance in math and the needs identified in that area were aligned with the math fluency and math word problems goals. Each of those two goals were objectively measurable and included clear methods of evaluation.

In particular, Student's math fluency goal focuses on Student's difficulties with multiplication of single-digit and multi-digit problems with whole numbers and decimals that was identified as a need in the math present levels for Student. Student's annual goal number four states: "By September 2022, [Student] will multiply single digit by multi-digit problems with whole numbers and decimals independently with 80 percent accuracy in three of four trials as measured by student work samples and data collection." The goal, as stated, is both objectively measurable and includes a clear measure of Student performance.

On October 27, 2021, Aspire held an IEP team meeting to review Padron's educationally related intensive counseling services assessment of Student, also conducted at Parent's request. Padron found that Student's difficulties with misreading social cues might be impacting his developing meaningful friendships, that Student sometimes lost his temper, occasionally did not listen to what he was told or refused adult directions, and displayed symptoms of depression. She recommended the IEP team consider adding social-emotional goals and intensive counseling services to Student's IEP. Based on Padron's assessment, the IEP team updated Student's present levels of performance and offered two new social emotional goals and 180 minutes per month of psychological services.

The October 27, 2021 IEP contained detailed present levels of performance in

- English language development,
- social emotional and educationally related intensive counseling services,
- reading,
- mathematics,
- recreational therapy,

- language function,
- occupational therapy,
- social emotional,
- behavior support,
- behavior and functional behavior assessment, and
- gross motor.

The IEP contained statements of measurable annual goals related to meeting the child's needs that result from the child's disability to enable the child to be involved in and progress in the general curriculum and meeting each of the child's other educational needs that result from the child's disability.

The 20 goals, an increase by four goals from the September IEP, were in the areas of

- English language development,
- behavioral support,
- social emotional,
- reading,
- writing,
- math fluency,
- expressive language,
- language function,
- math word problems,
- recreation therapy,
- occupational therapy fine motor,
- occupational therapy social,
- occupational therapy sensory,

- reading comprehension,
- language function repair, and
- adapted physical therapy gross motor.

Each goal was objectively measurable and included methods of evaluation, along with incremental objectives related to the goal. The goals were reasonably based upon Student's present levels of performance. Parent and Loza both had input on the drafting and formulation of the goals during the IEP meetings.

For example, Student's present levels of performance in math and the needs identified in that area were aligned with the math fluency and math word problems goals. Each of those two goals were objectively measurable and included clear methods of evaluation.

In particular, Student's math word problems goal focuses on Student's difficulties with word problems and arithmetic operations with whole numbers and decimals that was identified as a need in the math present levels for Student. Student's annual goal number ten states:

"By October 2022, when given word problems or numerical expressions that require division of two numbers (with up to five-digit dividend and two-digit divisor) involving whole numbers and decimals, [Student] will use a preferred strategy to calculate the quotient for four out of five problems with 80 percent accuracy, for two to three consecutive weeks, as measured by student work samples and data collection."

The goal, as stated, is both objectively measurable and includes a clear measure of Student performance.

Parent argues that the goals were not objectively measurable, but each of the goals have a means of measuring Student progress and Student's argument is not supported by the evidence. Aspire's personnel explained the goals during the IEP meetings and described how Student's performance would be measured. At hearing, Aspire's educational professionals described how the goals fit into Student's needs and how teachers and service providers were able to gather data and information from Student to determine progress on goals under the appropriate rubric.

Here, Parent failed to meet their evidentiary burden in establishing that Aspire failing to include adequate statements of measurable goals in all areas of need in the September 16, 2021 and October 27, 2021. Therefore, Aspire prevailed on Student's Issue 3.a.

### ISSUE 3b: DID ASPIRE DENY STUDENT A FAPE IN THE DEVELOPMENT OF THE SEPTEMBER 2021 AND OCTOBER 2021 IEPs BY NOT CONSIDERING PARENT'S CONCERNS IN THE DEVELOPMENT OF THE IEP?

Student contends that Aspire denied Student a FAPE by not considering Parent's concerns in the development of the September 2021 and October 2021 IEPs. Aspire contends that the various IEPs teams did consider Parent's concerns in the development of the IEPs.

Here, as before, Student's primary concerns boil down to Parent's concerns not being adopted by the IEP team rather than being considered by the team. The IEP engaged in extensive discussions with Parent and Loza over two IEP team meetings wherein Parent and Loza detailed their concerns about the Student. However, nothing

requires the IEP team to adopt a Parents concerns after the concerns are considered, and Student did not provide evidence that the concerns were not considered in good faith.

Parent failed to establish by a preponderance of the evidence that the IEP team did not consider Parent's concerns regarding Student. Therefore, Aspire prevailed on Student's Issue 3b.

### ISSUE 3c: DID ASPIRE DENY STUDENT A FAPE IN THE DEVELOPMENT OF THE SEPTEMBER 2021 AND OCTOBER 2021 IEPs BY PREDETERMINING ITS OFFER OF PLACEMENT AND SERVICES?

Student contends that Aspire denied Student a FAPE by predetermining its offer of placement and services in the development of the September 2021 and October 2021 IEPs. Aspire contends that the IEP teams did not predetermine their offers of placement and services in the indicated IEPs.

As it did in the Spring of 2021, Aspire prepared draft IEPs to facilitate the IEP team meeting process for the September and October meetings in question. Otherwise, the IEP team meetings allowed for extensive discussion and review of Student's abilities, needs and potential programmatic and service solutions. There was questioning by Parent and Loza of Aspire personnel and there was discussion and consideration of concerns and alternatives offer on behalf of Student as demonstrated through clear and credible testimony at hearing testimony by Aspire's personnel.



Student asserts that because Aspire did not adopt Parent's ongoing request for an all-day one to one aide that Aspire pre-determined the IEP outcome, but the record shows that Aspire considered Parent's request, but ultimately did not believe that an all-day, one-to-one aide was needed by Student or in the Student's best interests.

In sum, Student failed to demonstrate by a preponderance of the evidence that Aspire pre-determined the offers of placement and services that arose from the September and October IEPs. Student did not meet their burden of proof with regard to this issue. Therefore, Aspire prevailed on Student's Issue 3c.

#### ISSUE 4a: DID ASPIRE DENY STUDENT A FAPE IN THE DEVELOPMENT OF THE JUNE 2022 IEP BY FAILING TO TIMELY COMPLETE STUDENT'S ANNUAL REVIEW?

Student contends that Aspire denied Student a FAPE in the development of the June 2022 IEP by failing to timely complete Student's annual review. Aspire contends that Student's annual review was timely completed, and if not, that any such failure did not deny Student a FAPE.

Issue 4a. and Issue 5a essentially raise the same issue in asserting that Aspire's failure to complete the June 9, 2022 IEP led to the lack of an IEP in place when Student began their seventh grade year at the Aspire Centennial middle school. Therefore, the issue will be addressed in the analysis of Student's Issue 5a.

#### ISSUE 4b: DID ASPIRE DENY STUDENT A FAPE IN THE DEVELOPMENT OF THE JUNE 2022 IEP BY NOT INCLUDING ADEQUATE STATEMENTS OF MEASURABLE ANNUAL GOALS IN ALL AREAS OF NEED?

Student contends that Aspire denied Student a FAPE in the development of the June 2022 IEP by not including adequate statements of measurable annual goals in all areas of need. Aspire contends that it did not deny Student a FAPE in the development of the June 2022 IEP by failing to include adequate statements of measurable annual goals in all areas of need.

An IEP team meeting was held on June 9, 2022 and continued into a second meeting on June 15, 2022. The resulting IEP offer, dated June 9, 2022, contained detailed present levels of performance in

- English language development,
- social emotional,
- language and speech,
- reading,
- mathematics,
- recreational therapy,
- occupational therapy,
- behavior intervention,
- adapted physical education, and
- social functioning.

The IEP contained statements of measurable annual goals related to meeting the child's needs that result from the child's disability to enable the child to be involved in and progress in the general curriculum and meeting each of the child's other educational needs that result from the child's disability.

The twenty-one goals were in the areas of

- math geometry,
- behavioral support,
- social emotional,
- receptive language,
- expressive language,
- pragmatic language,
- math algebra,
- math word problems,
- reading,
- English language development,
- writing,
- occupational therapy social skills,
- occupational therapy fine motor,
- occupational therapy visual motor,
- occupational therapy gross motor,
- recreation therapy, and
- adapted physical education.

Each goal was objectively measurable and included methods of evaluation, along with incremental objectives related to the goal. The goals were reasonably based upon Student's present levels of performance. Parent and Loza both had input on the drafting and formulation of the goals during the IEP meetings.

Parent argues that the goals were not objectively measurable, but each of the goals have a means of measuring Student progress and Student's argument is not supported by the evidence. Aspire's personnel explained the goals during the IEP meetings and described how Student's performance would be measured. At hearing, Aspire's educational professional described how the goals fit into Student's needs and how teachers and service providers were able to gather data and information from Student to determine progress on goals under the appropriate rubric.

Here, Parent failed to meet their evidentiary burden in establishing that Aspire failing to include adequate statements of measurable goals in all areas of need in the June 9, 2022 IEP. Therefore, Aspire prevailed on Student's Issue 4b.

#### ISSUE 4c: DID ASPIRE DENY STUDENT A FAPE IN THE DEVELOPMENT OF THE JUNE 2022 IEP BY PREDETERMINING THE OFFER OF PLACEMENT AND SERVICES?

Student contends that Aspire denied Student a FAPE in the development of the June 2022 IEP by predetermining the offer of placement and services. Aspire contends that it did not predetermine the offer of placement and services in the development of the June 2022 IEP.

Once again, Aspire prepared a draft IEP to facilitate the IEP team meeting process for the June 9, 2022 and June 15, 2022 meetings in question. Otherwise, the IEP team meetings allowed for extensive discussion and review of Student's abilities, needs and potential programmatic and service solutions. There was questioning by Parent and Loza of Aspire personnel and there was discussion and consideration of concerns and alternatives offer on behalf of Student as demonstrated through clear and credible testimony at hearing testimony by Aspire's personnel.

Student asserts that because Aspire did not adopt Parent's ongoing request for an all-day one-to-one aide that Aspire pre-determined the IEP outcome, but the record shows that Aspire considered Parent's request, but ultimately did not believe that an all-day, one-to-one aide was needed by Student or in the Student's best interests. Student also asserts that Aspire did not adequately consider independent educational evaluations obtained by Student. Aspire's personnel testified clearly and convincingly that the IEP considered the independent evaluations in the IEP meetings. In sum, Student failed to demonstrate by a preponderance of the evidence that Aspire pre-determined the offers of placement and services that arose from the June IEP. Student did not meet their burden of proof for this issue. Therefore, Aspire prevailed on Student's Issue 4c.

#### ISSUE 5a: DID ASPIRE DENY STUDENT A FAPE, FOR THE 2022-2023 REGULAR SCHOOL YEAR THROUGH MARCH 12, 2023, BY FAILING TO HAVE AN IEP IN PLACE AT THE START OF THE SCHOOL YEAR?

Student contends that Aspire denied Student a FAPE, for the 2022-2023 regular school year through March 14, 2023, by failing to have an IEP in place at the start of the school year. Aspire contends that it materially implemented the consented-to portions

of the relevant IEP from the elementary school and then held an IEP meeting within 30 days of Student's arrival in middle school. Aspire also contends that the next yearly IEP meeting was not due until October 2022.

The IDEA, its implementing regulations, and the Education Code, do not set forth specific timing and procedures for a local educational agency to provide FAPE to a child with a disability who enrolls 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 local agency 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 local agency from another not within the new agency'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 local educational agencies 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 local agency is not required to implement a former agency’s IEP or give the student services that are “comparable” to those offered by the former agency, but the IEP must be reasonably calculated to provide the student a FAPE based on the information available. (*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.) 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 local agency'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.)

Student completed elementary school at the end of the 2021-2022 school year. As discussed above, Aspire Inskeep Academy Charter was developing an IEP offer, dated June 9, 2022. Aspire Inskeep Academy held two meetings at the end of that school year, but did not complete the IEP. Student transferred to a new local educational agency, Aspire Centennial College Preparatory Academy, for the start of middle school for the 2022-2023 school year. Student began middle school on August 15, 2022. Aspire Preparatory continued to implement the last-agreed to IEP, dated October 27, 2021, for the beginning of the 2022-2023 school year. Aspire Preparatory then held an IEP on September 15, 2022 to prepare a new IEP for Student for middle school.

Here, Aspire Preparatory delayed offering a new IEP offer for Student until after the start of the school year, instead of completing the June 9, 2022 IEP developed by Aspire Inskeep Academy Charter, or developing an alternative. Aspire therefore failed to have an appropriate IEP in place at the beginning of the school year and committed a procedural violation.

In matters alleging a procedural violation, a due process hearing officer may find that a child did not receive a FAPE only if the procedural violation did any of the following: impeded the right of the child to a FAPE; significantly impeded the opportunity of the parents to participate in the decision-making process regarding the provision of a FAPE to the child of the parents; or caused a deprivation of educational benefits. (20 U.S.C. § 1415(f)(3)(E)(ii); 34 C.F.R. § 300.513(a)(2); Ed. Code, § 56505, subd. (f)(2); *W.G., et. al. v.*



*Board of Trustees of Target Range School Dist., etc.* (9th Cir. 1992) 960 F.2d 1479, 1484 (*Target Range*), superseded in part by statute on other grounds.) The hearing officer

“shall not base a decision solely on nonsubstantive procedural errors, unless the hearing officer finds that the nonsubstantive procedural errors resulted in the loss of an educational opportunity to the pupil or interfered with the opportunity of the parent or guardian to participate in the formulation process of the individualized education program.” (Ed. Code, § 56505, subd. (j).)

Here, the difference between the services offered in the September 15, 2022 IEP versus the June 9, 2022 IEP was negligible. The only change was a reduction of service time for resource services in math from 210 minutes per week to 180 minutes per week. As such, there was no substantive impact on Student in any delay in the creation of an IEP for the 2022-2023 school year. Also, the operative goals at the beginning of the 2022-2023 school year were created in October 2021 and were designed to continue until October 2022, effectively eliminating any substantive impact on Student for the first 30 days of the 2022-2023 school year.

Student failed to demonstrate by a preponderance of the evidence that Aspire Preparatory’s failure to have an IEP in place at the start of the 2022-2023 school year resulted in any substantive denial of FAPE to Student for the 30 days of the 2022-2023 school year in question. Likewise, Student was not deprived of educational benefit by the delay. Therefore, Student’s receipt of a FAPE was not impeded, nor was Student deprived of educational benefits.

However, Aspire significantly impeded the opportunity of Parent to participate in the decision-making process for the timely creation of Student's IEP for the 2022-2023 school year through March 14, 2023 by failing to have an IEP in place by the start of the school year. Aspire asserts that based upon their history, Parent would not have agreed to the majority of any timely IEP offer, so that there was no substantive harm arising from the delay. Even if true, Parent was nonetheless denied their full opportunity to participate in the decision-making process for a timely IEP. Student did meet their burden of proof with regard to for the narrow issue of interference with the opportunity of the parent to participate in the formulation process of the individualized education program within the specified time. Therefore, Student prevailed in part on Student's Issue 5a.

**ISSUE 5b: DID ASPIRE DENY STUDENT A FAPE, FOR THE 2022-2023 REGULAR SCHOOL YEAR THROUGH MARCH 12, 2023, BY FAILING TO IMPLEMENT CONSENTED-TO PORTIONS OF THE IEP?**

Student contends that Aspire denied Student a FAPE, for the 2022-2023 regular school year through March 14, 2023, by failing to implement consented to portions of the most recent IEP. Aspire contends that it materially implemented the consented-to portions of the relevant IEP during the time period in question.

Student did not present credible evidence at hearing that the consented-to portions of Student's IEP were not implemented. On the other hand, Aspire personnel testified credibly and in detail about the means to which the IEP was implanted and that Student received the program and all of the services and accommodations that were called for in the IEP.

Student failed to demonstrate by a preponderance of the evidence that Aspire did not implement the consented to portions of Student's IEP during the 2022-2023 school year through March 14, 2023. Student did not meet their burden of proof with regard to this issue. Therefore, Aspire prevailed on Student's Issue 5b.

ISSUE 5c: DID ASPIRE DENY STUDENT A FAPE FOR THE 2022-2023 REGULAR SCHOOL YEAR THROUGH MARCH 12, 2023, BY FAILING TO OFFER AND IMPLEMENT APPROPRIATE SPECIALIZED ACADEMIC INSTRUCTION FOR IN-PERSON INSTRUCTION?

Student contends that Aspire denied Student a FAPE, for the 2022-2023 regular school year through March 14, 2023, by failing to offer and implement appropriate specialized academic instruction for in-person instruction. Aspire contends that it offered and materially implemented appropriate specialized instruction for in-person instruction.

The June 9, 2022 IEP offered Student 180 minutes per week of push-in specialized academic instruction related to English language development. The September 15, 2022 IEP offered 180 minutes per week of push-in specialized academic instruction related to mathematics, and 30 minutes per week of pull-out specialized academic instruction in mathematics. Previously, Student had received 120 minutes per week of push-in specialized academic instruction related to mathematics. The three service pieces were provided utilizing a fully qualified special education teacher that would provide the services. The special education teacher testified clearly and credibly at hearing both

that the services were appropriate for Student and that the services were provided to Student with fidelity. Garcia's testimony was supported by credible testimony from Aspire Preparatory principal McCoy that the services were appropriate for Student and that Student made reasonable progress during the 2022-2023 school year through March 14, 2023.

Student asserted, based primarily on testimony by Dr. Blum, that Student required more purely individualized service delivered in a pull-out model. Dr. Blum's testimony was not persuasive, as Blum did not observe the delivery of services in the classroom, was not trained as a special education teacher, and did not credit Student's academic progress during sixth grade.

Student failed to demonstrate by a preponderance of the evidence that the specialized academic instruction offered to Student and implemented by Aspire's personnel failed to provide Student with a FAPE. Student did not meet their burden of proof with regard to this issue. Therefore, Aspire prevailed on Student's Issue 5c.

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ISSUE 5d: DID ASPIRE DENY STUDENT A FAPE, FOR THE 2022-2023 REGULAR SCHOOL YEAR THROUGH MARCH 14, 2023, BY FAILING TO OFFER APPROPRIATE RELATED SERVICES IN OCCUPATIONAL THERAPY, LANGUAGE AND SPEECH, COUNSELING, BEHAVIOR SUPPORT AND SOCIAL SKILLS?

Student contends that Aspire denied Student a FAPE, for the 2022-2023 regular school year through March 14, 2023, by failing to offer appropriate related services in

- occupational therapy,
- language and speech,
- counseling, behavior support and
- social skills.

Aspire contends that it offered appropriate related services in occupational therapy, language and speech, counseling, behavior support and social skills.

Student did not offer evidence at hearing related to the appropriateness of the offers of services in the areas of occupational therapy, social skills, or counseling services. Student did not call any professional witnesses regarding these services areas, nor did Parent offer testimony related to these areas. Student therefore failed to demonstrate by a preponderance of the evidence that the services offered in the three areas were not appropriate for them. Student did not meet their burden of proof with regard to this issue. Therefore, Aspire prevailed in these three areas of Student's Issue 5d.

Student's June 15, 2022 IEP offered Student 90 minutes per week of direct language and speech services during the regular school year by a licensed or credentialed provider using a pull-out model. The language and speech services addressed Student's goals in receptive language, expressive language and pragmatic function. Student had four speech goals, including two in expressive language, one in receptive language and one in pragmatic language.

Student's September 15, 2022 IEP also offered Student 90 minutes per week of direct language and speech services during the regular school year by a licensed or credentialed provider, but reduced the pull-out minutes to 60 per week, leaving 30 minutes per week using a push-in model. The language and speech services addressed Student's goals in receptive language, expressive language and pragmatic function. The September IEP added two additional speech goals, one in expressive language and one in pragmatic language.

The service model and minutes were consistent with the recommendations in Aspire's May 26, 2021 speech/language assessment report prepared by speech/language pathologist India Banks. Student made reasonable progress in speech and language during the 2021-2022 school year and his developing skills were corroborated by Renee Jeremiah, Aspire's contract speech/language pathologist for |Aspire Centennial. Dr. Heaton also testified credibly and clearly that the prescribed language and speech services were appropriate for Student.

Student asserts that they were not offered sufficient service time for language and speech services for Student to make progress during the 2022-2023 school year

through March 14, 2023, based upon the testimony of Student's expert speech/language pathologist, Hollar. Hollar recommended that Student receive 135 minutes of speech and language services per week.

Aspire's contract speech language pathologist, Jeremiah, refuted Hollar's recommendations, noting that an increase to 135 minutes would further reduce Student's time in general education, and that the IEP team believed that 60 minutes per week were sufficient and that 90 minutes per week were more than Student needed to make adequate progress on his speech and language goals. Overall, Jeremiah's testimony, along with that of other Aspire educational professional, was accorded more weight than Student's retained expert.

Student raised the issue of behavior support in Issue 5d and in Issue 5e. The issue of behavioral support is therefore addressed in the stand-alone Issue 5e.

In sum, Student failed to demonstrate by a preponderance of the evidence that they were denied a FAPE for the 2022-2023 school year until March 14, 2023 in the indicated areas. Student did not meet their burden of proof with regard to this issue. Therefore, Aspire prevailed on Student's Issue 2c.

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ISSUE 5e: DID ASPIRE DENY STUDENT A FAPE, FOR THE 2022-2023 REGULAR SCHOOL YEAR THROUGH MARCH 12, 2023, BY FAILING TO OFFER AND IMPLEMENT POSITIVE BEHAVIORAL INTERVENTIONS AND SUPPORTS, BEHAVIOR INTERVENTION PLAN AND BEHAVIOR SUPPORT PLAN TO ADDRESS BEHAVIORS THAT INTERFERED WITH STUDENT'S LEARNING?

Student contends that Aspire denied Student a FAPE, for the 2022-2023 regular school year through March 14, 2023, by failing to offer and implement positive behavioral interventions and supports, behavior invention plan and behavior support plan to address behaviors that interfered with Student's learning. Aspire contends that it offered and implemented positive behavioral interventions and supports, behavior invention plan and behavior support plan to address behaviors that interfered with Student's learning.

For the 2022-2023 school year, the operative IEP for Student was, dated June 9, 2022, as amended in the September 16, 2021 and October 26, 2022 IEPs, following the review of Student's independent educational evaluation in functional behavior. The IEPs offered 150 per week of resource-based, push-in behavioral support, along with a behavior intervention plan targeted to Student's off-task behavior, and behavior goals. The behavioral plans, services and goals were implemented with fidelity during the 2022-2023 school year.

Student asserted that Student's behaviors were interfering with his education and that of others and that Student's safety was affected as well. Victoria Guzman, one of Student's special education teachers, testified clearly and convincingly that Student did



not exhibit the range or magnitude of problems claimed by Parent. Guzman further testified that Student did not display behaviors that interfered with others, and due to his relative independence may have needed less behavioral support that he was given in the IEP. Guzman's detailed testimony was accorded significant weight. Student's independent functional behavior assessment, conducted by Dr. Liu, was consistent with Aspire's then current behavior support program for Student and did not recommend any significant changes to that program.

Student failed to demonstrate by a preponderance of the evidence that the behavioral supports, services and goals offered to Student and implemented by Aspire's personnel failed to provide Student with a FAPE. Student did not meet their burden of proof with regard to this issue. Therefore, Aspire prevailed on Student's Issue 5e.

**ISSUE 5f: DID ASPIRE DENY STUDENT A FAPE, FOR THE 2022-2023 REGULAR SCHOOL YEAR THROUGH MARCH 12, 2023, BY FAILING TO OFFER AND IMPLEMENT ONE-TO-ONE AIDE SUPPORT, WITH SUPERVISION BY A BOARD-CERTIFIED BEHAVIORAL ANALYST?**

Student contends that Aspire denied Student a FAPE, for the 2022-2023 regular school year through March 14, 2023, by failing to offer and implement one-to-one aide support, with supervision by a board-certified behavioral analyst. Aspire contends that a one-to-one aide with support by a board-certified behavioral analyst was not necessary for Student to receive a FAPE.

Student made reasonable progress academically during the 2022-2023 school year through March 14, 2023 as demonstrated by his grades, teacher comments, progress on goals, standardized tests and as described through the credible testimony

of his teachers and services providers for the school year. Student did not demonstrate behaviors that were dangerous to himself or others, the usual threshold for a school to consider a full-time aide for a student for the entirety of the school day. Student did have issues with feeling unattended and in attending or staying focused, but the combination of services he received allowed him to access his education and make progress.

In contrast, Parent's and Loza's concerns regarding Student related significantly to his behavior and performance during distance learning, behaviors and performance Student did not demonstrate in person in the "brick and mortar" classroom. Dr. Blum's expert opinion was that Student needed a full-time daily aide to "close the gap" regarding Student's grade levels versus his neurotypical peers, but that is not the standard applicable under the IDEA.

Significantly, none of Aspire's personnel thought that Student needed such a full-time aide. Instead, their credible testimony was that such a level of support was both unnecessary and actually potentially detrimental to Student due to social isolation and overdependence on support. Student did testify at hearing that he wanted a full-time aide, but Student's opinion was less persuasive than the testimony of the educational experts.

Student failed to demonstrate by a preponderance of the evidence that Student was denied a FAPE by Aspire's not providing Student with an all-day, full-time aide at school. Student did not meet their burden of proof with regard to this issue. Therefore, Aspire prevailed on Student's Issue 5f.

ISSUE 5g: DID ASPIRE DENY STUDENT A FAPE, FOR THE 2022-2023 REGULAR SCHOOL YEAR THROUGH MARCH 12, 2023, BY FAILING TO OFFER AND IMPLEMENT INCLUSION SPECIALIST SERVICES?

Student contends that Aspire denied Student a FAPE, for the 2022-2023 regular school year through March 14, 2023, by failing to offer and implement inclusion specialist services. Aspire contends that inclusion specialist services beyond those already included in Student's program were not necessary for Student to receive a FAPE.

Heaton and Escalante testified clearly and credibly that Aspire utilized inclusion strategies throughout the school and that all Student's program had inclusion services embedded throughout the school day, and Student's program and services. Student's expert, Dr. Blum, conditioned the services of an inclusion specialist on acceptance of Blum's recommendation that Student have a full-time, all-day aide. In light of the determination above that Aspire was not required to provide such an aide, Aspire was not required to provide the accompanying inclusion services sought by Student. More significantly, Aspire already embedded inclusion into its educational model, practices and school day.

Student failed to demonstrate by a preponderance of the evidence that Aspire needed to offer or implement inclusion specialist services to provide Student with a FAPE. Student did not meet their burden of proof with regard to this issue. Therefore, Aspire prevailed on Student's Issue 5g.

ISSUE 6a: DID ASPIRE DENY STUDENT A FAPE IN THE DEVELOPMENT OF THE SEPTEMBER 2022 RECONVENED IEP AND OCTOBER 2022 AMENDMENT IEP BY FAILING TO CONSIDER THE RESULTS OF THE INDEPENDENT EDUCATIONAL EVALUATIONS IN DECISIONS REGARDING THE PROVISION OF FAPE?

Student contends that Aspire denied Student a FAPE in the development of the September 2022 reconvened IEP and the October 2022 amendment IEP by failing to consider the results of the independent educational evaluations in decisions regarding the provision of FAPE. Aspire contends that the respective IEP teams considered the results of the independent educational evaluations in their IEP offers.

If a parent obtains an independent assessment at public expense, or shares an evaluation obtained at private expense with a local educational agency, the results of the evaluation must be considered by the local agency, 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 local educational agency 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 local agency 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. SACV06847CJCM LGX) 2007 WL 9719115, at \*3–4), or alteration of IEP provisions in response to suggestions made by the private assessor. (*Ibid.*)

Student provided Aspire with three Independent educational evaluations. Dr. Blum had completed an independent neuropsychological report that was reviewed by the IEP team at the June 15, 2022 IEP. Dr. Liu completed an independent functional behavioral assessment that was reviewed by the IEP team at the June 9, 2022 IEP. Susan Hollar completed an independent speech/language assessment that was reviewed by the June 15, 2022 IEP team.

Students asserts that the various IEP teams failed to consider the results of the three independent assessments in formulating the offers of FAPE in the September 2022 and October 2022 IEPs. However, credible and convincing testimony by Escalante, along with Escalante's October 25, 2022 email to Parent regarding the recommendations adopted by the IEP teams from the three assessments, refute Student's assertion and Student failed to present any significant evidence that the assessments were not considered.

Student failed to demonstrate by a preponderance of the evidence that the Aspire IEP teams failed to consider the three independent assessments in the development of the September 2022 and October 2022 IEPs. Thus, Student did not meet their burden of proof with regard to this issue. Therefore, Aspire prevailed on Student's Issue 6a.

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ISSUE 6b: DID ASPIRE DENY STUDENT A FAPE IN THE DEVELOPMENT OF THE SEPTEMBER 2022 RECONVENED IEP AND OCTOBER 2022 AMENDMENT IEP BY NOT CONSIDERING PARENT'S CONCERNS IN THE DEVELOPMENT OF THE IEPs?

Student contends that Aspire denied Student a FAPE in the development of the September 2022 reconvened IEP and the October 2022 amendment IEP by not considering Parent's concerns in the development of the IEPs. Aspire contends that the two IEPs teams did consider Parent's concerns in the development of the IEPs.

Here, once again, Student's primary concerns boil down to Parent's concerns not being adopted by the IEP team rather than being considered by the team. The IEP engaged in extensive discussions with Parent and Loza over two IEP team meetings wherein Parent and Loza detailed their concerns about Student. However, nothing requires the IEP team to adopt a Parents concerns after the concerns are considered. Parent failed to establish by a preponderance of the evidence that the IEP team did not consider Parent's concerns regarding Student. Therefore, Aspire prevailed on Student's Issue 6b.

ISSUE 6c: DID ASPIRE DENY STUDENT A FAPE IN THE DEVELOPMENT OF THE SEPTEMBER 2022 RECONVENED IEP AND OCTOBER 2022 AMENDMENT IEP BY NOT INCLUDING ADEQUATE STATEMENTS OF MEASURABLE ANNUAL GOALS IN ALL AREAS OF NEED?

Student contends that Aspire denied Student a FAPE in the development of the September 2022 reconvened IEP and the October 2022 amendment IEP by not including

adequate statements of measurable annual goals in all areas of need. Aspire contends that the goals from those IEPs did include adequate statements of measurable annual goals in all areas of need so as to provide Student with a FAPE.

An IEP was held on September 15, 2022. The IEP contained detailed present levels of performance in all relevant areas related to student's progress, strengths and needs. The IEP contained statements of measurable annual goals related to meeting the child's needs that result from the child's disability to enable the child to be involved in and progress in the general curriculum and meeting each of the child's other educational needs that result from the child's disability.

The 24 goals offered in the IEP were objectively measurable and included methods of evaluation, along with incremental objectives related to the goal. The goals were reasonably based upon Student's present levels of performance. Parent and Loza both had input on the drafting and formulation of the goals during the IEP meetings.

An IEP was held on September 26, 2022. The IEP contained detailed present levels of performance in all relevant areas related to student's progress, strengths and needs. The IEP contained statements of measurable annual goals related to meeting the child's needs that result from the child's disability to enable the child to be involved in and progress in the general curriculum and meeting each of the child's other educational needs that result from the child's disability.

The 27 goals offered in the IEP were objectively measurable and included methods of evaluation, along with incremental objectives related to the goal. The goals were reasonably based upon Student's present levels of performance. Parent and Loza both had input on the drafting and formulation of the goals during the IEP meetings.

Parent argues that the goals in the two IEPs were not objectively measurable, but each of the goals have a means of measuring Student progress and Student's argument is not supported by the evidence. Aspire's personnel explained the goals during the IEP meetings and described how Student's performance would be measured. At hearing, Aspire's educational professional described how the goals fit into Student's needs and how teachers and service providers were able to gather data and information from Student to determine progress on goals under the appropriate rubric.

Here, Student failed to meet their evidentiary burden in establishing that Aspire failing to include adequate statements of measurable goals in all areas of need in the September 15, 2022 and October 26, 2022 IEPs. Therefore, Aspire prevailed on Student's Issue 6c.

#### ISSUE 6d: DID ASPIRE DENY STUDENT A FAPE IN THE DEVELOPMENT OF THE SEPTEMBER 2022 RECONVENED IEP AND OCTOBER 2022 AMENDMENT IEP BY FAILING TO REVISE THE IEPS TO ADDRESS LEARNING LOSS DURING SCHOOL CLOSURES?

Student contends that Aspire denied Student a FAPE in the development of the September 2022 reconvened IEP and the October 2022 amendment IEP by failing to revise the IEPs to address learning loss during school closures. Aspire contends that it offered compensatory services to Student in the indicated IEPs so as to provide Student with a FAPE.

Section N of the September 2022 IEP addresses pandemic learning loss consideration of compensatory and/or recoupment services. The additional discussion section, called Part 4, also addresses Aspire's offer of compensatory education to address



learning loss during Covid, including 920 minutes per year of adapted physical education, 240 minutes per year of educationally related intensive counseling services and 900 minutes per year of speech/language services.

Here, Student failed to meet their evidentiary burden in establishing that Aspire failed to revise the indicated IEPs to address learning loss arising from Covid closures. Therefore, Aspire prevailed on Student's Issue 6d.

#### ISSUE 6e: DID ASPIRE DENY STUDENT A FAPE IN THE DEVELOPMENT OF THE SEPTEMBER 2022 RECONVENED IEP AND OCTOBER 2022 AMENDMENT IEP BY PREDETERMINING ITS OFFER OF PLACEMENT AND SERVICES?

Student contends that Aspire denied Student a FAPE in the development of the September 15, 2022 reconvened IEP and the October 26 2022 amendment IEP by predetermining its offers of placement and services. Aspire contends that the IEP teams did not predetermine their offers of placement and services in the indicated IEPs.

As before, Aspire prepared a draft IEP to facilitate the IEP team meeting process for the September 15, 2022 and October 26, 2022 meetings in question. Otherwise, the IEP team meetings allowed for extensive discussion and review of Student's abilities, needs and potential programmatic and service solutions. There was questioning by Parent and Loza of Aspire personnel and there was discussion and consideration of concerns and alternatives offer on behalf of Student as demonstrated through clear and credible testimony at hearing testimony by Aspire's personnel.

Student asserts that because Aspire did not adopt Parent's ongoing request for an all-day one to one aide that Aspire pre-determined the IEP outcome, but the record shows that Aspire considered Parent's request, but ultimately did not believe that an all-day, one-to-one aide was needed by Student or in the Student's best interests. Student also asserts that Aspire did not adequately consider independent educational evaluations obtained by Student. Aspire's personnel testified clearly and convincingly that the IEP considered the independent evaluations in the IEP meetings. In sum, Student failed to demonstrate by a preponderance of the evidence that Aspire pre-determined the offers of placement and services that arose from the September 15, 2022 and October 26, 2022 IEPs. Student did not meet their burden of proof for this issue. Therefore, Aspire prevailed on Student's Issue 6e.

## 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 ISSUE 1, SUBSECTION a:

Aspire did not deny Student a FAPE in the development of the April/May 2021 and June 2021 IEPs by not including statements of measurable annual goals in all areas of need.

Aspire prevailed on Issue 1, subsection a.

#### STUDENT'S ISSUE 1, SUBSECTION b:

Aspire did not deny Student a FAPE in the development of the April/May 2021 and June 2021 IEPs by not considering Parent's concerns in the development of the IEP.

Aspire prevailed on Issue 1, subsection b.

#### STUDENT'S ISSUE 1, SUBSECTION c:

Aspire did not deny Student a FAPE in the development of the April/May 2021 and June 2021 IEPs by predetermining its offer of placement and services.

Aspire prevailed on Issue 1, subsection c.

#### STUDENT'S ISSUE 2, SUBSECTION a:

Aspire did not deny Student a FAPE, for the 2021-2022 regular school year and extended school year by failing to implement consented-to portions of the most recent agreed-to IEP.

Aspire prevailed on Issue 2, subsection a.

#### STUDENT'S ISSUE 2, SUBSECTION b:

Aspire did not deny Student a FAPE, for the 2021-2022 regular school year and extended school year by failing to offer and implement appropriate specialized academic instruction for in-person instruction.

Aspire prevailed on Issue 2, subsection b.

#### STUDENT'S ISSUE 2, SUBSECTION c:

Aspire did not deny Student a FAPE, for the 2021-2022 regular school year and extended school year by failing to offer appropriate related services in occupational therapy, language and speech, counseling, behavior support, and social skills.

Aspire prevailed on Issue 2, subsection c.

#### STUDENT'S ISSUE 2, SUBSECTION d:

Aspire did not deny Student a FAPE, for the 2021-2022 regular school year and extended school year by failing to offer and implement positive behavioral interventions and supports, behavior intervention plan, and behavior support plan to address behaviors that interfered with Student's learning.

Aspire prevailed on Issue 2, subsection d.

#### STUDENT'S ISSUE 2, SUBSECTION e:

Aspire did not deny Student a FAPE, for the 2021-2022 regular school year and extended school year by failing to offer and implement one-to-one aide support, with supervision by a board-certified behavioral analyst.

Aspire prevailed on Issue 2, subsection e.

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## STUDENT'S ISSUE 2, SUBSECTION f:

Aspire did not deny Student a FAPE, for the 2021-2022 regular school year and extended school year by failing to offer and implement inclusion specialist services.

Aspire prevailed on Issue 2, subsection f.

## STUDENT'S ISSUE 3, SUBSECTION a:

Aspire did not deny Student a FAPE in the development of the September 2021 and October 2021 IEPs by not including adequate statements of measurable annual goals in all areas of need.

Aspire prevailed on Issue 3, subsection a.

## STUDENT'S ISSUE 3, SUBSECTION b:

Aspire did not deny Student a FAPE in the development of the September 2021 and October 2021 IEPs by not considering Parent's concerns in the development of the IEP.

Aspire prevailed on Issue 3, subsection b.

## STUDENT'S ISSUE 3, SUBSECTION c:

Aspire did not deny Student a FAPE in the development of the September 2021 and October 2021 IEPs by predetermining its offer of placement and services.

Aspire prevailed on Issue 3, subsection c.

#### STUDENT'S ISSUE 4, SUBSECTION a:

Aspire did deny Student a FAPE in the development of the June 2022 IEP by failing to timely complete Student's annual review, and significantly impeding the opportunity of Parent to participate in the decision-making process for the timely creation of Student's IEP for the 2022-2023 school year through March 14, 2023 by failing to have an IEP in place by the start of the school year.

Student prevailed on Issue 4, subsection a.

#### STUDENT'S ISSUE 4, SUBSECTION b:

Aspire did not deny Student a FAPE in the development of the June 2022 IEP by not including adequate statements of measurable annual goals in all areas of need.

Aspire prevailed on Issue 4, subsection b.

#### STUDENT'S ISSUE 4, SUBSECTION c:

Aspire did not deny Student a FAPE in the development of the June 2022 IEP by predetermining its offer of placement and services.

Aspire prevailed on Issue 4, subsection c.

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#### STUDENT'S ISSUE 5, SUBSECTION a:

Aspire significantly impeded the opportunity of Parent to participate in the decision-making process for the timely creation of Student's IEP for the 2022-2023 school year through March 14, 2023 by failing to have an IEP in place by the start of the school year.

Student prevailed in part on Issue 5, subsection a.

#### STUDENT'S ISSUE 5, SUBSECTION b:

Aspire did not deny Student a FAPE, for the 2022-2023 regular school year through March 14, 2023 by failing to implement consented-to portions of the IEP.

Aspire prevailed on Issue 5, subsection b.

#### STUDENT'S ISSUE 5, SUBSECTION c:

Aspire did not deny Student a FAPE, for the 2022-2023 regular school year through March 14, 2023 by failing to offer and implement appropriate specialized academic instruction for in-person instruction.

Aspire prevailed on Issue 5, subsection c.

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#### STUDENT'S ISSUE 5, SUBSECTION d:

Aspire did not deny Student a FAPE, for the 2022-2023 regular school year through March 14, 2023 by failing to offer appropriate related services in occupational therapy, language and speech, counseling, behavior support, and social skills.

Aspire prevailed on Issue 5, subsection d.

#### STUDENT'S ISSUE 5, SUBSECTION e:

Aspire did not deny Student a FAPE, for the 2022-2023 regular school year through March 14, 2023 by failing to offer and implement positive behavioral interventions and supports, behavior intervention plan, and behavior support plan to address behaviors that interfered with Student's learning.

Aspire prevailed on Issue 5, subsection e.

#### STUDENT'S ISSUE 5, SUBSECTION f:

Aspire did not deny Student a FAPE, for the 2022-2023 regular school year through March 14, 2023 by failing to offer and implement one-to-one aide support, with supervision by a board-certified behavioral analyst.

Aspire prevailed on Issue 5, subsection f.

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#### STUDENT'S ISSUE 5, SUBSECTION g:

Aspire did not deny Student a FAPE, for the 2022-2023 regular school year through March 14, 2023 by failing to offer and implement inclusion specialist services.

Aspire prevailed on Issue 5, subsection g.

#### STUDENT'S ISSUE 6, SUBSECTION a:

Aspire did not deny Student a FAPE in the development of the September 2022 reconvened IEP and October 2022 amendment IEP by failing to consider the results of the independent educational evaluations in decisions regarding the provision of FAPE.

Aspire prevailed on Issue 6, subsection a.

#### STUDENT'S ISSUE 6, SUBSECTION b:

Aspire did not deny Student a FAPE in the development of the September 2022 reconvened IEP and October 2022 amendment IEP by not considering Parent's concerns in the development of the IEP.

Aspire prevailed on Issue 6, subsection b.

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#### STUDENT'S ISSUE 6, SUBSECTION c:

Aspire did not deny Student a FAPE in the development of the September 2022 reconvened IEP and October 2022 amendment IEP by not including adequate statements of measurable annual goals in all areas of need.

Aspire prevailed on Issue 6, subsection c.

#### STUDENT'S ISSUE 6, SUBSECTION d:

Aspire did not deny Student a FAPE in the development of the September 2022 reconvened IEP and October 2022 amendment IEP by failing to revise the IEPs to address learning loss during school closures in the 2020-2021 school year.

Aspire prevailed on Issue 6, subsection d.

#### STUDENT'S ISSUE 6, SUBSECTION e:

Aspire did not deny Student a FAPE in the development of the September 2022 reconvened IEP and October 2022 amendment IEP by predetermining its offer of placement and services.

Aspire prevailed on Issue 6, subsection e.

#### REMEDIES

Student partially prevailed on Issues 4a. and 5a a denial of parental participation in the timely creation of an IEP for Student in advance of the 2022-2023 school year.

As remedies, Student requested in their complaint reimbursement for a Lindamood-Bell reading intervention program, compensatory education and related services, and reimbursements. Aspire argues that under the holding in *Doug C. v Hawaii Dep't of Educ.* (9th Cir. 2013) 720 F. 3d 1038, 1046-1047, that it was erring on the side of parental participation in delaying the resolution of the IEP process until Fall 2022.

Courts have broad equitable powers to remedy the failure of a local educational agency to provide a FAPE to a child with a disability. (20 U.S.C. § 1415(if)(1)(C)(iii); Ed. Code, § 56505, subd. (g); see *School Committee of the Town of Burlington, Massachusetts v. Dept. of Education* (1985) 471 U.S. 359, 369 [105 S.Ct.1996]; *Parents of Student W. v. Puyallup School Dist.*, No. 3 (9th Cir. 1994) 31 F.3d 1489, 1496 (*Puyallup*.) The conduct of both parties must be reviewed and considered to determine whether equitable relief is appropriate. (*Id.* at p. 1496.) This broad equitable authority extends to an ALJ who hears and decides a special education administrative due process matter. (*Forest Grove Sch. Dist., v. T.A.* (2009) 557 U.S. 230, 240 [129 S.Ct. 2484, 174 L.Ed.2d 168].)

None of the remedies sought by Student are commensurate with the narrow substantive harm related to the denial of Parent's participation in the creation of a timely IEP for Student for the 2022-2023 school year through March 14, 2023. Additionally, from an equitable standpoint, Aspire's efforts to maximize parental participation afford it some consideration. Here, an appropriate equitable remedy for Aspire's failure to have a completed IEP for Student prior to the school year is training for Aspire Inskeep's IEP team members in the process and timelines for the IEP process.

## ORDER

1. Aspire shall within 60 days of this Decision provide one hour of training to the administrative Aspire Inskeep IEP team members in the process and timelines for the IEP.
2. All of Student's other requests for relief are denied.

## RIGHT TO APPEAL THIS DECISION

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

Ted Mann

Administrative Law Judge

Office of Administrative Hearings