

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

PARENT ON BEHALF OF STUDENT,

v.

ELK GROVE UNIFIED SCHOOL DISTRICT.

DECISION
CASE NO. 2023030253

September 18, 2023

On March 8, 2023, Student filed a corrected amended due process hearing request with the Office of Administrative Hearings, called OAH, naming Elk Grove Unified School District. On March 19, 2023, OAH deemed Student's corrected amended due process hearing request filed. On April 24, 2023, OAH granted a continuance of the due process hearing to May 31, 2023. On May 31, 2023, OAH granted a second continuance of the due process hearing to June 20, 2023. Administrative Law Judge Kara Hatfield heard this matter by videoconference on June 20, 21, 22, 27, 28, 29, and July 11, 12, 25, 26, and 28, 2023.

Attorneys Lynda Williams and Sheila Bayne represented Student. Parent attended all hearing days on Student's behalf. Student did not attend the hearing. Attorneys Kendra Tovey, Kyle Raney, Rebal Halabi, and Alyssa Bivins represented Elk

Grove. Elk Grove's Special Education Director, Anne Rigali, attended on Elk Grove's behalf on June 20, 21, 22, 27, 28, and 29, and July 11, 12, 25, 26, and 28, 2023. Elk Grove's Special Education Coordinator Alicia Wilson attended on Elk Grove's behalf on June 20 and 21, 2023.

At the parties' request, OAH continued the matter to August 22, 2023, for written closing arguments. The record was closed, and the matter was submitted on August 22, 2023.

ISSUES

Free appropriate public education is called FAPE. Individualized education program is called IEP.

1. Did Elk Grove Unified School District deny Student a FAPE by failing to assess Student's speech and language skills for the IEP team meeting on December 6, 2021?
2. Did Elk Grove Unified School District deny Student a FAPE by failing to assess Student's need for adapted physical education for the IEP team meeting on December 6, 2021?
3. Did Elk Grove Unified School District predetermine the December 6, 2021 IEP offer by failing to have a general education teacher attend the IEP team meeting on December 6, 2021?

4. Did Elk Grove Unified School District deny Student a FAPE in the December 6, 2021 IEP, by failing to:
 - a. Offer Student appropriate goals because the goals offered were not sufficiently ambitious;
 - b. Offer Student appropriate placement by failing to offer Student placement in a regular, general education classroom for the majority of the school day;
 - c. Offer Student appropriate related services, specifically:
 - i. Adapted physical education;
 - ii. Post-secondary transition services;
 - iii. Sufficient language and speech services;
 - iv. A one-to-one aide; and
 - v. Parent training regarding Student's speech and language needs;
 - d. Address Student's regression?
5. Did Elk Grove Unified School District deny Student a FAPE by failing to assess Student's need for transition services for the IEP team meeting on March 23, 2022?
6. Did Elk Grove Unified School District deny Student a FAPE in the March 23, 2022 IEP by failing to offer Student appropriate related services, specifically:
 - a. Post-secondary transition services; and
 - b. Sufficient language and speech services?

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.) All subsequent citations to the Code of Federal Regulations are to the 2006 version, unless otherwise stated. The main purposes of the Individuals with Disabilities Education Act, referred to as the IDEA, are to ensure:

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

The IDEA affords parents and local educational agencies the procedural protection of an impartial due process hearing with respect to any matter relating to the identification, assessment, or educational placement of the child, or the provision of a FAPE to the child. (20 U.S.C. § 1415(b)(6) & (f); 34 C.F.R. § 300.511; Ed. Code, §§ 56501, 56502, and 56505; Cal. Code Regs., tit. 5, § 3082.) The party requesting the hearing is limited to the issues alleged in the complaint, unless the other party consents, and has the burden of proof by a preponderance of the evidence. (20 U.S.C. § 1415(f)(3)(B); Ed. Code, § 56502, subd. (i); *Schaffer v. Weast* (2005) 546 U.S. 49, 57-58, 62 [126 S.Ct. 528, 163 L.Ed.2d 387]; and see 20 U.S.C. § 1415(i)(2)(C)(iii).) Student had

the burden of proof on all issues. The factual statements in this Decision constitute the written findings of fact required by the IDEA and state law. (20 U.S.C. § 1415(h)(4); Ed. Code, § 56505, subd. (e)(5).)

Student was 16 years old and entering 11th grade at the time of hearing. Student resided within Elk Grove's geographic boundaries at all relevant times. Beginning in 2010, Student was eligible for special education and related services. Her eligibility categories changed over time, as Student matured and her developmental delays became more apparent. In December 2020, the middle of Student's eighth grade year, she was eligible under the primary category of intellectual disability. She had a secondary eligibility category of other health impairment, due to mild cerebral palsy as well as attention deficit hyperactivity disorder.

Student's working memory deficit and slow processing affected her ability to successfully complete academic work. She had significant delays in general cognition, academic ability, language, and conceptual adaptive skills. These delays interfered with her ability to perform and make progress within the general education setting.

STUDENT'S EDUCATIONAL BACKGROUND AND PROGRESS AS OF FALL 2021

Student had been eligible for special education and related services since she was three years old. Student's second three-year eligibility review reevaluation was done in January 2016, when Student was in third grade. At that time, her full-scale intelligence quotient, known as IQ, was 62, as measured by the Weschler Intelligence Scale for Children. Her standard scores in various subcategories ranged from 86 to 55, all in the below average, low, and very low ranges.

Student's third three-year eligibility review reevaluation was done in December 2018, when she was in sixth grade. At that time, her full-scale intelligence quotient was 65, again measured by the Weschler Intelligence Scale for Children. Her standard scores in various subcategories ranged from 89, in the 23d percentile at the bottom end of the average range, down to 62, in the first percentile, in the very low range.

LANGUAGE/COMMUNICATION ABILITIES, EDUCATIONAL PLACEMENT, SPEECH THERAPY SERVICES, AND LANGUAGE/COMMUNICATION GOALS AND PROGRESS DECEMBER 2018 TO DECEMBER 2020

During middle school, Student attended special education classes 86 percent of her day, in a classroom teaching students functional life skills using a modified curriculum, called the independent living skills program. Student attended general education classes, extra-curricular activities, and non-academic activities 14 percent of her day, including general education physical education. In addition to special education, Student received the related service of speech and language therapy outside the classroom, called pull-out service, for 30 minutes one time per week.

As part of the three-year eligibility review reevaluation in December 2018, Elk Grove assessed Student's language/speech communication development. Her receptive and expressive vocabulary skills were below average. Her overall language skills were also below average. Based on the December 2018 assessment, Student's relative strengths were following oral directions, and formulating grammatically and semantically correct sentences. Vocabulary and listening comprehension were areas of concern.

The December 2018 IEP team documented Student's present level of performance, also called a baseline, in semantics. Student had difficulty answering "wh" questions with accurate and appropriate vocabulary. The December 2018 baseline did not include specific information expressed as percentages about her abilities at the time.

The December 2018 IEP semantics goal, to be achieved by December 2019, was for Student to respond accurately to who, what, where, and when questions in a small group setting in eight out of 10 opportunities with 80 percent accuracy as measured by speech-language pathologist observation and charted data. The short-term objectives were for Student to first respond accurately to "wh" questions in a small group setting with 40 percent accuracy by April 2019, then with 60 percent accuracy by August 2019, before achieving the annual goal of 80 percent accuracy by December 2019.

In April 2019, Student responded to "wh" questions in a small group setting with the following accuracy rates:

- who: 20 percent;
- what: 30 percent;
- where: 10 percent; and
- when: 10 percent.

Additional progress information about this December 2018 IEP goal was not included in evidence except as it was reported in the December 11, 2020 IEP, when Student was in eighth grade. As of December 11, 2020, one year later than the December 2018 goal was anticipated to be achieved, Student still had not met the semantics goal. In December 2020, Student showed progress in her ability to answer

questions, and was correctly responding to most “wh” questions with 50 percent accuracy with minimal prompting. As some possible explanation for the reason Student had not made the anticipated progress on the speech goal that had been in effect for two years, the December 2020 IEP stated direct, skilled speech services were started later in the year due to “late hire” of a speech-language pathologist and “covid challenges.”

The December 2020 IEP team recommended continuing the speech/language goal and adjusting and updating it throughout the year as needed. The annual goal developed at the December 2020 IEP team meeting regarding expressive communication was based on Student’s then-present level of performance: answering “wh” questions with 50 percent accuracy. The goal remained the same as it was in December 2018, but with a new anticipated date of achievement. The goal was for Student, by December 2021, to respond accurately to who, what, where, and when questions in a small group setting in eight out of 10 opportunities with 80 percent accuracy as measured by speech-language pathologist observation and charted data.

The December 2020 IEP offered Student 30 minutes per week of language and speech service by a speech-language pathologist as a pull-out service.

MATH, READING, AND WRITING PROGRESS DECEMBER 2020

In December 2020, the middle school IEP team reviewed Student’s progress on the 2019 IEP’s goals and discussed Student’s present levels of performance as of December 2020. The 2019 IEP had three goals in math areas. The first was for multiplying. As of December 2019, Student correctly solved four out of eight multiplication problems

that involved multiplying two digits by two digits. She used a multiplication chart to complete these problems, but still achieved only 50 percent accuracy. The December 2019 multiplication goal was for Student to, by December 2020, use a multiplication chart and her notes to correctly solve 10 problems multiplying two digits by two digits with 80 percent accuracy in three trials measured by work samples.

As of December 2020, Student used a multiplication chart to multiply and divide, and correctly multiplied two digits by one digit, three digits by one digit, and two digits by two digits when the answers did not require carrying a number to the next place value. The December 2020 IEP did not document the percentage of her accuracy at these tasks as of December 2020.

The 2019 IEP's second math goal was for fractions. As of December 2019, Student added and subtracted fractions with common denominators but was not yet reducing her answers. An example of this would be correctly adding one-sixteenth and seven-sixteenths for a total of eight-sixteenths, or $\frac{1}{16} + \frac{7}{16} = \frac{8}{16}$ in numerical format. Reducing the sum, eight-sixteenths, to the smallest representation results in one-half, with the lowest possible denominator being two – in numerical format this would be $\frac{8}{16} = \frac{1}{2}$. The December 2019 fractions goal was for Student to use her notes and a multiplication chart to solve 10 mixed addition and subtraction problems adding and subtracting fractions with different denominators and reduce her answer with at least 80 percent accuracy in three trials measured by work samples and teacher records, by December 2020. As of December 2020, Student correctly solved addition and subtraction of fractions with common denominators, but still did not reduce her answers.

The 2019 IEP's third math goal was for counting money. As of December 2019, Student counted common coins to \$1.00 but did not yet count mixed coins to \$1.00. The December 2019 money-counting goal was for Student to, by December 2020, count mixed coins up to \$1.00 using quarters, dimes, nickels, and pennies, using a visual support. Her achievement of the goal was to be measured by teacher records. As of December 2020, Student knew the four coins and their values and counted common coins up to \$1.00 but had more difficulty counting mixed coins.

After reviewing Student's progress on the three math goals of the December 2019 IEP, the December 2020 IEP team developed one math goal for Student. The math goal was for Student, by December 2021, to solve positive one-step equations, five of each kind of addition, subtraction, multiplication, and division, with one variable, showing her work by doing the opposite operation, on two trials each with at least 80 percent accuracy.

The 2019 IEP had one reading goal. As of December 2019, while Student was in seventh grade, her frustration level was at third grade text. The December 2019 IEP reading goal was for Student, by December 2020, to read a passage written at the fourth-grade level and answer 10 comprehension questions with 80 percent accuracy as measured by a reading inventory passage.

As of December 2020, Student read third grade text and answered an average of 55 to 80 percent of questions correctly on an informal assessment. When reading short passages, Student answered literal questions directly from the text at a third-grade instructional level and fourth-grade frustration level. Also, Student correctly read 95 out of 100 Edmark Grocery words, correctly read seven out of eight words that had two to

three syllables and ended in "le," and correctly read seven out of eight closed-syllable words. Student had more difficulty with words that were three or more syllables. The IEP team did not develop a reading goal for the December 2020 IEP.

The 2019 IEP had one writing goal, which did not state Student's present level of performance. The December 2019 IEP writing goal anticipated that by December 2020, Student would engage in teacher-led pre-writing activities, then compose a single paragraph including a topic sentence, supporting sentences, and a concluding sentence with 80 percent accuracy in three of four trials and receiving a "3" on the school district's writing rubric as measured by student work samples. As of December 2020, Student wrote good topic sentences and wrote on topic. She remembered to use a capital letter and period. The December 2020 IEP team retained the same writing goal from December 2019, but with a new anticipated date of achievement of December 2021.

Parent consented to the December 2020 IEP, and Elk Grove implemented it for the rest of the 2020-2021 school year.

Overall and in all domains, Student's abilities and performance were low. She made progress toward all her goals, but her progress was very slow.

TRANSITION TO HIGH SCHOOL FALL 2021

On May 12, 2021, an IEP team met to discuss Student's transition to high school in the upcoming school year. The IEP team determined Student would remain placed in the independent living skills program in ninth grade.

Student matriculated to Florin High School for ninth grade for the 2021-2022 school year. She continued to attend special education classes using a modified curriculum and addressing functional life skills for three out of four 90-minute periods per day. She attended a general education class for one 90-minute period each day. In the fall semester, Student's two general education classes were physical education and floral design, held on alternating days according to a block schedule.

When Student started at Florin High, the special education classroom Student attended was called a self-contained "independent living skills" class. The name later changed to "Level 2" self-contained class. Student was in the self-contained class among a total of 15 students in ninth and tenth grades, all taught by teacher Lauren Lemieux and two classroom aides. The students in the independent living skills/Level 2 class had varying levels of cognitive ability and different skill levels in different areas, but all the students functioned within the higher levels of intellectual disability. There was a different independent living skills/Level 2 class for 11th and 12th grade students with abilities similar to Student's. There also were other self-contained classes for students with abilities lower than Student's.

The Level 2 class used the Unique Learning System curriculum, not geared to the Common Core State Standards. Students in the class were not working toward earning a regular high school diploma, but instead a certificate of completion. The independent living skills class focused on developing students' skills to work and live independently. Academics were living-skills-based. For example, math focused on money and skills to carry out a job independently. The entire thrust of the independent living skills/Level 2 program was looking toward what students would do after high school and preparing students for their lives after secondary education.

Lemieux was Student's case manager as well as teacher. Lemieux had been a paraeducator in independent living skills classrooms, and in a classroom for the "severely handicapped," from 2000 through 2015. She then earned her education specialist credential, also known as a special education teacher credential. Lemieux's credential was specifically for students with moderate-to-severe disabilities and needs. She started teaching an independent living skills class at Florin High in the 2016-2017 school year. At the time of hearing, Lemieux had been an education specialist for eight years, and taught Student for the two prior school years, 2021-2022 and 2022-2023.

ISSUES 1, 4(c)(iii), AND 4(c)(v): FAILING TO ASSESS STUDENT'S SPEECH AND LANGUAGE SKILLS FOR THE IEP TEAM MEETING ON DECEMBER 6, 2021, AND FAILING IN THE DECEMBER 6, 2021 IEP TO OFFER SUFFICIENT LANGUAGE AND SPEECH SERVICES AND PARENT TRAINING REGARDING STUDENT'S SPEECH AND LANGUAGE NEEDS

ISSUE 1: FAILING TO ASSESS STUDENT'S SPEECH AND LANGUAGE SKILLS FOR THE IEP TEAM MEETING ON DECEMBER 6, 2021

Student contends Elk Grove denied her a FAPE by failing to assess her speech and language skills for the IEP team meeting on December 6, 2021. Student alleged in her complaint she had 30 minutes a week of speech therapy as an IEP service as of the time of her three-year-review IEP team meeting in December 2021, but Elk Grove did not conduct a speech and language assessment by a speech-language pathologist by the time of the December 6, 2021 IEP team meeting. Student argues she did not receive meaningful or appropriate speech and language services due to the delayed assessment. Student also

argues the fact that the speech and language assessment was completed and an IEP team meeting about Student's speech and language needs was held on March 23, 2022, at which time a new IEP speech and language goal was developed and offered, proves the delay significantly impeded Parent's opportunity to participate in the decisionmaking process until the 2021-2022 school year was nearly over.

Elk Grove contends that while it had not completed the speech and language assessment Parent consented to on November 10, 2021, by the time of the December 6, 2021 annual and three-year-review IEP team meeting, the lack of assessment by that date did not deny Student a FAPE. Elk Grove argues Student failed to demonstrate actual loss of educational benefit, any significant impediment to Parent's opportunity to participate in the educational decisionmaking process, or any other impedance of Student's right to a FAPE from December 6, 2021, until March 23, 2022, when the assessment was completed and reviewed at an IEP team meeting. Elk Grove asserts the fact that Student's speech and language services were continued at the same frequency and duration after the assessment was completed and reviewed indicates Student was not denied a FAPE during the time between December 6, 2021, and March 23, 2022.

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.) "Special education" is instruction specially designed to meet the unique needs of a child with a disability. (20 U.S.C. § 1401(29); 34 C.F.R. § 300.39; Ed. Code, § 56031.) "Related services" are transportation and other developmental, corrective, and supportive services that are required to assist

the child in benefiting from special education. (20 U.S.C. § 1401(26); 34 C.F.R. § 300.34; Ed. Code, § 56363, subd. (a) [in California, related services are also called designated instruction and services].)

Parents and school personnel develop an IEP for an eligible student based upon state law and the IDEA. (20 U.S.C. §§ 1401(14), 1414(d)(1); and see Ed. Code, §§ 56031, 56032, 56341, 56345, subd. (a), and 56363, subd. (a); 34 C.F.R. §§ 300.320, 300.321, and 300.501.)

In general, a child eligible for special education must be provided access to specialized instruction and related services, which are individually designed to provide educational benefit through an IEP reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances. (*Board of Education of the Hendrick Hudson Central School Dist. v. Rowley* (1982) 458 U.S. 176, 201-204; *Endrew F. v. Douglas County School Dist. RE-1* (2017) 580 U.S. 386, 402-403 [137 S.Ct. 988, 1000-1001] (*Endrew F.*).)

An IEP is evaluated in light of information available at the time it was developed; it is not judged in hindsight. (*Adams v. State of Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149 (*Adams*), citing *Fuhrmann v. East Hanover Board of Educ.* (3d Cir. 1993) 993 F.2d 1031, 1041 (*Fuhrmann*).) An IEP is "a snapshot, not a retrospective." (*Id.*, 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, by looking at the IEP's goals and goal achieving methods at the time the plan was implemented and determining whether the methods were reasonably calculated to confer an educational benefit. (*Adams, supra*, 195 F.3d at p. 1149; *Fuhrmann, supra*, 993 F.2d at p. 1041 ("an IEP must take into account what was, and what was not, objectively reasonable ... at the time the IEP was drafted").)

However, after-acquired evidence “may shed light” on the objective reasonableness of a school district’s offer and actions at the time the IEP was developed. (*Adams, supra*, 195 F.3d at p. 1149-1150.) Subsequent events may be considered, because “the clear implication of permitting some hindsight is that additional data, discovered late in the evaluation process, may provide significant insight into the child’s condition, and the reasonableness of the school district’s action, at the earlier date.” (*E.M. v. Pajaro Valley Unified School Dist.* (9th Cir. 2011) 652 F.3d 999, 1006.)

School district evaluations, called assessments in California, of students with disabilities under the IDEA serve two purposes:

- identifying students who need specialized instruction and related services because of an IDEA-eligible disability; and
- helping IEP teams identify the special education and related services the student requires. (34 C.F.R. §§ 300.301 AND 300.303.)

The first purpose refers to the initial evaluation to determine if the child has a disability under the IDEA, while the latter refers to the follow-up or repeat evaluations that occur throughout the course of the student’s educational career. (See 71 Fed. Reg. 46640 (Aug. 14, 2006).)

The IDEA provides for reevaluations, called reassessments in California, to be conducted not more frequently than once a year unless the parent and school district agree otherwise, but at least once every three years unless the parent and school district agree that a reevaluation is not necessary. (20 U.S.C. § 1414(a)(2)(B); 34 C.F.R. § 300.303(b); Ed. Code, § 56381, subd. (a)(2).) A reassessment must be conducted if the school district determines that the educational or related-services needs, including

improved academic achievement and functional performance, of the student warrant a reassessment, or if the student's parents or teacher requests a reassessment. (20 U.S.C. § 1414(a)(2)(A)(i) & (ii); 34 C.F.R. § 300.303(a)(1) & (2); Ed. Code, § 56381, subd. (a)(1).)

A school district's failure to assess a child may constitute a procedural violation of the IDEA. (*D.K. v. Abington School Dist.* (3d Cir. 2012) 696 F.3d 233, 249; see also *Park v. Anaheim Union High School Dist., et.al.* (9th Cir. 2006) 464 F.3d 1025, 1032 [A failure to properly assess is a procedural violation of the IDEA.]) However, a procedural violation results in a denial of a FAPE only if the violation:

1. impeded the child's right to a FAPE;
2. significantly impeded the parent's opportunity to participate in the decisionmaking process regarding the provision of a FAPE to the child; or
3. 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.)

To determine whether a school district substantively offered a student a FAPE, the focus must be on the adequacy of the district's proposed program. (*Gregory K. v. Longview School Dist.* (9th Cir. 1987) 811 F.2d 1307, 1313-1315 (*Gregory K.*).) If the school district's program was designed to address the student's unique educational needs, was reasonably calculated to provide the student with some educational benefit, and comported with the student's IEP, then the school district provided a FAPE, even if the student's parents preferred another program, and even if the parents' preferred program would have resulted in greater educational benefit. (*Ibid.*)

PREPARATION FOR DECEMBER 2021 TRIENNIAL REASSESSMENT

On November 1, 2021, Lemieux and Parent had a telephone conference to discuss the need for a three-year reevaluation of Student's eligibility for special education and related services. Elk Grove and Parent considered in what areas additional data should be gathered, and determined some assessment was needed to complete an appropriate three-year review. Lemieux and Parent discussed any need for additional data regarding Student's academic achievement. After teaching Student for approximately two and a half months in ninth grade, Lemieux observed Student demonstrating a 3.5 grade level in reading, and up to a 3.3 grade level in math. Elk Grove proposed to assess Student's academic achievement in the areas of basic reading and math skills.

Elk Grove proposed to assess Student's intellectual development/cognitive functioning specifically to investigate her nonverbal abilities. Elk Grove proposed to assess Student's adaptive behavior regarding "conceptual, social, and practical" functioning. Elk Grove also proposed to assess Student's health to obtain current medical data regarding attention problems, vision, and hearing.

Specifically related to Issue 1, Elk Grove proposed to assess Student's language/speech communication development. New data was recommended in the areas of expressive and receptive language to determine Student's current level of functioning and eligibility.

Connected to Issue 2, below, regarding the fact that Elk Grove did not assess Student's need for adapted physical education, Lemieux and Parent reviewed Student's motor development as it related to three categories of services: occupational therapy,

physical therapy, and what the three-year reevaluation worksheet called “adaptive” physical education. In all three separate categories, the three-year reevaluation worksheet documented “motor skills not impeding progress” and therefore no additional data would be gathered related to these three related services to confirm eligibility, to understand areas of current deficit, to consider progress made, or to update Student’s ongoing goal and service needs.

Additional categories reviewed and considered by Lemieux and Parent included determinations that Student’s social-emotional functioning, and her school and classroom behavior, were not impeding her progress. Elk Grove therefore did not propose collecting additional data in those areas for the triennial reevaluation. Parent did not request additional data collection in any other area.

Parent received the three-year reevaluation worksheet and did not add information in the area where a parent was afforded space to write in requests for assessment in additional areas. On November 7, 2021, Parent signed the worksheet and determination form agreeing assessment was needed in the areas marked on it. Lemieux signed the form on November 10, 2021, confirming she reviewed the data on the form and involved Parent in the process of determining whether additional formal assessment was necessary at the time for three-year-review planning purposes.

After Lemieux and Parent met on November 1, 2021, Elk Grove sent Parent a written assessment plan dated November 3, 2021. The assessment plan proposed, and Parent consented to, assessments in:

- academic achievement, by a school psychologist;
- intellectual development, by a school psychologist;

- adaptive behavior, by a school psychologist;
- health, by a school nurse; and
- language/speech communication development, by a speech-language pathologist.

Parent signed consent to these assessments on November 7, 2021, and Elk Grove received the signed assessment plan on November 10, 2021.

DECEMBER 2021 ASSESSMENTS AND IEP TEAM MEETING

School psychologist Manuel Penaloza conducted a psychoeducational assessment of Student and documented the results in a report dated December 6, 2021. Penaloza earned his master's degree in educational psychology, with an emphasis in school psychology, in 1984. Apart from his internship in a different school district, Penaloza worked for Elk Grove his entire educational psychology career until he retired in June 2022. At the time of the due process hearing, Penaloza continued to occasionally work for Elk Grove on an as-needed basis.

Penaloza was assigned as a school psychologist at Florin High from 1998 through 2022. Among his other duties as a school psychologist for 37 years, Penaloza conducted approximately 70 to 80 psychoeducational assessments each year, including initial eligibility assessments and three-year reassessments. Penaloza reviewed Student's two prior three-year reassessments, the December 2020 IEP, and what he described as some other areas helpful to plan appropriate services.

Based on that review, Penaloza determined he specifically needed to investigate Student's cognitive ability and adaptive behavior skills to determine if she continued to meet eligibility criteria for special education and related services under the category of intellectual disability.

Penaloza was aware Student's prior cognitive functioning scores were more than two and a half standard deviations below what would be expected for a child of her chronological age for both her verbal and non-verbal problem-solving ability. Student's full-scale intelligence quotient had been in the first or second percentile, in the low range. Both her verbal and non-verbal comprehension subtest scores had been in the very low range, although her non-verbal score was two points higher than her verbal score. This slight difference suggested Student's cognitive abilities might be best evaluated using test instruments that were not as heavily dependent on language.

In December 2021, Penaloza selected the Test of Nonverbal Intelligence to assess Student's cognitive abilities. That instrument measures non-verbal problem-solving skills, like the non-verbal IQ subtest of the Wechsler, but does not require any verbal response. Student's standard score was 78, in the seventh percentile, in the range defined by that test's publisher as "poor." Penaloza reported Student worked quickly, did not look at all the designs in the stimulus array before making a choice, and failed to evaluate the accuracy of her choice. However, her standard score was higher than her 2016 and 2018 cognitive ability test scores. Her standard score was also two points lower than the cognitive ability score from her first three-year reassessment in early 2014. The scores across time were generally consistent with each other, which supported the validity of the current results. As of December 2021, Student's cognitive abilities remained poor.

At hearing, Penaloza explained written comments in the psychoeducational assessment report about Student working quickly and not checking her work on the cognitive test, that the test might have underestimated her current level of functioning. Penaloza clarified that the protocol for administering the cognitive test does not allow for additional time if the person taking the test works slowly, and does not allow the person proctoring the test to encourage a person taking the test to check their work. Further, Penaloza believed even if Student had been encouraged to slow down and check her work, Student would not have performed better enough to increase her score as much as would have been required to impact her special education eligibility category. Student's score, in the poor range, on the Test of Nonverbal Intelligence in 2021, was consistent with her two most recent three-year cognitive scores, which had qualified her for the intellectual disability eligibility category.

To prepare for his assessment, Penaloza reviewed Student's prior scores on the Adaptive Behavior Assessment System as rated by Parent and Student's sixth grade teacher in December 2018. Overall, her adaptive behavior subtest scores at that time were very low. Penaloza administered the Adaptive Behavior Assessment System in December 2021. Student's special education teacher Lemieux completed the teacher form of the rating scale. Lemieux rated Student's adaptive behaviors as average in eight areas, and below average in one, about self-direction.

Student's adaptive behavior scores in the average range in 2021 were discrepant to the poor results on other tests. Penaloza interpreted Lemieux's ratings to mean Student functioned in the average range for adaptive behavior within the highly structured independent living skills classroom, which had a small number of students and three adults, and emphasized learning of functional, adaptive skills that were not academically based. This environment afforded Student the opportunity to work at her

comfort level, especially in academic areas. Penaloza concluded Student's improvement in her adaptive behavior scores since 2018 indicated Student experienced educational benefit from spending most of her school day in the structured environment of the independent living skills special education program, with its practical/functional curriculum and emphasis on communication and social skills.

Penaloza's analysis regarding Student's continued eligibility for special education and related services was that Student exhibited significantly sub-average general intellectual functioning, concurrent with deficits in adaptive behavior if the supports provided within the independent living skills special day class program were not continued. Therefore, she continued to qualify for special education and related services as a student with intellectual disability.

Other aspects of the December 2021 psychoeducational assessment are further discussed below, as individually related to other Issues. But one notable result was Student's score on the Peabody Picture Vocabulary Test, a measure of Student's receptive vocabulary, or words a person can understand. Student's standard score was 52, in the 0.1 percentile, described as very low. Penaloza did not assess Student's expressive vocabulary, because Student expressed her wants and needs, communicating with others. Penaloza did not see expressive vocabulary as an issue for Student, and it was not part of determining whether she met eligibility criteria for any category of eligibility for special education and related services he was investigating. Penaloza opined at hearing that Student's expressive vocabulary was greater than her receptive vocabulary.

Information regarding Student's health was summarized in the December 2021 IEP. She was in good health overall. She had diagnoses of mild cerebral palsy and attention deficit hyperactivity disorder. She wore glasses and had some specified environmental and food allergies.

The language/speech communication development assessment by a speech-language pathologist was not completed in time for the December 6, 2021 IEP team meeting. A speech-language pathologist could not attend the December 6, 2021 IEP team meeting. The IEP team members who attended on December 6, 2021, were aware the language/speech communication development assessment was not available for their review, and that the IEP team would meet again "at a later date" to review the pending assessment's report and discuss Student's progress on both her speech and language goal and her speech and language skills generally.

Despite the language/speech communication development assessment not being done yet, the IEP team did have information about Student's communication development as of December 6, 2021. Lemieux informed the IEP team, and documented in the December 6, 2021 IEP, that from her observation of Student in the special education classroom, Student:

- communicated her wants and needs;
- spoke with proper staff when she wanted to talk to someone about how she felt;
- socialized with both staff and peers;
- was talkative and usually good-natured in conversations; and
- rarely needed reminders to advocate for herself appropriately.

Lemieux also reported to the IEP team, and documented in the IEP, information about Student's social-emotional/behavioral functioning that connected to Student's communication development. Student liked to socialize with staff and peers and was polite. On days when Student felt upset or bothered by something, she asked to speak to the proper staff member about how she felt. Student was receptive to staff redirection, and was respectful.

Parent also shared information with the IEP team related to Student's speech and language. Lemieux took notes at the IEP team meeting and documented Parent's statement of concerns. The description of Parent's concerns documented in the December 6, 2021 IEP was noted contemporaneously during the IEP team meeting. Parent did not challenge what Lemieux wrote to describe Parent's concerns at the time of the IEP team meeting, when Parent signed consent to the December 6, 2021 IEP, or at any time thereafter until her testimony at the due process hearing.

The IEP's description of what Parent reported at the December 6, 2021 IEP team meeting was more reliable than Parent's inconsistent and uncertain testimony regarding what Parent said at that IEP team meeting. Parent informed the IEP team she was concerned about Student socializing with her friends on the phone and her use of inappropriate language at home. Parent was also concerned about Student's safety when she got frustrated at home and went outside to take a break from things in the house.

At hearing, Parent claimed she reported to school personnel before the December 6, 2021 IEP team meeting that she was worried about Student's ability to get along with other students, because Student told Parent she felt she was always being pressured and bullied. Parent asserted she called the school before the

December 6, 2021 IEP team meeting and told someone she was worried because Student came home crying because of what other girls at school said. Parent tried to explain to Student that Student needed to get to know her teachers and the other students better. Student responded that she told her teacher what happened, but the teacher told her to go sit down, and Student did. Parent believed Student then sat down because she is an obedient child.

When asked further questions about this event by her own attorney, Parent testified she was sure she talked to school personnel about it, she but could not recall when, could not recall to whom she spoke, and did not know if it was before the December 6, 2021 IEP team meeting. Parent claimed she called the school before the December 6, 2021 IEP team meeting and told "them" she was worried because of what other girls said to Student. But she testified moments later that she did not remember if she raised her concerns with Student's teachers before the December 6, 2021 IEP team meeting. On cross-examination, Parent was only confident she called the school and spoke to a person, whose name or position she did not remember, sometime during the first semester of Student's ninth grade year.

Parent testified her comments at the December 6, 2021 IEP team meeting that were documented as Parent's concerns about Student were actually about other students. Parent testified two female peers in Student's general education classes, and two female peers in Student's special education classroom, called Student on her cell phone and used profane language directed at Student. Student did not always realize when someone was picking on her and she thought people were her best friends until the issues got out of hand. Parent asserted the concern she reported to the IEP team on December 6, 2021, was about other students' behavior toward Student, not Student's behavior toward others. When cross-examined about the peers Parent testified Student

had conflict with, Parent said she was not sure if they were in general education and in her special education class, that it was possible she had testified it was both, but she did not know.

Parent stated she did not believe Student used inappropriate or profane language either at school or at home. Parent had never been informed by the school that Student used inappropriate or profane language at school, so Parent did not think Student had done that at school. Parent testified Student did not use profane or inappropriate language at home, because that was not how she was being raised.

Parent claimed she reported what happened to the school the next day, but did not get through to the teacher. Parent spoke by phone to the parents of the other students, and they agreed to help Parent. Parent asserted the offensive calls stopped because Parent took Student's phone away from her for two weeks.

On cross-examination, Parent stated she had not yet had the conversations with the other girls' parents by the time of the December 6, 2021 IEP team meeting. Parent described that call as being in the first semester of ninth grade, and probably in December 2021, but to her memory it was after December 6, 2021. Therefore, the evidence did not support Parent's claim that what she told the IEP team on December 6, 2021, was that Student was receiving abusive phone calls from general education and special education classmates, and that it was the other girls who were using inappropriate language. This example of Parent's inconsistent, vague, and illogical testimony significantly reduced the credibility Parent's testimony generally.

Although Parent claimed she asked about, requested, or said some things during the December 6, 2021 IEP team meeting, her individual claims about specific things she asked about, requested, or said were greatly weakened by her testimony and admission

that she “basically sat there quietly because [she] didn’t know what else to do.” Parent said she had suggested a paraeducator years before “but it didn’t go anywhere so [she] didn’t bring it up anymore.” Parent’s testimony undercut Student’s arguments Elk Grove and the members of the December 6, 2021 IEP team were aware of challenges Student experienced as alleged in Student’s complaint.

In written closing argument, Student argued Elk Grove failed to provide Student speech therapy from the start of the 2021-2022 school year through the December 6, 2021 IEP team meeting, claimed Elk Grove failed to offer witnesses or documents to show Elk Grove provided Student speech therapy during that time, and asserted Exhibit 52, with the heading Service Provider History, “shows no speech and language service minutes.” Student’s argument misses three important points.

First and most importantly, there is no Issue in this case regarding any alleged failure by Elk Grove to provide Student speech therapy, that is, to implement Student’s December 2020 IEP regarding speech therapy, from the start of the 2021-2022 school year through December 6, 2021. Second, Student bore the burden of proof on all Issues in this case. Elk Grove was not obligated to present any proof regarding whether it provided Student speech therapy from the start of the 2021-2022 school year through December 6, 2021.

Third, the Service Provider History exhibit did not reflect service minutes for any special education or related service. That document only identified, by name and type, the people who were assigned to provide special education and related services to Student, and reflected when the assignment started and, if applicable, ended. With respect to speech-language pathologists assigned to serve Student during the period relevant to Student’s claims in this case, Talitha Tchong-Dixon was assigned to Student

from September 18, 2020, to October 13, 2021. Veniece Barnett was assigned to Student from October 13, 2021, to January 19, 2022. And Angela Hutchinson was assigned to Student from January 19, 2022, through July 25, 2022. During the 2022-2023 school year, Nina Allen was assigned to Student beginning July 25, 2022. Allen's testimony indicated she served Student in August through November 2022, when she went on a leave of absence.

The December 6, 2021 IEP team did not have current information about Student's progress on her December 2020 IEP expressive communication goal regarding answering "wh" questions in a small group setting. Therefore, the December 6, 2021 IEP team did not change anything about Student's language and speech goal or the related service of speech therapy on December 6, 2021. The IEP team deferred the subject until the language/speech communication development assessment was completed. The December 6, 2021 IEP documented the IEP team would reconvene later to review the assessment results and discuss Student's progress and needs regarding language/speech communication.

At the due process hearing, Hutchinson testified regarding the speech therapy sessions she provided Student, beginning in January 2022. Hutchinson's service notes recorded that in early February 2022, Student responded in functional writing to "wh" questions with 60 percent accuracy. As the topic and sentence complexity increased, Student was more confused and less accurate.

More than one year after the December 2020 expressive communication goal was developed and implemented, Student had not yet met the goal. She functioned at a basic, concrete level, answering questions about where she went to school, and when school started. Hutchinson worked with Student to make speech therapy activities

relevant for Student, and challenging. Hutchinson worked with information in written paragraphs and read them aloud to Student, then asked Student when, where, and what questions. Student responded with 65 percent accuracy about the content. When Hutchinson asked Student questions on topics of interest, such as personal events like what Student did that weekend or what was her favorite subject, Student appropriately answered the questions. Hutchinson recorded those responses as 100 percent accurate.

Hutchinson believed the December 2020 IEP goal regarding “wh” questions was still appropriate for Student to be working on in February 2022 because it addressed an area of ongoing need and Student did not yet perform at the level targeted in the December 2020 goal. Additionally, based on Hutchinson’s work with Student from the end of January 2022 through the IEP team meeting on March 23, 2022, Hutchinson did not believe Student had other areas of need that were unaddressed. Hutchinson also believed the service level of one speech therapy session each week for 30 minutes was appropriate to enable Student to make progress on the December 2020 expressive communication goal. She worked with Student weekly from the end of January 2022 through the IEP team meeting on March 23, 2022.

By March 23, 2022, with speech therapy once a week for 30 minutes, Student met the December 2020 IEP’s expressive communication goal, at least with respect to questions during speech therapy session activities about Student’s day. Given the credible evidence that as of the end of January 2022 Student had not achieved the December 2020 expressive communication goal, it is reasonable to also conclude she had not met it at the time of the December 6, 2021 IEP team meeting.

Student failed to present any evidence to rebut Hutchinson’s opinion, as a licensed speech-language pathologist with 25 years of experience, that the expressive

communication goal from the December 2020 IEP was appropriate for Student as late as March 2022, and that as of early 2022, Student had no unaddressed areas of need. Student also failed to present any evidence to rebut Hutchinson's opinion that 30 minutes per week of pull-out speech therapy was an appropriate level of that related service to support Student between December 2021 and March 2022 to achieve the December 2020 expressive communication goal. Student's only evidence against these professional opinions was Parent's testimony that 30 minutes per week was not enough time for Student to get to know a new speech therapist and know what the therapist wanted out of her. Parent did not have an opinion about how long it would take for Student to be comfortable with the speech therapist, but Student got acquainted with her other teachers daily. Student's attorney asked Parent if she thought Student would have benefited from speech therapy in the classroom, and Parent responded that she did not know.

MARCH 2022 SPEECH AND LANGUAGE ASSESSMENT AND MARCH 23, 2022 IEP TEAM MEETING

Hutchinson conducted a speech and language assessment with testing in February and March 2022, and she documented the results in a report dated March 22, 2022. The IEP team met on March 23, 2022, to review the results of the assessment and develop new annual goals related to speech and language to be included in Student's December 6, 2021 annual IEP.

Hutchinson conducted a formal assessment of Student's expressive and receptive language skills. She did not do a formal assessment of Student's speech articulation or speech mechanism because those were not areas of concern based on existing evaluation data and Hutchinson's observations of Student while conducting the speech

and language assessment. Student did not present with an articulation delay during evaluative sessions. And, based on Hutchinson's informal gross oral-motor peripheral examination, Student's intra-oral structure, fascial musculature, dentition, and overall function of the oral mechanism were adequate to support oral speech production.

Social language, called pragmatics, is the effective and appropriate use of communication in relation to varying social and situational contexts, intent, and conversational rules. Hutchinson determined Student took turns appropriately and interacted with peers appropriately. She communicated in the classroom appropriately. Therefore, Hutchinson concluded with respect to Student's pragmatics, she demonstrated appropriate skills and this was not an area of deficit.

Fluency means control of the speech mechanism regarding rate and rhythm in which sounds, syllables, and words are joined together in connected speech. Student showed no dysfluencies during Hutchinson's examination. With respect to her voice, Student's vocal intensity, quality, and pitch were appropriate for her age and gender. Hutchinson concluded Student did not have a deficit with articulation/phonology. Also, Student's fluency and voice were within normal limits.

Hutchinson used two formal instruments to assess Student's language. One was the Expressive Vocabulary Test. Student's standard score on the Expressive Vocabulary Test was 79, in the eighth percentile. Her score was below average, with the average range ending at the 25th percentile. While Student was 14 years, 11 months old at the time, her test-age equivalent was eight years, seven months. She demonstrated an expressive vocabulary below the expected range compared to other children of the same age.

The other standardized instrument Hutchinson used was the Clinical Evaluation of Language Fundamentals. Student's Core Language Score, a composite of four subtests that collectively evaluated her expressive and receptive language skills, was a standard score of 73, in the fourth percentile. That placed her in the moderately low range of language functioning. Three of her subtest scores – for formulated sentences, understanding spoken paragraphs, and semantic relationships – were in the ninth percentile, meaning she performed equal to or better than nine out of 100 other children her age.

Hutchinson drew attention to Student's fourth subtest score, regarding recalling sentences, because although Student's subtest scores were all objectively low, this one was quite discrepant to the others. The recalling sentences subtest evaluates a student's ability to listen to spoken sentences of increasing length and complexity and repeat sentences without changing any of the following:

- word meaning and content;
- word structure, called morphology; or
- sentence structure, called syntax.

Student scored in the second percentile.

Student's other three subtest scores were in the ninth percentile and were commensurate with her December 2021 non-verbal cognitive ability score, in the seventh percentile. That indicated to Hutchinson Student's performance in broad language was what might be expected for a person with Student's level of cognitive impairment. However, Student's score on the recalling sentences subtest

was seven percentiles lower. That indicated to Hutchinson Student exhibited an even greater deficit and therefore had a particular need in this specific area, and it was what should be addressed through speech and language services.

In consideration of all the collected data, Hutchinson concluded Student had a language disorder, also called a language impairment, based on both syntax and semantics. Syntax is the system of language dealing with the understanding and use of rules governing word order and the combination of words in sentences. Semantics is the system of language dealing with word meaning and word relationships. Hutchinson reported Student's language deficits adversely affected her educational performance and she continued to qualify for speech/language therapy services.

In written closing argument, Student repeatedly argued Elk Grove failed to conduct a proper assessment of Student's speech and language skills or needs. Again, Student's argument misses the point. There is no Issue in this case regarding any alleged failure by Elk Grove to conduct an appropriate speech and language assessment. The only Issue Student pleaded regarding the speech and language assessment concerns whether Elk Grove denied Student a FAPE by failing to assess Student's speech and language skills for the December 6, 2021 IEP team meeting.

At the IEP team meeting on March 23, 2022, Hutchinson informed the IEP team Student met her December 2020 speech goal of answering "wh" questions regarding her day and during speech session activities with 80 percent accuracy with minimal to no cues required. Hutchinson reviewed with the IEP team her language/speech communication development assessment.

Hutchinson reported Student's present level of performance in expressive language was that Student demonstrated a deficit in constructing complex sentences when completing assignments in the classroom. Hutchinson proposed a new annual goal based on syntactical and semantic concerns for comprehension and expression. The new goal was anticipated to be achieved by December 2022, on the same timeline as the other goals developed and consented to by Parent at the December 6, 2021 IEP team meeting. The goal was for Student, within about nine months, to construct sentences with complex sentence structure, with the correct use of two to three of the following grammatical constructs:

- noun-verb agreement,
- coordinating and subordinating conjunctions like "before" and "after"; and
- prepositions such as for location, time, or direction.

Student's goal would be achieved if she completed the task with 75 percent accuracy over three consecutive speech therapy sessions as measured by session data.

Hutchinson believed group speech therapy for 30 minutes each week would be adequate to enable Student to achieve the one goal. The goal was to look at semantic and syntactic things Student would possibly see in her English Language Arts course and would be addressed not only during speech therapy but also in the classroom.

The March 23, 2022 IEP team adopted the proposed new expressive language goal. Hutchinson proposed Student continue to receive 30 minutes per week of group pull-out speech therapy. The IEP team adopted the proposed level of service and Elk Grove offered Student 30 minutes of weekly group speech therapy in the March 23, 2022 IEP. Parent signed consent to the speech therapy goal and service.

Hutchinson's testimony at the due process hearing was credible. She acknowledged what she did not remember, and she did not exaggerate or overstate her knowledge. Her statements regarding what was and was not said at the March 23, 2022 IEP team meeting, and the lack of questions or communication from Parent regarding Student's speech and language needs, were more reliable than Parent's uncertain and inconsistent testimony.

During the December 6, 2021 IEP team meeting, Parent reported her concerns about Student's telephone conversations with peers at home and Student's use of "inappropriate language," meaning profanity. Parent's report was noted in the IEP document. Parent did not verbally repeat this concern to the IEP team on March 23, 2022, when Hutchinson attended and Student's speech and language skills and needs were discussed.

Significantly, if Parent had repeated during the March 23, 2022 IEP team meeting her concerns about Student using "inappropriate language" on the telephone with peers at home, Hutchinson would not have recommended different goals or services than what she proposed. Hutchinson regarded speaking with "inappropriate language" as a behavior, such as signaling anger, and it did not relate to her domain as a speech-language pathologist, which concerns whether a student has the skills to understand or express language. Hutchinson would not have recommended speech services to address "inappropriate language" such as profanity.

Parent did not raise concerns about Student's socialization or social skills. And based on working with Student weekly for approximately two months and assessing Student's speech/language communication development, Hutchinson did not believe Student required services regarding social skills.

Parent testified she did not think the speech therapy services Student had received in the past and as offered on March 23, 2022, were sufficient for Student to succeed in speech and language development. When Student's attorney asked Parent if she brought this up at the March 23, 2022 IEP team meeting, Parent responded she was having a hard time thinking about that meeting. The totality of the evidence established Parent did not request more speech therapy, or object to the proposal of 30 minutes per week of group speech therapy.

Hutchinson's speech/language communication development assessment report included some general recommendations for parents and teachers to address comprehension and receptive language skills, and verbal expression/expressive language skills. Parent received a copy of the report. Parent did not express concerns about understanding the recommendations. Parent never expressed concern about how to assist Student at home. And Parent never contacted Hutchinson to discuss Student's speech and language services.

NO FAPE DENIAL FOR LACK OF SPEECH AND LANGUAGE ASSESSMENT AT DECEMBER 6, 2021 IEP TEAM MEETING

There is no dispute Student required a reassessment of her language and speech skills as part of a comprehensive three-year review. Elk Grove conducted that reassessment. The dispute is whether Student was denied a FAPE because the assessment was not completed before the December 6, 2021 IEP team meeting. Elk Grove's written closing argument concedes the delay in completing the speech and language assessment "constitutes ... a procedural violation" but correctly argues it was only a procedural violation that did not result in denial of a FAPE to Student. Student

failed to prove by a preponderance of the evidence that Elk Grove denied her a FAPE because the IEP team that met on December 6, 2021, did not have results of a language/speech communication development assessment.

Most significantly, Student did not lose educational benefit as a result of the IEP team not developing a new goal in the area of speech and language on December 6, 2021. And Student did not lose educational benefit as a result of the IEP team not changing her speech therapy service on December 6, 2021. The December 6, 2021 IEP team acknowledged the need to reconvene when the assessment results were available, and agreed not to make any changes to Student's expressive language goal and agreed not to make any changes to Student's speech therapy services until the assessment results were reviewed by the IEP team. Student's December 6, 2021 IEP retained the December 2020 expressive language goal and related service level.

While there was the theoretical possibility that a status quo arrangement pending the assessment results would deprive Student of educational benefit, in fact, Student needed to continue working on the December 2020 expressive language goal. The evidence established as of December 2021, Student had made progress on but not yet met the goal. By March 23, 2022, with the continued service of 30 minutes of weekly speech therapy, Student basically met the goal. The uncontroverted evidence also established the December 2020 expressive language goal, and the related-service level of 30 minutes per week of pull-out speech therapy, remained appropriate for Student from December 6, 2021, through March 23, 2022. Both the goal and service continued to be reasonably calculated to enable Student to make appropriate progress in light of her circumstances during that period.

When the assessment was completed, it did not reveal areas of previously unidentified need for Student in the domain of language and speech. Therefore, the uncontroverted evidence established Elk Grove would not have offered Student additional goals in different areas of language and speech between December 6, 2021, and March 23, 2022, had the language/speech development assessment been completed for the December 6, 2021 IEP team meeting. Student failed to demonstrate she would have received additional or different services or educational benefits between December 6, 2021, and March 23, 2022, if the assessment had been completed sooner.

Furthermore, Parent was not significantly impeded in her opportunity at the December 6, 2021 IEP team meeting to participate in the decisionmaking process regarding providing Student a FAPE. Parent shared information with the IEP team that she thought related to Student's speech and language needs, and she had the opportunity to ask questions, make requests, and object to any proposals. By Parent's own admission, despite having the opportunity to participate, she chose to sit there quietly because she did not know what else to do. Parent could have but did not request an increase in the amount of speech therapy pending the assessment results, based on her opinion Student required longer or more frequent service to get to know the speech therapist at the high school. Parent could have but did not request a change, pending the assessment results, in the type of speech therapy, such as to have service provided inside the special education or general education classrooms, instead of having Student pulled out of class specifically for speech therapy.

Student failed to prove by a preponderance of the evidence that Elk Grove denied her a FAPE by failing to assess Student's speech and language skills for the IEP team meeting on December 6, 2021.

ISSUE 4(c)(iii): SUFFICIENT LANGUAGE AND SPEECH SERVICES IN THE DECEMBER 6, 2021 IEP

Student contends Elk Grove denied her a FAPE by failing in the December 6, 2021 IEP to offer her sufficient language and speech services. Student asserts in her written closing argument that she “clearly would perform better with speech and language services twice per week.”

Elk Grove contends the December 6, 2021 IEP offered Student sufficient language and speech services to allow Student to make progress on her expressive communication goal.

As of December 6, 2021, Student continued to make progress toward but had not yet achieved the expressive communication goal of her December 2020 IEP. The progress was achieved with 30 minutes weekly speech therapy, along with the functional academics and independent living skills curriculum of the special education classroom. The IEP team did not change Student’s expressive communication goal and did not change the amount or type of speech therapy from the December 2020 IEP, pending the results of the language/speech communication development assessment.

The December 6, 2021 IEP document included “language and speech” on the special education and related services grid on the Offer of FAPE – Service page of the IEP. However, the grid stated the same start and end dates as had been in the December 2020 IEP, indicating service starting on December 11, 2020, and ending on December 10, 2021. Despite failing to change the service dates stated, Elk Grove

continued to provide Student speech therapy until March 23, 2022, with Hutchinson taking over in January 2022. Student continued to work on the goal in speech therapy in early 2022, and basically met the goal by March 23, 2022.

As stated above in Issue 1, the uncontroverted evidence established the December 2020 expressive language goal, and the speech therapy related-service level of 30 minutes per week on a pull-out model, were still appropriate for Student from December 6, 2021, through March 23, 2022.

Student failed to establish by a preponderance of the evidence that Elk Grove denied her a FAPE in the December 6, 2021 IEP by failing to offer sufficient language and speech services.

ISSUE 4(c)(v): PARENT TRAINING REGARDING STUDENT'S SPEECH AND LANGUAGE NEEDS IN THE DECEMBER 6, 2021 IEP

Student contends Elk Grove denied her a FAPE by failing in the December 6, 2021 IEP to offer parent training regarding Student's speech and language needs. Student alleged in her complaint,

"[T]he 12/6/2021 IEP team was aware that Student didn't achieve her academic goals and also her speech and language goals, and that she had problems not only at school, but also at home. Thus, District's failure to consider Parent's problem with Student at home with academics and also with her speech and language, violates the IDEA and has denied Student a FAPE."

Student's written closing argument about Issue 4(c)(v) states Student's complaint "indicated District failed to offer Student training in Transitional needs for the Student. This includes training in Student's needs for Vocational assessment counseling, guidance, and career assessment." Student's complaint alleged no such thing. Student's closing argument then contends federal regulations define related services as including parent counseling and training, and Elk Grove "did not offer essential training required by IDEA to assist [Parent] to participate in the IEP as an IEP team member."

Elk Grove contends Student did not establish a need for parent training as defined by law, and Elk Grove did not deny Student a FAPE by failing to offer Parent training regarding Student's speech and language needs.

In California, related services must be provided "as may be required to assist an individual with exceptional needs to benefit from special education." (Ed. Code, § 56363, subd. (a).) The IDEA and the California Code of Regulations define parent counseling and training as:

- assisting parents in understanding the special needs of their child;
- providing parents with information about child development; and
- helping parents acquire the necessary skills that will allow them to support the implementation of their child's IEP. (34 C.F.R. § 300.34(c)(8); see also Cal. Code Regs., tit. 5, § 3051.11(a).)

Parent training must be offered when it is necessary to assist the child with special needs to benefit from her special education. (Ed. Code, § 56363, subd. (b)(11).)

Student offered no evidence to support her claim that Student required Parent to have training regarding Student's speech and language needs for Student to benefit from her special education. And nothing supported an interpretation that Elk Grove was aware at the time of the December 6, 2021 IEP team meeting that Student required Parent to have training regarding Student's speech and language needs for Student to benefit from her special education. Student called Parent and 12 employees of Elk Grove as witnesses, plus an independent transition services specialist. None of them testified Parent required training or counseling about Student's speech and language needs to assist Student to benefit from her special education.

Parent testified she had 30 years' experience working with children with special needs. She had experience raising a child and owned her own daycare center for over 25 years. At the time of the hearing, she had five teenagers in her home. She testified she understood Student's disability and her educational needs related to her disability, and did not have questions about Student's development from child to adult. Parent testified she did not have any questions in December 2021 about how she could help support or assist the implementation of the IEP. When asked what type of training she would have liked Elk Grove to offer her, Parent stated she wanted training to feel more at ease with what Student was doing at school. When asked whether she felt she would have benefitted from parent training, Parent stated she would have felt more at ease with Student doing what she was doing at school.

Parent could not articulate what type of training she required or why she needed training in Student's speech and language needs. Parent did not claim she ever expressed to Elk Grove a need for parent training, either before, during, or after the December 6, 2021 IEP team meeting. No Elk Grove employee at the IEP team meeting claimed Parent

expressed a need or desire for parent training, and none of them believed Parent needed training regarding Student's speech and language needs for Student to benefit from her special education.

Student failed to establish how parent training was necessary for Student to receive a FAPE under the December 6, 2021 IEP. Student did not present any evidence establishing Student failed to derive educational benefit from her December 6, 2021 IEP because Parent was not offered parent training or counseling in Student's speech and language needs. Accordingly, Student failed to prove she was denied a FAPE based on Elk Grove's failure to offer Parent training regarding Student's speech and language needs in the December 6, 2021 IEP.

ISSUE 2: FAILING TO ASSESS STUDENT'S NEED FOR ADAPTED PHYSICAL EDUCATION FOR THE IEP TEAM MEETING ON DECEMBER 6, 2021

Student contends Elk Grove denied her a FAPE by failing to assess Student's need for adapted physical education for the IEP team meeting on December 6, 2021. Student alleged in her complaint that at the time of the December 6, 2021 IEP team meeting, Elk Grove reported Student

"was able to participate in the physical activities at PE, with modified running. The parent ... told the IEP team that [Student] will need hip surgery and that she should avoid running during PE, but her PE teacher ignored that. Therefore, it was reasonably foreseeable that Student was struggling in PE in the 2021-2022 school year. However, District [did] not conduct [] an assessment in adapted physical education (APE) for the 12/6/2021 IEP meeting."

In closing argument, Student asserts she was first eligible for special education and related services when she was three years old in 2010 under the category of orthopedically impaired due to cerebral palsy. Therefore, when she entered high school, her "IEP record clearly identified the need for an Adaptive [*sic*] Physical Education assessment, but none was conducted."

Elk Grove contends Student failed to present any evidence regarding a suspected need for adapted physical education such that an assessment was warranted.

The IDEA defines "special education" as specially designed instruction to meet the unique needs of a child with a disability, including instruction conducted in the classroom, in the home, in hospitals and institutions, and in other settings, and including instruction in physical education. (20 U.S.C. § 1401(29)(A)&(B); 34 C.F.R. § 300.39(a)(1); see also Ed. Code, § 56031, subd. (a).)

"Physical education" is defined by federal regulation as the development of:

- physical and motor fitness;
- fundamental motor skills and patterns; and
- skills in aquatics, dance, and individual and group games and sports.

The federal definition of physical education "includes special physical education, adapted physical education, movement education, and motor development." (34 C.F.R. § 300.39(b)(2).)

The term “special physical education” is only used again in the federal regulations as a heading:

“Special physical education. If specially designed physical education is prescribed in a child’s IEP, the public agency responsible for the education of that child must provide services directly or make arrangements for those services to be provided through other public or private programs.”
(34 C.F.R. § 300.108(c).)

In all other places, the term “specially designed physical education” is used, for example, to distinguish it from “regular physical education”:

“each child with a disability must be afforded the opportunity to participate in the regular physical education program available to nondisabled children unless the child is enrolled fulltime in a separate facility; or [t]he child needs specially designed physical education, as prescribed in the child’s IEP.” (34 C.F.R. § 300.108(b).)

It bears repeating, Students with disabilities “must be afforded the opportunity to participate in the regular physical education program available to nondisabled children unless ... the child needs specially designed physical education, as prescribed in the child’s IEP.” (34 C.F.R. § 300.108(b)(2).)

California defines “adapted physical education” only as follows, by referring to other categories of physical education:

Adapted physical education is for individuals with exceptional needs who require developmental or corrective instruction and who are precluded

from participation in the activities of the general physical education program, modified general physical education program, or in a specially designed physical education program in a special class. Consultative services may be provided to pupils, parents, teachers, or other school personnel for the purpose of identifying supplementary aids and services or modifications necessary for successful participation in the regular 'D' Physical education program or specially designed physical education programs. (Cal. Code. Regs., tit. 5, § 3051.5(a).)

Student attended regular education physical education in ninth grade with teacher Susan Jordan. Jordan held a single-subject teaching credential in physical education. She taught physical education for Elk Grove for 34 years before she retired at the end of the 2021-2022 school year. In the 2021-2022 school year, Jordan taught a total of six general education physical education classes each term. Some of her classes included students from the independent living skills self-contained class. When students from the independent living skills class were in one of Jordan's general education physical education classes, a classroom aide also came from the independent living skills classroom, to support those students on an as-needed basis.

Jordan testified Student adequately participated in all the activities of general education physical education. The only specific modification for Student was for running. Lemieux informed Jordan Student had a hip issue that required modification for her running. When other students were required to run, Student was told to do what she could, and if she needed to walk, she could walk. Student did not express concern or problems about that to Jordan. Student was not required to run to earn a grade in the class. Student sometimes did run, then stopped running and started

walking. Student never told Jordan she had discomfort after physical education class due to running. Student was able to and did participate in all other activities the students participated in.

All students from the independent living skills class had modified grading in general education physical education, but not modified activities except as explained about for Student's running. For example, general education students were scored on physical fitness testing activities based on their actual performance in tasks like push-ups, curl-ups, flexibility, and cardiovascular fitness. A chart determined, as one requirement, how many push-ups were required to earn a C grade, and how many were required for a B or an A. General education students were graded according to the chart. Special education students earned a C if they even attempted the test at all. And, if they completed a number of push-ups higher than that required to earn a C, they earned the grade for their actual physical achievement. If special education students refused to attempt the physical fitness test, or were absent, they scored a zero but had the opportunity to make up the test.

Jordan did not test Student's cardiovascular fitness, because of Student's modification for running. But other physical fitness testing for Student was not modified in how it was tested, only how it was graded. Jordan observed that Student made progress in physical education based on her fitness testing results and Jordan's observations of Student's daily warm-ups. Student's physical fitness scores on average were lower than other girls' scores in the class, and in fact were low in relation to other female students. However, low fitness scores did not indicate a need for adapted

physical education. Muscular strength and endurance can be developed, unlike eye-hand coordination that might require extra work from a specialist to bring about improvement.

Jordan opined Student did not need adapted physical education. Student had modifications to general education physical education that allowed her to attend and be successful in general education physical education. Jordan did not believe Student required one-to-one attention to work on specific skills in a small environment, pulled out of general education by an adapted physical education teacher. In Jordan's class, Student improved physically and socially.

Adapted physical education teacher Brigette Valenzuela-Keilig had a single-subject teaching credential in physical education with an adapted physical education supplement. She taught general education physical education for 11 years and had been teaching adapted physical education for students with disabilities for five years at the time of the hearing. Valenzuela-Keilig described adapted physical education as specialized instruction for students with disabilities who could not participate in general education physical education with accommodations, to address their gross motor development. She opined if a student required modifications in physical education, that did not mean the student should be referred for adapted physical education. She explained a student might require a modification for skills related to one sport like soccer but not for another sport like basketball, and that did not mean the student required adapted physical education.

Valenzuela-Keilig was in the gym along with many general education physical education classes when any of the students she served attended a general education physical education class. She regularly consulted with general education physical

education teachers regarding their students whenever she was there, approximately one to two times per week. Jordan did not present to Valenzuela-Keilig any concerns about Student, and Valenzuela-Keilig did not notice Student having difficulties that would have caused her to approach Jordan about Student's possible need for adapted physical education.

As stated above in Issue 1, on November 1, 2021, Lemieux and Parent had a telephone conference to discuss the need for a three-year-review reevaluation of Student's eligibility for special education and related services. Elk Grove and Parent considered in what areas additional data should be gathered, and determined there were some areas of assessment needed to complete an appropriate three-year-review reevaluation. Lemieux and Parent reviewed Student's motor development as it related to three categories of services: occupational therapy, physical therapy, and adapted physical education. In all three separate categories, the three-year-review reevaluation worksheet documented "motor skills not impeding progress" and therefore no additional data would be gathered related to these three related services to confirm eligibility, to understand areas of current deficit, to consider progress made, or to update Student's ongoing goal and service needs.

Elk Grove therefore did not propose collecting data in motor development for the three-year-review reevaluation. Parent did not request data collection regarding Student's motor development in any area that would be addressed by occupational therapy, physical therapy, or, adapted physical education.

Parent received the three-year-review reevaluation worksheet and did not add information in the area where a parent was afforded space to write in requests for assessment in additional areas. On November 7, 2021, Parent signed the worksheet

and determination form agreeing assessment was needed in the areas, and only the areas, marked on that document. Lemieux signed the form on November 10, 2021, confirming she reviewed the data on the form and involved Parent in the process of determining the need for additional formal assessment in various areas for triennial planning purposes.

After Lemieux and Parent met on November 1, 2021, in addition to the three-year-review reevaluation worksheet, Elk Grove sent Parent a written assessment plan dated November 3, 2021, seeking Parent's consent to the selected assessments. The assessment plan form listed among the common options an assessment of a student's motor development, but, consistent with the analysis on the three-year-review reevaluation worksheet, the November 3, 2021 assessment plan for Student did not have that option selected. On November 7, 2021, Parent signed consent to the proposed assessments, and only the selected assessments, marked on the assessment plan. Elk Grove received the signed assessment plan on November 10, 2021.

No witnesses presented any evidence that suggested Student could not participate in general education physical education. There was no evidence Student should have been assessed in fall 2021 for whether she required adapted physical education to obtain educational benefit.

Student called her 10th grade general education physical education teacher, Megan Hill, as a witness. While not directly probative of Student's need for an assessment for adapted physical education in fall 2021, her testimony about Student's performance in general education physical education in the 2022-2023 school year further demonstrated Student did not require an assessment for adapted physical education. Hill described Student's participation in a general education physical

education class that had 46 students in total, including about eight special education students. Student had the physical skills to participate in all the physical activities the class did. She did not run as fast as typical students in the class, but she threw and caught a ball as well as the typical students. Hill described Student as doing everything except running at a typical level. Student followed instructions and did not have trouble following directions that required knowledge of a game. Student did not ask to sit out activities, and she participated in all team sports during regular general education physical education.

Student failed to offer any evidence to support her assertion that before December 6, 2021, she required an assessment of her need for adapted physical education. Student did not establish there was any reason to suspect Student required developmental or corrective instruction and was “precluded from participation in the activities of the general physical education program [or] modified general physical education program.” (Cal. Code. Regs., tit. 5, § 3051.5(a).)

Student failed to prove by a preponderance of the evidence that Elk Grove denied her a FAPE by failing to assess Student’s need for adapted physical education for the IEP team meeting on December 6, 2021.

ISSUE 3: PREDETERMINATION BY FAILING TO HAVE A GENERAL EDUCATION TEACHER ATTEND THE DECEMBER 6, 2021 IEP TEAM MEETING

Student contends Elk Grove predetermined the December 6, 2021 IEP offer by failing to have a general education teacher attend the IEP team meeting on December 6, 2021. Student alleged in her complaint “the General/Education Teacher was excused” but “the General Education teacher is a *mandatory* IEP team member.” (Original italics.).

Student also alleged in her complaint the absence of a general education teacher at the December 6, 2021 IEP team meeting means the IEP was “a pre-determined IEP” because

“Student’s services, accommodations and placement were decided by the District alone, without integrating the General Education teacher, and at the end of the IEP team meeting, Parent had no possibility to ask the GenEd teacher questions nor to receive answers from the Student’s teacher regarding a GenEd setting.”

Student’s written closing argument asserts Elk Grove did not properly obtain Parent’s consent to excuse the general education teachers because Elk Grove gave Parent the form to excuse them at the time of the meeting.

Elk Grove contends Parent signed a written form excusing Student’s two general education teachers from the December 6, 2021 IEP team meeting, and the teachers provided written input regarding Student’s participation and progress in their classes. Therefore, based on Parent’s consent and Elk Grove’s compliance with statutory requirements Elk Grove contends that a general education teacher was not a required member of the December 6, 2021 IEP team. Elk Grove also contends the December 6, 2021 IEP was not predetermined by the absence of a general education teacher.

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 Missoula, Mont.* (9th Cir. 1992) 960 F.2d 1479, 1485, superseded in part by statute on other grounds.) “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 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. v. Vashon Island School Dist.* (9th Cir. 2003) 337 F.3d 1115, 1131, superseded on other grounds by statute (*Ms. S.*))

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 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.)

An IEP need not conform to a parent's wishes to be sufficient or appropriate. (*Shaw v. District of Columbia* (D.D.C. 2002) 238 F. Supp. 2d 127, 139 [IDEA did not provide for an "education ... designed according to the parent's desires"] (*Shaw*); see *J.R. v. Sylvan Union School Dist.* (E.D.Cal., March 10, 2008, No. CIV S-06-2136 LKK GGH PS) 2008 WL 682595, **10-11.) A school district is not required to place a student in a program

preferred by a parent, even if that program will result in greater educational benefit to the student. (*Shaw, supra*, 238 F. Supp. at p. 139.) A school district has the right to select the program offered, as long as the program is able to meet the student's needs, and the district is ultimately responsible for ensuring a FAPE is offered. (*Letter to Richards* (OSEP January 7, 2010).) The Ninth Circuit has held that while the school district must allow for meaningful parental participation, it has no obligation to grant the parent a veto over any individual IEP provision. (*Ms. S., supra*, 337 F.3d at p. 1131.)

An IEP team shall include not less than one regular education teacher of the student, if the student is or may be participating in the regular education environment. (Ed. Code, § 56341, subd. (b)(2); see also 34 C.F.R. § 300.321(a).) However, among other exceptions, a general education teacher is not required to attend an IEP team meeting, in whole or in part, if the parent of the student and the school district agree, in writing, that the attendance of the general education teacher "is not necessary because that [excused] member's area of the curriculum or related services is not being modified or discussed in the meeting." (Ed. Code, § 56341, subd. (f); see also 34 C.F.R. § 300.321(e)(1).)

Additionally, a general education teacher is not required to attend an IEP team meeting, in whole or in part, if the parent of the student and the school district "consent to the excusal after conferring with the [excused] member," and the general education teacher "submits, in writing, to the parent and the [IEP] team input into the development of the [IEP] prior to the meeting." (Ed. Code, § 56341, subd. (g)(2); see also 34 C.F.R. § 300.321(e)(2).)

In preparation for Student's annual and three-year-review IEP team meeting, Lemieux contacted Student's two general education teachers, Jordan for physical education and Sheila Folan for the elective Floral Design. Lemieux gave each a form

called Student Progress Summary to complete and return to her before the IEP team meeting date. Both teachers returned the completed forms to Lemieux. Lemieux gave Parent and the other IEP team members copies on December 6, 2021.

Folan provided information about Student's participation in Floral Design, a year- long course with approximately 30 students. The course involved project-based learning including the propagation of plants and use of florals as an art medium. Folan sometimes modified or differentiated assignments for Student, such as by making them shorter, but Student attained a level Folan deemed needed to be modified for Student for her to complete tasks at the same time as the other students. Folan allowed Student extra time for assignments, sometimes by minutes in the class period or extra days depending on the enormity of the assignment. She allowed Student to work with a peer, or a paraeducator in the classroom at any time. Folan monitored Student's progress and checked for and ensured understanding as often as possible. Folan and a paraeducator provided Student what Folan testified was a lot of one-on-one time. Student asked questions when she wanted clarification or assistance, and she chose good times to ask questions and for assistance either from a paraeducator or Folan directly.

On the Student Progress Summary, Folan's general comment was that Student worked hard in class, turned in everything in a timely manner, and participated fully in all design work. Folan checked boxes indicating how frequently Student demonstrated various skills and behaviors, and rated Student very positively. Folan also provided short responses to the form's inquiries about other specific topics.

Physical education teacher Jordan's general comment about Student on the Student Progress Summary form was that Jordan enjoyed having Student in class

because Student was a positive young lady who jumped in and participated daily. Jordan checked boxes indicating how frequently Student demonstrated various skills and behaviors, and also rated Student very positively. Jordan, too, provided short responses to the form's inquiries about other specific topics. She indicated check-ins and reminders worked well in class to help Student. Student's comprehension skills were lower in relation to grade-level peers, and Student struggled with muscular endurance and cardiovascular activities. Her fitness scores were low for her grade level, but her classroom behavior was "awesome."

On December 6, 2021, Lemieux gave Parent Folan and Jordan's written input. She also gave Parent a form IEP Team Member Excusal, which Lemieux had completed to seek Parent's consent to excuse Folan and Jordan from attending the IEP team meeting. The form indicated Elk Grove was seeking Parent's consent to excuse both of Student's general education teachers, who taught physical education and "floral." The form indicated those teachers' "area of curriculum or related services is not being discussed or modified." The form also indicated "written input has been submitted to the parent and the IEP team prior to the meeting regarding area of curriculum or related services." Finally, the form indicated these teachers would be excused from the whole, not just a part, of the IEP team meeting.

Lemieux explained to Parent what the form meant, by stating the general education teachers for physical education and Student's floral design class were unable to attend and informing Parent that if, given the teachers' written reports, Parent

“was OK with them not attending,” Parent could sign consent. Parent did not express concern about the two general education teachers not attending, and signed consent. Kara Lack, a program specialist attending the December 6, 2021 IEP team meeting as an administrative designee, signed the IEP Team Member Excusal on behalf of Elk Grove. The IEP team meeting then proceeded without the general education teachers.

Elk Grove sought and obtained from Parent a valid waiver of the attendance of any general education teacher. Parent could have refused to waive the attendance of either or both general education teachers. The IEP team meeting would have been rescheduled to a date when the general education teachers could attend, had Parent declined Elk Grove’s request to waive their attendance. But Parent and the rest of the IEP team were provided with the general education teachers’ written input, and Parent agreed in writing to neither general education teacher attending the meeting.

Therefore, Student failed to prove by a preponderance of the evidence that Elk Grove predetermined the December 6, 2021 IEP offer by failing to have a general education teacher attend the IEP team meeting on December 6, 2021.

In written closing argument, Student attempted to revive a claim attorney Sheila Bayne explicitly withdrew during the prehearing conference on May 19, 2023. This is especially improper because Bayne signed Student’s written closing argument. In written closing argument, Student argues OAH improperly limited Student’s Issue 3 and “denied [Student] the opportunity to address” additional claims of predetermination stated in Student’s complaint “during the evidentiary presentation.” Student argues

the December 6, 2021 IEP was predetermined because Parent was denied meaningful participation because, as alleged in the complaint, "Parent stated [Student] asked to see the psychologist, but she was told that this is not possible, and that everything is fine with her."

During the prehearing conference, the Administrative Law Judge asked Bayne to clarify the allegation in the complaint regarding someone asking about the school psychologist, specifically whether the pronoun "she" in a particular sentence referred to Parent or Student being told it was not possible to see the psychologist. Bayne, who signed Student's complaint, did not know what the sentence referred to. The Administrative Law Judge gave Bayne multiple and lengthy opportunities to review the exhibits she intended to use at hearing, to contact Parent, and otherwise investigate the allegation during the prehearing conference so the Order Following Prehearing Conference could accurately state the Issue Student had attempted to plead and intended to prove. After ample opportunity to clarify the allegation, Bayne requested to withdraw the issue. The Order Following Prehearing Conference listed the Issues remaining in the case, and specifically noted, "Student explicitly withdrew any issues regarding predetermination of the December 6, 2021 or March 23, 2022 IEPs due to something related to Parent's comment or question about a psychologist."

Student's attempt to resuscitate a withdrawn claim and expand the issues for hearing, or use a withdrawn claim to advance Student's remaining issue about predetermination on a different basis, is rejected.

ISSUE 4: THE DECEMBER 6, 2021 IEP

ISSUE 4(a): SUFFICIENTLY AMBITIOUS GOALS

Student contends Elk Grove denied her a FAPE by failing to offer appropriate goals in the December 6, 2021 IEP because the goals offered were not sufficiently ambitious. Student alleged the 2021 IEP annual goals

“were inadequate because they offered nothing more than de minimus [*sic*] increases in goals at best -- mostly, no changes in goals at all -- which neither added new skills in areas of need nor made substantive progress in existing skills.”

Student argues the goals of the December 6, 2021 IEP were weak and unambitious.

Elk Grove contends each goal in the December 6, 2021 IEP was appropriately ambitious.

The purpose of annual goals is to permit the IEP team to determine whether the pupil is making progress in an area of need. (Ed. Code, § 56345, subd. (a).) For each area in which a special education student has an identified need, the IEP team must develop measurable annual goals that are based upon the child’s present levels of academic achievement and functional performance, and which the child has a reasonable chance of attaining within a year. (Ed. Code, § 56345; *Letter to Butler* (OSERS March 25, 1988); Notice of Interpretation, Appendix A to 34 C.F.R., part 300, Question 4 (1999 regulations).) The IEP team need not draft IEP goals in a manner that the parents find optimal, as long as the goals are objectively measurable. (*Bridges ex rel. F.B. v. Spartanburg County School Dist. Two* (D.S.C., Sept. 2, 2011,

No. 7:10-CV-01873-JMC) 2011 WL 3882850 [the use of percentages tied to the completion of discrete tasks was an appropriate way to measure student progress].)

The IEP must include appropriate objective criteria, evaluation procedures, and schedules for determining, on at least an annual basis, whether the annual goals are being achieved, and a statement of how the student's progress toward the goals will be measured. (*Jessica E. v. Compton Unified School Dist.* (C.D.Cal., May 2, 2017, No. CV16-04356-BRO (MRWx)) 2017 WL 2864945; see also 20 U.S.C. § 1414(d)(1)(A)(i)(II) & (III); Ed. Code, § 56345, subd. (a)(2) & (3).) An examination of the goals in an IEP is central to the determination of whether a student received a FAPE: "[W]e look to the [IEP] goals and goal achieving methods at the time the plan was implemented and ask whether these methods were reasonably calculated to confer ... a meaningful benefit." (*Adams, supra*, 195 F.3d at p. 1149.)

Rowley, supra, did not provide concrete guidance with respect to a child who is not fully integrated in the regular classroom and not able to achieve on grade level, as the student in *Rowley* did. In *Endrew F.*, the Supreme Court elaborated that a student's IEP need not aim for grade-level advancement if that is not a reasonable prospect.

"But his educational program must be appropriately ambitious in light of his circumstances, just as advancement from grade to grade is appropriately ambitious for most children in the regular classroom. The goals may differ, but every child should have the chance to meet challenging objectives." (*Endrew F., supra*, 580 U.S. at p. 402 [137 S.Ct. at p. 1000].)

SPEECH AND LANGUAGE GOAL

Student first attacks the speech and language goal from the December 6, 2021 IEP. In short, Student argues the December 6, 2021 IEP proposed no new speech and language goal and therefore was inadequate. Student does not otherwise explain how the continuation of the expressive language goal Student had not yet met, as explained above in Issue 1, was not sufficiently ambitious for Student to continue working on until the language/speech communication development assessment was completed and reviewed by the IEP team.

MATH GOAL

Student next attacks the academic goals of the December 6, 2021 IEP. The IEP team reviewed Student's progress on her goals from the December 2020 IEP, as well as the results of the academic testing conducted as part of the three-year reassessment.

As of December 2020, Student used a multiplication chart to multiply and divide, and correctly multiplied two digits by one digit, three digits by one digit, and two digits by two digits when the answers did not require carrying a number to the next place value. The December 2020 IEP did not document the percentage of her accuracy at these tasks as of December 2020. As of December 2020, Student correctly solved addition and subtraction of fractions with common denominators, but did not reduce her answers. And as of December 2020, Student knew the four coins and their values and counted common coins up to \$1.00 but had more difficulty counting mixed coins. After reviewing Student's progress on the three math goals of the December 2019 IEP, the December 2020 IEP team developed one math goal for Student. The math goal was for Student to solve positive one-step equations, five of each kind of addition,

subtraction, multiplication, and division, with one variable, showing her work by doing the opposite operation, on two trials each with at least 80 percent accuracy, by December 2021.

In December 2021, when given access to her class notes, Student solved positive one-step equations, five of each kind of addition, subtraction, multiplication, and division, with one variable, showing her work by doing the opposite operation, with 91 percent accuracy. The IEP team determined Student met the math goal from her December 2020 IEP and recommended discontinuing the goal.

Penaloza's psychoeducational assessment included a standardized achievement subtest in math computation. Penaloza assessed some aspects of academic achievement to consider if Student was benefitting from the supports and services in her program, and to understand how Student functioned in comparison to her general education peers. Student's performance was well below average. Her standard score was 69, in the second percentile, in the low range. Her age equivalent was eight years, four months. Her grade equivalent was the beginning of third grade.

Lemieux administered an academic achievement assessment in math, which was a computational assessment on which Student used pencil and paper to solve written computational problems. On three different instruments, Student performed work at the third grade level, up to the third grade, third month level. Student's computational skills were the abilities to add multi-digit numbers with regrouping, subtract multi-digit numbers without regrouping, and multiply three-digit numbers by a one-digit number, with prompting.

Adding with regrouping meant that when adding together digits in the ones, tens, or hundreds place values, the sum could be 10 or higher, so it was necessary to

increase the next place value by one. Subtracting without regrouping meant that when subtracting one digit from another digit in the ones, tens, or hundreds place values, the number being subtracted was never larger than the number from which it was subtracted, so it was not necessary to reduce the next place value by one. Subtracting with regrouping meant that when subtracting one digit from another in the ones, tens, or hundreds place values, the number being subtracted was larger than the number from which it was subtracted, so it was necessary to reduce the next place value by one.

Because Student could not yet subtract with regrouping, Lemieux proposed a new annual math goal for Student to independently compute the answers without a calculator for at least 10 subtraction problems with two- to three-digit numbers and regrouping, with 80 percent accuracy in three out of four trials as measured by student work samples, by December 2022.

At hearing, Parent asserted Student demonstrated this skill at a younger age and that the proposed goal was therefore not ambitious. Parent claimed she taught Student subtraction with regrouping when Student attended in distance learning during spring 2020 through early spring 2021 due to school campus closures in response to the COVID-19 pandemic. Parent asserted she knew Student mastered regrouping because she continually gave Student different problems on a page and when she did them right, Parent “figured she had caught on.” Parent said when Student did not get the problems right, they did them again.

However, at the December 6, 2021 IEP team meeting, Parent did not share her opinion that the math goal was not sufficiently ambitious, or propose a different, more appropriate in her opinion, math goal. Further, Parent testified she believed the results

of Lemieux's academic achievement testing were accurate and that at the time Student took the computational assessments, she did not demonstrate the skill of multi-digit subtraction with regrouping. Parent agreed at the hearing that if Student had not satisfactorily performed subtraction with regrouping on the day of the testing, the goal Lemieux proposed in that area was appropriate.

Lemieux testified the proposed math goal targeted a subtraction math skill Student had not yet mastered. It was necessary for working on other skills in the class related to life skills, like working with money.

Given the historically slow progress Student made in math skills and data reflecting her present level of performance in math, the math goal of the December 6, 2021 IEP was sufficiently ambitious. Student failed to present persuasive evidence to rebut the opinion of Student's highly qualified special education teacher that the December 6, 2021 math goal was appropriately challenging for Student.

WRITING GOAL

As of December 2020, Student read third grade text and answered an average of 55 to 80 percent of questions correctly on an informal assessment. When reading short passages, Student answered literal questions directly from the text at a third-grade instructional level and fourth-grade frustration level. Also, Student correctly read 95 out of 100 Edmark Grocery words, correctly read seven out of eight words that had two to three syllables and ended in "le," and correctly read seven out of eight closed-syllable words. Student had more difficulty with words that were three or more syllables. The IEP team did not develop a reading goal for the December 2020 IEP.

In December 2021, Lemieux reported to the IEP team the results of the academic achievement assessments in reading. On a list of 250 words that often cannot be represented by illustrations or sounded out phonetically and instead need to be recognized by sight, and which make up about 50 to 75 percent of the words in children's books, Student correctly read 244 of them. The San Diego Quick, a screening test to determine a student's reading level, indicated Student read at the third grade, zero months level. The Slosson Oral Reading Test for decoding reading indicated Student read at the third grade, sixth month level. And the Jerry John's Reading Comprehension Subtest indicated Student's comprehension level was at the sixth grade, zero months level. Lemieux's report explained that meant Student's reading comprehension was up to a sixth grade level when answering literal questions.

Penaloza's psychoeducational assessment included a standardized achievement subtest in letter and word recognition. Student's standard score was 68, in the second percentile, in the low range. Her age equivalent was eight years, seven months. Her grade equivalent was third grade, one month.

The 2019 IEP had one writing goal. That goal did not state what Student's present level of performance was in writing as of December 2019. The December 2019 IEP writing goal was for Student to engage in teacher-led pre-writing activities and then compose a single paragraph including a topic sentence, supporting sentences, and a concluding sentence with 80 percent accuracy in three of four trials and receiving a "3" on the school district's writing rubric as measured by student work samples, by December 2020. As of December 2020, Student wrote good topic sentences and was on topic. She remembered to use a capital letter and period. But she had not achieved the writing goal from the December 2019 IEP, and the December 2020 IEP team retained the same writing goal from December 2019, but with a new anticipated date of achievement of December 2021.

As of December 2021, Student wrote complete sentences and was working on adding supporting detail sentences with a graphic organizer. She still did not achieve the writing goal of performing the target tasks with 80 percent accuracy, as she was rated at 65 percent accuracy. The IEP team recommended the goal be continued with modifications. Lemieux explained at hearing that the proposed goal was written to help her meet the goal she had not previously met by giving Student more tools like a graphic organizer.

Because Student could not yet compose a paragraph with the parameters and at the accuracy level targeted, Lemieux proposed a new annual writing goal for Student to use a graphic organizer such as a “hamburger” paragraph guide and a reading passage and/or writing prompt to independently write a five sentence explanatory paragraph with a topic sentence, three supporting details, and a concluding sentence with 80 percent accuracy in three out of four trials as demonstrated by Student work samples, by December 2022.

At hearing, Parent testified she recalled the IEP team discussing the new writing goal but did not recall if she shared any concerns about the goal or asked any questions about the goal. The evidence established that at the December 6, 2021 IEP team meeting, Parent did not share any opinion that the new writing goal was not sufficiently ambitious or propose a different writing goal she thought was more appropriate.

Given the historically slow progress Student made in writing skills, and data reflecting her present level of performance in writing, the writing goal of the December 6, 2021 IEP was sufficiently ambitious. Student failed to present persuasive evidence to rebut the opinion of Student’s highly qualified special education teacher that the December 6, 2021 writing goal was appropriately challenging for Student.

FUNCTIONAL ACADEMICS – PERSONAL INFORMATION GOAL

In the domain of functional skills, Lemieux documented in the Triennial Assessment/Annual Review, also called Teacher Report, that as of December 2021, Student knew much of her personal information such as her

- full name,
- full address,
- birthday,
- signature,
- parent name and phone number,
- school name, and
- school identification number.

As an adaptive/daily living skill, Student independently used her school identification number while going through the cafeteria.

In her Teacher Report, Lemieux proposed a new goal area for Student, in functional academics regarding personal information. Lemieux proposed that within one year, Student would independently fill out applications or similar forms that requested more extensive personal information such as emergency contact, doctor, school information, etc., by filling in the proper information with 90 percent accuracy in three of four trials as measured by student work samples and/or staff observation/data.

During the December 6, 2021 IEP team meeting, Parent told the IEP team Student already knew that information, and Lemieux agreed Student knew most of it. Parent testified that is when the IEP team said they would work on adding doctor's information. Parent testified Student knew her doctor and medical information, but Parent did not

want the school teaching Student her doctor's phone number because knowing Student, if she knew a phone number, she would call it, and Parent did not want Student calling the doctor all day. Parent testified she thought the goal was beneficial, but did not think it challenged Student because she already knew that information.

When Student's attorney asked Parent what she thought would have been a better goal, Parent testified she didn't know, maybe filling out applications, or how to write a check, or withdraw money from a bank. When Elk Grove's attorney asked Parent follow-up questions about thinking a better functional academics goal would have been about filling out applications, Parent asserted she understood what the goal required Student to do, but "if she already knew it, why would we keep using it as a goal?" Parent's testimony ignored the fact that the proposed goal was, specifically, about Student using information she knew to independently, properly, fill out applications and other forms that required more extensive personal information.

On redirect, Parent testified she thought the goal would not help Student achieve past her baseline because she already knew the information and she was basically just sitting and wasting her teacher's time and her own time. Parent testified as of December 2021, Parent was helping Student fill out forms and Student was doing forms "about half the time, it seemed like a 50 percent ability thing." However, the evidence established that at the December 6, 2021 IEP team meeting, Parent did not share any opinion that the functional academics goal was not sufficiently ambitious or propose a different functional academics goal she thought was more appropriate. And significantly, the proposed goal addressed something Parent acknowledged was important for Student to do beyond merely knowing the personal information, but accurately using it to complete

applications and forms. The proposed goal included a target of 90 percent accuracy, a significant increase from what Parent later opined was a skill Student was performing with only 50 percent accuracy.

Lemieux testified the functional academics goal regarding personal information was working toward the ability to relay to others personal information Student knew, and related to job-readiness skills of completing application forms. The goal would use Student's reading skills and was targeted to functional academics.

The functional academics goal regarding personal information in the December 6, 2021 IEP was sufficiently ambitious. Student needed to gain independence in completing applications and other forms that required extensive personal information. The information the December 6, 2021 IEP team had regarding Student's ability, and Parent's after-the-fact admission that Student was only 50 percent accurate at completing applications and forms regarding personal information in December 2021, supported the appropriateness of the functional academics goal. Student failed to present persuasive evidence to rebut the opinion of Student's highly qualified special education teacher that the December 6, 2021 functional academics goal was appropriately challenging for Student.

Penaloza also believed all the goals offered in the December 6, 2021 IEP were appropriate, and he would have spoken up at the IEP team meeting if he thought they were inappropriate. Student failed to present persuasive evidence to rebut the opinion of the highly qualified school psychologist that the December 6, 2021 goals were appropriately challenging for Student.

Overall and in all domains, Student demonstrated abilities and performance in the low range. She made progress, albeit very slowly, toward all her goals from the

December 2020 IEP, commensurate with her cognitive abilities. She met her math goal, did not meet her writing goal, and did not meet her expressive communication goal. Elk Grove developed new goals in math, writing, and functional academics. Elk Grove deferred discussion of Student's expressive communication goal and any other goal in speech and language until the language/speech communication development assessment was completed and reviewed by the IEP team. Based on Student's history and progress, Elk Grove offered sufficiently ambitious new annual goals in the December 6, 2021 IEP.

POST-SECONDARY TRANSITION GOAL

Finally, Student challenged the post-secondary transition goals in the portion of the December 6, 2021 IEP labeled "individual transition planning," also called an ITP. Student's dispute regarding post-secondary transition services offered in the December 6, 2021 IEP and ITP is addressed in Issue 4(c)(ii), below. In this part of Issue 4(a), the focus is on whether the post-secondary transition goals were sufficiently ambitious.

Beginning not later than the first IEP to be in effect when a student with a disability is 16 years old, and updated annually thereafter, the IEP must include appropriate, measurable, post-secondary goals based upon age-appropriate transition assessments related to training, education, employment, and, where appropriate, independent living skills. (20 U.S.C. § 1414(d)(1)(A)(i)(VIII)(aa)-(bb); 34 C.F.R. § 300.320(b); Ed. Code, § 56345, subd. (a)(8).) Every such IEP must also include transition services to assist the student in reaching those post-secondary goals. (*Ibid.*) If determined appropriate by the IEP team, transition services may begin earlier than the IEP in effect at age 16. (34 C.F.R. § 300.32(b); Ed. Code § 56345, subd. (a)(8); 71 Fed. Reg. 46667 (August 14, 2006).)

Student argues the fact that the December 6, 2021 IEP included an ITP with post-secondary goals in training or education, employment, and independent living means the IEP team determined it was appropriate for Student, specifically, to have an ITP with goals and transition services. Elk Grove argues Student's December 6, 2021 IEP team did not determine it was appropriate for Student to have transition goals and services but merely implemented a district-wide policy of doing individual transition planning for all special education students starting at age 14. Program specialist Lack testified Elk Grove started transition planning younger than the law required because it was good practice. She stated the transition planning changes as students get older, and starting early helped Elk Grove know how to prepare each student for life after high school and transition students through high school to an adult transition program or college/career readiness.

The evidence did not support any interpretation that Student's December 6, 2021 IEP team determined it was appropriate for Student to have an ITP. The evidence established Elk Grove employees complied with a district-wide policy for all special education students to begin individual transition planning at age 14. At the time of the December 6, 2021 IEP team meeting, Student was 14 years old, and would turn 15 in three months. In Student's independent living skills class, on September 1, 2021, Student completed a written survey that was part of the Unique Learning System curriculum about "where [she] would like to live." Student's selections from among a variety of options documented her desire, as of September 2021, to live in the city, on a quiet street, in a house, alone or with a boyfriend/girlfriend, and near a grocery store, park, library, laundry mat, her church, and her job.

Student also completed three job interest surveys, which each proposed four different jobs in specific settings. Student indicated whether she was interested, not

interested, or wanted to learn more about each of the four jobs on the page. Student was interested in one job from one survey, two jobs from a second survey, and none of the jobs on the third survey. She did not want more information about any jobs. Student's selections documented she was interested in patient care at an assisted living center, clerical work in an office, and animal care in a pet supply store. None of the surveys included job options in cosmetology such as hair styling, but Elk Grove staff seemed to know Student had expressed interest in being a hair stylist. Parent also knew Student talked about wanting to be a hairdresser, and hoping she would get to go to beauty college so she could be a hairdresser. None of the surveys included job options in the culinary arts, but Elk Grove staff and Parent had also heard Student express interest in culinary arts for future employment.

At 14 years of age, Student did not yet have a right to individual transition planning under the IDEA or California law. And the December 6, 2021 IEP team did not "determine" that it was appropriate for Student, younger than 16, to have individual transition planning. Therefore, Student cannot establish that Elk Grove denied her a FAPE in the December 6, 2021 IEP by failing to offer Student sufficiently ambitious post-secondary transition goals.

Student conceded this point during the prehearing conference on May 19, 2023. Attorney Bayne and the Administrative Law Judge engaged in specific discussion about Student's complaint, its allegations, and the issues Student pleaded. Bayne agreed there were two IEP documents, one dated December 6, 2021, and the other dated March 23, 2022. Bayne agreed to discuss the claims Student presented regarding each document separately. While discussing the assessments Student alleged should have been done for the December 6, 2021 IEP team meeting, Bayne raised the allegation about Elk Grove's failure to assess Student's need for transition services. The Administrative Law

Judge stated she understood Student's allegation about the denial of FAPE for failing to assess Student's need for transition services as relating to the March 23, 2022 IEP, because Student was not going to turn 16 within a year from December 6, 2021, as she was 14 years old in December 2021 and her birthday was mid-March. Bayne stated, "Ah, yes, yeah, that's correct."

Additionally, even assuming Student was legally entitled to an ITP with post-secondary transition goals, Student did not prove by a preponderance of the evidence that the post-secondary transition goals in training or education, employment, and independent living were not sufficiently ambitious for Student. All the goals concerned what Student would do after she finished school. Because Student was on the alternate curriculum pursuing a certificate of completion, she was eligible for special education and related services until she was 22 years old.

The December 6, 2021 IEP post-secondary goal regarding training or education was, "upon completion of school," Student would go to an adult program to explore vocational classes, and noted that "right now," when Student was 14 years old, she was interested in "cosmetology (hair) and culinary." Student incomprehensibly argued, "This goal was inappropriate and denied Student a FAPE as she attempted to deliver her post-secondary educational and vocational skills and knowledge." Student, through Parent's testimony, asserted her real career goals were to be a hair stylist, or to work in culinary arts. Both require specific training and education. The post-secondary training or education goal regarding vocational classes at an adult program, likely focused on cosmetology or culinary skills, after Student finished school was sufficiently ambitious for Student at age 14.

The December 6, 2021 IEP post-secondary goal regarding employment was, "upon completion of school," Student would obtain employment in a setting where she could work with animals, and noted that "right now," when Student was 14 years old, she was interested in "working at Pet Smart." Student argued the goal was "entirely lacking in ambition." Student hired Certified Transition Specialist Judith Imperatore after there had already been six days of testimony in the case. None of Imperatore's testimony established this post secondary employment goal – to which Student had no legal right – was not sufficiently ambitious.

The December 6, 2021 IEP post-secondary goal regarding independent living was, "upon completion of school," Student would "live on [her] own, but [she] will still need support." Student made no argument regarding the independent living goal and its level of ambition.

Parent consented to the December 2021 IEP, and Elk Grove implemented it the rest of the 2021-2022 school year.

Student failed to establish by a preponderance of the evidence Elk Grove denied her a FAPE by failing to develop sufficiently ambitious goals in the December 6, 2021 IEP.

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ISSUE 4(b): APPROPRIATE PLACEMENT

Student contends Elk Grove denied her a FAPE in the December 6, 2021 IEP by failing to offer Student appropriate placement, specifically placement in a regular, general education classroom for the majority of the school day. Student alleged in her complaint and repeated in her written closing argument,

“District should recall that the student in *Rachel H.* had an IQ of 44 and was still determined to be able to receive educational benefit in full-time general education classroom (*Sacramento City Unified School Dist. v. Rachel H.* (9th Cir. 1994) 14 F.3d 1398, 14.)”

Elk Grove contends the December 6, 2021 IEP offered Student the appropriate balance of placement in a special day class where Student could receive instruction from an education specialist targeting Student’s academic and functional needs at the levels she exhibited, and time in general education for exposure to neuro-typical peers. Elk Grove argues the placement offered in the December 6, 2021 IEP was reasonably calculated to enable Student to make progress in light of her circumstances and educate her in the least restrictive environment.

School districts are required to provide each special education student with a program in the least restrictive environment. To provide the least restrictive environment, school districts must ensure, to the maximum extent appropriate, that children with disabilities are educated with non-disabled peers; and that special classes or separate schooling occur only if the nature or severity of the disability is such that

education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily. (20 U.S.C. § 1412(a)(5)(A); 34 C.F.R. § 300.114(a); Ed. Code, § 56031.)

The continuum of program options includes, but is “not necessarily” limited to, in increasing order of restrictiveness:

- regular education;
- resource specialist programs;
- designated instruction and services;
- special classes;
- nonpublic, nonsectarian schools;
- state special schools;
- specially designed instruction in settings other than classrooms;
- itinerant instruction in settings other than classrooms; and
- instruction using telecommunication, and instruction in the home, in hospitals, or other institutions. (Ed. Code, § 56361.)

In determining the educational placement of a child with a disability, a school district must ensure that:

- the placement decision is made by a group of persons, including the parents, and other persons knowledgeable about the child, the meaning of the evaluation data, and the placement options, and takes into account the requirement that children be educated in the least restrictive environment;

- placement is determined annually, is based on the child's IEP, and is as close as possible to the child's home;
- unless the IEP specifies otherwise, the child attends the school that he or she would if non-disabled;
- in selecting the least restrictive environment, consideration is given to any potential harmful effect on the child or on the quality of services that he or she needs; and
- a child with a disability is not removed from education in age-appropriate regular classrooms solely because of needed modifications in the general education curriculum. (34 C.F.R. § 300.116.)

To determine whether a special education student could be satisfactorily educated in a regular education environment, the Ninth Circuit has balanced the following factors:

1. the educational benefits of placement full-time in a regular class;
2. the non-academic benefits of such placement;
3. the effect the student has on the teacher and children in the regular class; and
4. the costs of mainstreaming the student.

(*Sacramento City Unified School Dist. v. Rachel H.* (9th Cir. 1994) 14 F.3d 1398, 1404 (*Rachel H.*) [adopting factors identified in *Daniel R.R. v. State Board of Education* (5th Cir. 1989) 874 F.2d 1036, 1048-1050 (*Daniel R.R.*).])

However, the Ninth Circuit has also found that a general education placement is not the least restrictive environment for every special-needs child. In *Poolaw v. Bishop* (9th Cir. 1995) 67 F.3d 830 (*Poolaw*), the Ninth Circuit considered the *Rachel H.* factors

and determined that a general education classroom was not the least restrictive environment for the child in question. The Court acknowledged that there was a tension within the IDEA between the requirement that a district provide children with a FAPE to meet their unique needs and the preference for mainstreaming. The Court stated:

In some cases, such as where the child's handicap is particularly severe, it will be impossible to provide any meaningful education to the student in a mainstream environment. In these situations, continued mainstreaming would be inappropriate and educators may recommend placing the child in a special education environment. This allows educators to comply with the Act's main requirement – that the child receive a free appropriate public education. Thus, "the Act's mandate for a free appropriate public education qualifies and limits its mandate for education in the regular classroom." (*Poolaw, supra*, 67 F.3d at p. 834, citing *Daniel R.R., supra*, 874 F.2d at p. 1044.)

If a school district determines that a child cannot be educated in a general education environment, then the least restrictive environment analysis requires determining whether the child has been mainstreamed to the maximum extent that is appropriate in light of the continuum of program options. (*Daniel R.R., supra*, 874 F.2d at p. 1050.)

In resolving the question of whether a school district has offered a FAPE, the focus is on the adequacy of the school district's proposed program. (*Gregory K., supra*, 811 F.2d at p. 1314.) No one factor is determinative in placement, and parental preference cannot

be either the sole or predominant factor in placement decisions. (See, e.g., *Letter to Burton* (OSERS March 20, 1991); *Letter to Anonymous* (OSEP April 20, 1994); *Letter to Bina* (OSERS November 5, 1991).)

Student relies exclusively on *Rachel H.* as an example of how a student with a very low intelligence quotient might be appropriately placed fulltime in the regular education environment. Student ignores that Rachel H. was in second grade and the academic rigor of the regular education curriculum and classroom was very low at that level. In sharp contrast, Student was in high school, following the alternative curriculum leading to a certificate of completion rather than a regular high school diploma because her abilities were so far below the academic rigor and requirements of the regular education high school curriculum. Although Student's full-scale intelligence quotient and non-verbal cognitive abilities were higher than those of Rachel H., she exhibited significant cognitive delays coupled with deficits in adaptive behavior and met the eligibility criteria for intellectual disability.

Student learned very slowly, but she was capable of learning with repetition and material presented at her cognitive and ability levels. Parent took the perspective in her testimony that she did not know what Student might achieve if given the chance to attend all her academic subjects in general education, a sort of we'll-never-know-until-we-try approach. At hearing, Parent said she thought Student should have been in the regular English and math class to find out if she would force herself to do better. However, she did not raise concerns about Student's placement during the December 6, 2021 IEP team meeting.

Student's attorney asked Parent if she told the December 6, 2021 IEP team that she wanted Student to be mainstreamed into general education classes beyond what

she was already attending. Parent answered that she never told them that, she asked if it was possible for her to be. But as explained earlier, although Parent claimed she asked about, requested, or said some things during the December 6, 2021 IEP team meeting, her individual claims about specific things she asked about, requested, or said were greatly weakened by her testimony and admission that she “basically sat there quietly because [she] didn’t know what else to do.” All the other members of the December 6, 2021 IEP team testified, and none stated Parent inquired about, let alone requested, Student attend more general education classes.

Even more significantly, Parent admitted during the December 6, 2021 IEP team meeting she “more than likely ... stated [she] agreed with the placement.” Parent testified that during the meeting, school psychologist Penaloza “made his little comments.” Parent claimed she had a different opinion and did not agree with what he had to say, but she couldn’t recall any specifics at the hearing. She had a conversation with Penaloza privately after the December 6, 2021 IEP team meeting and he agreed they did not agree on everything. He thought Student was appropriately placed because of her testing scores.

Parent recalled that during the December 6, 2021 IEP team meeting, education specialist Lemieux reviewed Student’s progress and said the independent living skills classroom was appropriate. Parent testified she did not remember if she stated any disagreement with Lemieux’s opinion, and more than likely stated agreement with the independent living skills classroom placement. Lemieux testified Parent agreed the independent living skills classroom placement was providing Student academic and non-academic benefit, did not express concerns about that placement not being the least restrictive environment for Student, and did not request the IEP team discuss more general education time.

Parent's interest in increasing Student's time in general education classes seemed to be the result of Student's recent complaints to Parent, after finishing 10th grade. Student told Parent she wanted to be mainstreamed, to socialize with more kids at school, learn more. Student told Parent she was bored, not challenged at school. Student reported doing the same things over and over, such as a project and then going over it more times. Parent testified she told Student that is how she learns, and Student responded it was boring. Notably, Parent had her own experience working with Student during the distance learning model while school campuses were closed during the COVID-19 pandemic. Parent reported she also had worked repetitively with Student, with math work regarding regrouping as an example of "if she didn't get them right, we did them again."

To summarize, the high school IEP team that met on December 6, 2021, discussed Student's progress on her goals and her adjustment to high school. After reviewing Student's progress on her goals, her academic achievement testing results, and her present levels of performance, the IEP team reviewed Student's progress in her general education classes according to the written reports the physical education and floral design teachers submitted. Lemieux proposed new goals, which no one disagreed with and were adopted.

The IEP team discussed how Student's progress was going overall and if the IEP team thought the independent living skills program was meeting her needs. Lemieux testified all IEP team members agreed the independent living skills program was meeting Student's needs. Parent did not ask for Student to spend more time in general education. The IEP team discussed the school day schedule, how Student was doing and progressing, and that Student's schedule would remain essentially the same.

Lemieux and Penaloza persuasively demonstrated the appropriateness of Student's placement in an independent living skills class for 75 percent of the day. Student's attorney asked Lemieux if she thought Student could progress in her math skills according to grade-level math standards versus functional math. Lemieux explained it would be very difficult for Student to make progress in grade-level math because she was still working on foundational math skills. Lemieux believed Student could make progress in her academic skills in math, but not within the general education classroom. A general education class would not help Student meet her goals for academic progress because the general education class focused on general education curriculum at grade-level content, concepts, and instruction. Student's December 2021 IEP goals targeted her own academic level and ability, six grade levels below her placement level.

Penaloza explained a general education math class would not be appropriate for Student because the work could not have been sufficiently modified in general education to allow Student to access it. Student struggled on basic math facts, and the fluency with which she can pull up information, apply it, put it down on paper, and monitor her own work. As of December 2021, Penaloza believed Student was receiving academic benefit in the independent living skills classroom working on both functional and academic goals, which supported Student improving her addition and subtraction skills.

Penaloza persuasively demonstrated general education English would not be appropriate for Student because it would be far too difficult for Student, largely due to Student's very low receptive vocabulary. General education English had a lot of verbal instruction and assumed students have recognition and understanding of words. Even if Student were given modified instruction to a simpler version, she still would not be

receiving information helpful to her. English coursework in the independent living skills class involved vocabulary that was structured and specific, and introduced in a specific way. Students had the opportunity to practice and apply it, and then there was a lot of repetition to reinforce the information. Students then can later build on what they know. Penaloza explained Student knew some synonyms, but tasks like compare and contrast, finding differences and similarities, were very difficult for her.

Penaloza opined Student did not have the academic language and skills in either English or math necessary to access the general education curriculum. Student's skills were so basic, meaning at an awareness level. Student's understanding was very concrete, and she was very literal in how she interpreted things. At the high school level, a lot of academics are expressed in conceptual language, and those concepts would have been very difficult for her to access. Even with differentiated instruction, due to the pace and kind of instruction in general education high school classes, it would be "very very hard for her."

Lemieux persuasively demonstrated other academic general education courses would not be appropriate for Student. Student's attorney asked Lemieux if Student could "handle" being in a general education social studies class. Based on what Lemieux knew about Student, Lemieux believed Student could sit in that class and be there, but it would be very difficult for Student to access the content, attend to the lessons, and complete the expected requirements of that class. Lemieux later added that the academic level of high school general education classes would be "very very difficult for her to access" in terms of the content and how the content is delivered, and would also be difficult for Student to express her knowledge of the content. Student's

attorney asked if Student might be assisted by attending a general education science class. Lemieux believed it would be very difficult for Student to access based on her academic levels.

Student's attorney asked Lemieux if Student could benefit from an additional general education class in her schedule. Lemieux believed Student's class schedule of three out of four periods each day in special education, and one period daily in general education, supported Student very well.

With respect to Student's individual goals and whether they could be worked on within the general education high school classes, Lemieux specifically testified she did not believe Student would make progress on the writing goal proposed in the December 6, 2021 IEP in a regular classroom setting. In general education, students' curriculum applied foundational skills, which they already mastered, to access the content, work on lessons, and complete assignments. Student's proposed writing goal required her to work on those foundational skills, and she required direct instruction from an education specialist. In contrast, ninth grade general education classes did not deliver instruction on this goal.

Further, Lemieux did not believe Student would make progress on the math goal proposed in the December 6, 2021 IEP in a regular classroom setting. The proposed goal targeted Student's math needs and skill levels. In general education, ninth graders heavily relied upon their already-mastered foundational math skills which Student had not yet mastered. Student required direct instruction from an education specialist, and ninth grade general education classes did not deliver instruction on this goal.

None of the general education classes at Florin High addressed the skill targeted in the December 6, 2021 IEP goal for functional academics regarding personal information. Student worked on that skill in the living skills course, delivered for one 90-minute period daily in the independent living skills class. The course addressed skills not directly taught in general education. They included interpersonal skills, money skills, time skills, a certain level of functional skills as applied to hygiene and daily living skills to hold a job, and other job-readiness skills such as using personal information to fill out applications, or other applications focused on being as independent as possible as the students grew older.

Lemieux explained the independent living skills class provided Student meaningful educational benefit because lessons were geared to Student's academic level, and the content was focused on meaningful instruction for Student. Lemieux taught English for one 90-minute period every other day, alternating with math, taught for one 90-minute period every other day. Lemieux also taught science and social studies on an alternating schedule with each other for one 90-minute period every other day. Other students in the independent living skills class had skills commensurate with Student's, and the group worked on skills similar to those addressed by Student's December 6, 2021 IEP goals. For example, in math, the independent living skills class used a lot of paper and pencil manipulatives for students to work out math concepts, to practice, and to go over with students step-by-step how to work on the answers. Lemieux worked with Student little by little to increase Student's skills.

In sum, Student failed to present persuasive evidence that Student would receive academic benefit in the high school regular education environment.

All the witnesses agreed Student benefitted socially from exposure to neuro-typical peers in general education classes. The largest benefit was from behavior modeling by typical peers, but also Student just enjoyed socializing with many people. Everyone described her as working well with students in general education classes, and general education students working well with her.

Student's attorney asked Lemieux how increasing Student's mainstreaming time would have affected Student's social skill development. Lemieux did not believe it would impact Student's social skills development, because she had observed Student interact with others and Student appeared "pretty comfortable." Lemieux testified during the 2021-2022 school year, Parent communicated with Lemieux about Student socializing with peers outside of school and having issues during those social interactions with those peers. Lemieux testified Student had required some support at school navigating conflict with peers, talking out her feelings, talking out the situation that happened, and finding a solution to move forward. Her recollection of how often that happened in the 2021-2022 school year was probably once or twice in a semester, "if that." It was "not very often."

Lemieux saw an improvement in Student's communication skills within the two school years she had known her. At the time of hearing, Student better advocated for herself, a skill she learned in the independent living skills/Level 2 program. Living skills instruction taught how to ask for help, and to whom to go to ask for help. Living skills instruction including teaching relationships with peers such as navigating relationships, how to be positive members of the class, and how to work with others.

The December 6, 2021 IEP team discussed the potential "harmful effect" of Student not attending general education classes all day, which was the fact that less access to typically developing peers by spending time in a special day class reduced the

amount of exposure to typical peers for peer role models throughout the day. However, the IEP team determined Student had access to peer models across the day in other opportunities like her general education classes and other unstructured time such as recess and lunch. Further, the IEP team determined the benefit to Student spending 75 percent of her school day in the special day class to serve her need for a smaller class size with additional adult support, instruction targeted to her academic and functional skills levels and needs at a pace she could maintain in a format that better suited her learning style, and her need for the alternate curriculum outweighed any potential harmful effect of reduced exposure to typical peers.

There was no evidence Student was disruptive to students in the regular classroom setting or took an undue amount of the general education teacher's time. When Student and others from the independent living skills class attended physical education and the floral design class, one of the independent living skills classroom aides went with the students to the general education class. The classroom aide assisted the group of special education students on an individual and as-needed basis to support their participation and inclusion in the regular classroom. Jordan and Folan each testified they sometimes provided direct, individual attention to Student, but it was not burdensome.

Student offered no evidence of the cost to provide the type of program that would satisfactorily educate Student in regular classes "the majority of the school day." Elk Grove did not defend this case as a matter of undue cost for including Student in the regular classroom "the majority of the school day," but focused on the analysis of whether Student was mainstreamed to the maximum extent that is appropriate in light of the continuum of program options. (*Daniel R.R.*, *supra*, 874 F.2d at p. 1050.)

Student never advocated for full-time placement in general education, and Issue 4(b) only asserts Elk Grove denied Student a FAPE by failing in the December 6, 2021 IEP to offer Student placement in general education for the majority of her school day. But Student failed to prove the analysis under the four factors of *Rachel H.*, and consideration of whether Student had been offered general education inclusion to the maximum extent appropriate under *Daniel R.R.*, compelled the December 6, 2021 IEP team to increase Student's time in general education to the majority of her school day. Student failed to prove that her general education inclusion should even have been increased to more than two general education classes. Student asserted in written closing argument:

She is an ideal Student for inclusive education as well as inclusive schools. Significantly more integration with the general education population is appropriate for Student and would provide her more examples of age-appropriate verbal skills, compliance, socialization, and academic performance. Students who are impacted to a much greater extent than this Student have been successfully included the entire school day with neurotypically developing peers. It is well accepted that children learn by attending school with their peers. Research studies clearly indicate students taught with their general education peers showed more academic and social gains over students in self-contained classrooms, and that Student could benefit from imitating typical peers.

Student produced no research or testimony regarding research of the kind asserted in Student's written closing argument. Student did not have any psychologist or inclusion expert testify on her behalf, and offered no evidence to establish the benefits described

above. Finally, Student failed to produce any evidence critical of the placement decision of the December 6, 2021 IEP team, and therefore failed to meet her burden of production and her burden of persuasion.

In addition to finding that Student failed to meet her burden of proof for this Issue, the evidence established Elk Grove reasonably offered Student placement in a special day class setting for her core academic courses. Consideration of the academic educational benefits of placing Student in a regular class, based on the information available to the IEP team on December 6, 2021, indicated Student would not access the high school curriculum in those classes or make progress on her individual goals in that environment.

There did not appear to be a significant difference for Student in the non-academic benefits of increasing placement in general education. Student was well-behaved and did not require significant “modeling” by neuro-typical peers to learn to comport herself well, follow directions, classroom rules, or social conventions. The general education setting for physical education and an elective, with recess, lunch, and other unstructured time, afforded Student ample opportunity to socialize with students without disabilities and gain non-academic benefits from those interactions.

The effect Student had on the teacher and students in the regular class was not a negative factor in Student’s placement consideration, nor was the absence of any effect itself a reason to compel more inclusion. Similarly, there was no indication it cost more or less to educate Student in special education or general education classrooms, and Elk Grove did not improperly assign Student to special education classes for her core academic courses because it was any less costly than mainstreaming her.

Student failed to prove based on the information available to the IEP team on December 6, 2021, Elk Grove denied her a FAPE by offering her placement in special education classes for her core academic courses and in general education classes for physical education and an elective, which meant Student was placed the majority of her school day in the special education setting. No evidence indicated that this group IEP team decision, approved by Parent, amounted to a denial of FAPE.

Consequently, Student failed to prove by a preponderance of the evidence that Elk Grove denied her a FAPE in the December 6, 2021 IEP by failing to offer Student appropriate placement, specifically placement in a regular, general education classroom for the majority of the school day.

ISSUE 4(c): APPROPRIATE RELATED SERVICES

ISSUE 4(c)(i): ADAPTED PHYSICAL EDUCATION

Student contends Elk Grove denied her a FAPE in the December 6, 2021 IEP by failing to offer her adapted physical education. Student argues she “often struggled with many of her physical education requirements” and posits without an assessment, it is not possible to identify the precise [adapted physical education services] that Student required.” Student’s argument ignores that it was her burden to prove what she required, the absence of which denied her a FAPE.

Elk Grove contends Student failed to present any evidence to establish Student required adapted physical education to receive a FAPE.

As detailed above in Issue 2, no witnesses presented any evidence that suggested Student could not participate in general education physical education and should have been assessed in fall 2021 for whether she required adapted physical education to obtain educational benefit.

Student failed to offer any evidence to support any inference that as of December 6, 2021, Student required developmental or corrective instruction and was “precluded from participation in the activities of the general physical education program [or] modified general physical education program.” (Cal. Code. Regs., tit. 5, § 3051.5(a).)

Student failed to prove by a preponderance of the evidence that Elk Grove denied her a FAPE in the December 6, 2021 IEP by failing to offer her adapted physical education.

ISSUE 4(c)(ii): POST-SECONDARY TRANSITION SERVICES

Student contends Elk Grove denied her a FAPE in the December 6, 2021 IEP by failing to offer her appropriate post-secondary transition services. Student argues Elk Grove’s individual transition planning and post-secondary transition services offered in the December 6, 2021 IEP’s ITP did not comply with the requirements of the IDEA.

Elk Grove contends Student did not require an ITP, including transition services, to receive a FAPE in the December 6, 2021 IEP, because Student was 14 years old at the time the IEP was developed and would have another annual IEP developed before she turned 16. Further, Elk Grove argues it offered Student appropriate transition services in the December 6, 2021 IEP and its ITP.

As stated above in Issue 4(a), federal and state law require, beginning not later than the first IEP to be in effect when a student with a disability is 16 years old, and updated annually thereafter, the IEP to include appropriate, measurable, post-secondary goals based upon age-appropriate transition assessments related to training, education, employment, and, where appropriate, independent living skills. (20 U.S.C. § 1414(d)(1)(A)(i)(VIII)(aa)-(bb); 34 C.F.R. § 300.320(b); Ed. Code, § 56345, subd. (a)(8).) Every such IEP must also include transition services to assist the student in reaching those post-secondary goals. (*Ibid.*) If determined appropriate by the IEP team, transition services may begin earlier than the IEP in effect at age 16. (34 C.F.R. § 300.32(b); Ed. Code § 56345, subd. (a)(8); 71 Fed. Reg. 46667 (August 14, 2006.)

Transition services are defined as a coordinated set of activities for a special needs student that:

- is designed within a results-oriented process focused on improving the student's academic and functional achievement to facilitate movement from school to post-school activities, including post-secondary education, vocational education, integrated employment, including supported employment, continuing and adult education, adult services, independent living, or community participation;
- is based upon the individual needs of the student, taking into account his strengths, preferences, and interests; and
- includes instruction, related services, community experiences, the development of employment and other post-school adult living

objectives, and, if appropriate, acquisition of daily living skills and provision of a functional vocational evaluation. (20 U.S.C. § 1401(34); 34 C.F.R. § 300.43(a); Ed. Code, § 56345.1, subd. (a).)

Also as stated above, at 14 years of age, Student did not yet have a right to individual transition planning under the IDEA or California law. And the December 6, 2021 IEP team did not “determine” that it was appropriate for Student, younger than 16, to have individualized transition planning. Therefore, Student cannot establish that Elk Grove denied her a FAPE in the December 6, 2021 IEP by failing to offer Student appropriate post-secondary transition services.

Additionally, even assuming Student was legally entitled to an ITP with post-secondary transition services, Student did not prove by a preponderance of the evidence that the post-secondary transition services offered in the December 6, 2021 IEP’s ITP were not reasonably calculated to enable Student to make progress appropriate in light of her circumstances.

Student’s placement for 75 percent of her school day in the independent living skills special day class was oriented toward preparing Student for life after school. The curriculum focused Student’s education on practical skills for independent living and employment. The independent living skills class included 90 minutes every day, every semester, of a course called Workplace Exploration. Lemieux described that course as including interpersonal skills, money skills, time skills, a certain level of functional skills as applied to hygiene and daily living skills to hold a job, and other job-readiness skills such as using personal information to fill out applications, or other applications focused on being as independent as possible as the students grew older. General education students did not receive instruction in these topics or have access to this course.

Elk Grove transition specialist Jolene Hood worked with Student and consulted with Lemieux to draft the individual transition planning document presented and discussed at the December 6, 2021 IEP team meeting. The goals were preliminary, appropriate for a 14-year-old, to start the process of Student and her family exploring future goals in education and training, employment, and independent living. Hood explained the transition services offered to support the goals were vocational assessment, counseling, and guidance, and career assessment. The ITP also listed activities that would support Student's post-secondary goals.

Hood emphasized that Student was supported in advancing toward and eventually, after school, achieving her post-secondary employment goal by the independent living skills classroom program in which Student participated during the 2021-2022 school year, and would, under the December 6, 2021 IEP, continue to be in through December 2022. The classroom program worked on developing "soft skills" to enable students to be successful in an employment setting. "Hard skills" were technical or specific, measurable skills to do a job. "Soft skills" were harder to measure and related to personality or characteristics like being able to get to work on time, work with a team, accept criticism, and follow directions.

Hood explained the independent living skills class also supported students in achieving their post-secondary independent living goals by working on soft skills for daily living, preparing students to do more cooking at home or laundry, and shopping, to develop more independent living skills.

In addition to daily group instruction regarding post-secondary transition topics and skills, the December 6, 2021 IEP specifically offered Student three sessions of 30 minutes each individual vocational assessment, counseling, and guidance, and career assessment. Hood delivered those services individually to Student.

Hood opined the transition services offered in the December 6, 2021 IEP were appropriate to address the post-secondary goals of Student's ITP based on the exploration activities she and Student did together before developing the ITP, and while Student was only 14 years old.

The testimony of Certified Transition Specialist Imperatore, whom Student hired after there had already been six days of testimony in the case and had a videoconference with Student in July 2023, did not persuasively establish the post-secondary transition services offered in the December 6, 2021 IEP – to which Student had no legal right – were not appropriate for her at 14 years old and at the beginning of her exploration of what training or education, employment, and independent living arrangement she wanted after she was 22 years old and no longer in school.

Student failed to prove by a preponderance of the evidence Elk Grove denied her a FAPE in the December 6, 2021 IEP by failing to offer her appropriate post-secondary transition services.

ISSUE 4(c)(iv): ONE-TO-ONE AIDE

Student contends Elk Grove denied her a FAPE in the December 6, 2021 IEP by failing to offer her a one-to-one aide. Student asserted during the hearing that she

required a one-to-one aide fulltime, in the general education setting as well as in the special day class. In her written closing argument, Student seems only to tie Issue 4(c)(iv) to the assertion that the least restrictive environment for Student was the regular education classrooms and that “[w]ith this one-to-one aide support Student would have been able to access her education while attending the general education classroom.”

Elk Grove contends it was not necessary or appropriate for Student to have a one-to-one aide. Therefore, Elk Grove did not deny Student a FAPE by failing to offer one in the December 6, 2021 IEP.

Parent was the only witness who opined Student needed a one-to-one aide. Parent’s explanation for why Student needed a one-to-one aide had nothing to do with accessing curriculum either in regular classes or in the special day class. In fact, Parent was asked if she thought Student needed a one-to-one aide to access the curriculum, and Parent said no. She also did not think Student needed a one-to-one aide to navigate the campus.

Parent thought Student was afraid and that “fear [was] holding her back” and Parent did not want Student to be bullied. Parent thought a one-to-one aide would answer Student’s questions and make the students bullying her think twice and not do that to her. Parent thought a one-to-one aide would give Student “a safety net,” and help “if things got out of control.” Parent did not ask the December 6, 2021 IEP team for Student to have a one-to-one aide.

Lemieux persuasively testified Student was well-supported in the independent living skills special day class by the small class size with one education specialist and two classroom aides. Student had challenges with cognitive understanding and processing

of information. Student called on the instructional aides, as needed, throughout the day. Student needed assistance daily. But Student did not ask for assistance so frequently or struggle so greatly in the special education classroom that she required a dedicated one-to-one aide to support only her, all the time.

Lemieux also persuasively testified Student was well-supported in the general education classes by the special day class instructional aide who went with the students from the independent living skills classroom into the physical education and floral design classes. Student sometimes needed the aide to facilitate her full access to the classes, providing Student support with understanding concepts and implementing what the students were working on in those classes. Lemieux opined Student accessed the lessons with the help of a paraeducator and fully participated in the classes with the support of a paraeducator while she attended the general education physical education and floral design classes. As of December 2021, Student did not exhibit the need for a dedicated one-to-one aide to support only her, all the time, in the general education classes she attended. Lemieux did not believe Student would benefit from a one-to-one aide in her general education classes because Student participated fully, attended to the lessons, and worked on what was asked of her with the support of the classroom aide who supported all the special education students while in the general education classes.

Jordan and Folan thought Student was well-supported in their classes by the aide who came from the independent living skills classroom with Student and the other special education students in their general education classes. Jordan did not recall Student needing direction or assistance either from Jordan or the aide who came to class with the students from the independent living skills program. If Student truly never needed support from the classroom aide in Jordan's physical education class, Student did not need a dedicated one-to-one aide. Folan described Student seeking

assistance from both the classroom aide and Folan directly, mostly for tasks that involved using reasoning skills. Folan did not think Student relied so heavily on the classroom aide or Folan that Student needed a dedicated one-to-one aide to benefit from the educational experience in the floral design class.

Student failed to prove by a preponderance of the evidence Elk Grove denied her a FAPE in the December 6, 2021 IEP by failing to offer her a one-to-one aide.

ISSUE 4(d): ADDRESSING STUDENT'S REGRESSION

Student contends Elk Grove denied her a FAPE in the December 6, 2021 IEP by failing to address her regression. Student's complaint alleged Elk Grove was aware Student was prone to regression and had ample potential for regression, and that Student was offered extended school year service because she was prone to regression over a period of absence. However, Student's written closing argument does not include a section regarding Issue 4(d) and Student made no argument about any purported failure "to address" Student's assumed regression. Student did not otherwise explain or describe what she required but was not offered to address any regression.

Elk Grove contends it had no data at the December 6, 2021 IEP team meeting demonstrating regression, such that it needed to be addressed. Elk Grove argues Student did not prove she demonstrated any regression.

Parent repeatedly testified the present levels of performance reported through the 2021 psychoeducational reassessment and teacher's report indicated Student did not demonstrate to the school psychologist and special education teacher skills Parent

believed Student had previously accomplished. Parent believed the school psychologist and teacher accurately reported the skills Student exhibited for them, but thought they were below skills exhibited during middle school.

However, the IEP team reviewed Student's present levels of performance from December 2020, the goals from the December 2020 IEP, and Student's progress on her math and writing goals. Student met her math goal, meaning she made significant progress from her prior baseline. Student did not meet her writing goal, but improved from her baseline. This information did not suggest Student had regressed.

Student's attorney asked Parent at hearing if she brought up concerns about regression to the December 6, 2021 IEP team. Parent said she thought she made some comment, but did not recall what it was, and "let it go. I did not know what else to do." Parent's testimony was unconvincing regarding whether Student had previously demonstrated higher order skills in math and writing, and even less credible regarding whether she told the December 6, 2021 IEP team the present levels of performance they were discussing for Student did not in fact represent valid progress but were only indicating continued recoupment of skills in which Student had previously regressed.

Elk Grove was aware Student was prone to regression during extended breaks and that she had a limited recoupment capacity. For that reason, Elk Grove offered Student extended school year service, as required by California Code of Regulations, title 5, section 3043.

But Student did not offer persuasive evidence that Student had experienced regression, and that the December 6, 2021 IEP team, and specifically Elk Grove, knew Student had experienced regression and required any additional supports, services, programs, or methodologies to address it.

Consequently, Student failed to prove by a preponderance of the evidence that Elk Grove denied her a FAPE by failing to address Student's regression in the December 6, 2021 IEP.

ISSUE 5: FAILING TO ASSESS STUDENT'S NEED FOR TRANSITION SERVICES FOR THE IEP TEAM MEETING ON MARCH 23, 2022

Student contends Elk Grove denied her a FAPE by failing to assess Student's need for transition services for the IEP team meeting on March 23, 2022. Student alleged in her complaint, "At the time of the triennial 3/23/2022 IEP continuation meeting, Student was 15 years old (9th grade). Therefore, an assessment in college and career awareness, and transition was required, because the offer of FAPE would last for one year until 3/23/2023 when Student would be 16 years old. However, the 3/23/2022 IEP team didn't conduct any assessment in college awareness or career awareness, nor for Student's transition. Hence, this was not sufficient to constitute a FAPE." Student repeats this assertion in written closing argument.

Elk Grove contends the March 23, 2022 IEP amendment meeting occurred when Student had just turned 15 years old, and Student would not turn 16 while the December 6, 2021 IEP, as modified by the March 23, 2022 amendment regarding Student's new expressive language goal, was in effect. Therefore, it was not yet required

for Student to be assessed for her transition-related needs, and Elk Grove did not deny Student a FAPE by not completing a transition assessment before the March 23, 2022 IEP team meeting.

As explained above in Issue 1, the December 6, 2021 IEP team did not discuss Student's language and speech progress and needs, pending the assessment to which Parent consented on November 10, 2021, but had not been completed by the time of the December 6, 2021 IEP team meeting. The December 6, 2021 IEP set out three new goals to be achieved by December 2022, and indicated specialized academic instruction and vocational assessment counseling, guidance, and career assessment services would be provided from December 6, 2021, through December 6, 2022. This annual IEP was expected to be in effect during the time Student was 14 and 15 years old. Student's next annual IEP, anticipated to be held in December 2022 – three months before she would turn 16 – would be the IEP in effect when Student turned 16.

An IEP team meeting was held on March 23, 2022, to review the results of the language/speech communication development assessment and discuss Student's progress in speech therapy and consider future goals and services. On March 23, 2022, speech-language pathologist Hutchinson proposed a new annual goal for expressive language. The new goal was anticipated to be achieved by December 2022, on the same timeline as the other goals developed and consented to by Parent at the December 6, 2021 IEP team meeting. The March 23, 2022 IEP amended the December 6, 2021 IEP only by adding notes reflecting the speech and language data shared and discussed, the new expressive language goal, and updating the services grid on the Offer of FAPE – Service page to reflect Elk Grove's offer of 30 minutes per week group speech therapy starting on December 6, 2021, and ending on December 6, 2022.

The March 23, 2022 amendment to the December 6, 2021 IEP was not a new annual IEP, and it was not, by its own terms, expected to be in effect beyond December 6, 2022. Contrary to Student's allegation and argument, the March 23, 2022 amendment IEP would not last for one year until March 23, 2023, when Student would be 16 years old.

Student failed to prove by a preponderance of the evidence that Elk Grove denied her a FAPE by failing to assess Student's need for transition services for the IEP team meeting on March 23, 2022.

ISSUE 6: THE RELATED SERVICES OF THE MARCH 23, 2022 IEP

ISSUE 6(a): POST-SECONDARY TRANSITION SERVICES

Student contends Elk Grove denied her a FAPE in the March 23, 2022 IEP by failing to offer her appropriate post-secondary transition services. Student makes the same arguments as for Issue 4(c)(ii) regarding the offer of post-secondary transition services in the December 6, 2021 IEP.

Elk Grove contends the March 23, 2022 IEP only amended the December 6, 2021 annual IEP regarding Student's speech and language, and was not a new offer of FAPE with a new annual end date after Student would have turned 16. Student still was not legally entitled to post-secondary transition services during the time the December 6, 2021 annual IEP, as amended regarding speech and language only on March 23, 2022, would be in effect, and any post-secondary transition services Elk Grove offered on December 6, 2021 were sufficient and Student was not denied a FAPE.

The March 23, 2022 IEP team meeting was solely for the purpose of, and was used only for, discussion of the results of the language/speech communication development assessment, Student's progress on her December 2020 expressive communication goal, any proposed new goals in speech and language, and the service level for speech therapy. The individual transition planning document from the December 6, 2021 IEP was not discussed and was not amended.

For the same reasons Student failed to prove Elk Grove denied her a FAPE in the December 6, 2021 IEP by failing to offer appropriate post-secondary services, her claim regarding the March 23, 2022 IEP fails.

Student failed to prove by a preponderance of the evidence Elk Grove denied her a FAPE in the March 23, 2022 IEP by failing to offer her appropriate post-secondary transition services.

ISSUE 6(b): SUFFICIENT LANGUAGE AND SPEECH SERVICES

Student contends Elk Grove denied her a FAPE by failing in the March 23, 2022 IEP to offer her sufficient language and speech services. Student asserts in her written closing argument that she required speech and language services for 30 minutes at least twice weekly, to address what Student argues was a lack of services in the first part of the school year as well as what Student argues were deficits the three-year-review assessment identified.

Elk Grove contends the March 23, 2022 IEP offered Student sufficient language and speech services to allow Student to make progress on her new expressive language goal.

As of December 6, 2021, Student continued to make progress toward but had not yet achieved the expressive communication goal of her December 2020 IEP. The progress was achieved with 30 minutes weekly speech therapy, along with the functional academics and independent living skills curriculum of the special education classroom. The December 6, 2021 IEP team did not change Student's expressive communication goal, and did not change the amount or type of speech therapy from the December 2020 IEP, pending the results of the language/speech communication development assessment.

Elk Grove continued to provide Student speech therapy until March 23, 2022, working on the December 2020 expressive communication goal in speech therapy in early 2022, and Student finally approximated the goal by March 23, 2022.

As detailed above in Issue 1, the new goal adopted on March 23, 2022, was for Student, within about nine months, to construct sentences with complex sentence structure, with the correct use of two to three of the following grammatical constructs:

- noun-verb agreement,
- coordinating and subordinating conjunctions like "before" and "after"; and
- prepositions such as for location, time, or direction.

Student's goal would be achieved if she completed the task with 75 percent accuracy over three consecutive speech therapy sessions as measured by session data.

Hutchinson believed group speech therapy for 30 minutes each week would be adequate to enable Student to achieve the one goal. The goal was to look at semantic and syntactic things Student would possibly see in her English Language Arts course, and would be addressed not only during speech therapy but also in the classroom.

The March 23, 2022 IEP team adopted the proposed new expressive language goal. Hutchinson proposed Student continue to receive 30 minutes per week of group pull-out speech therapy. The IEP team adopted the proposed level of service and Elk Grove offered Student 30 minutes of weekly group speech therapy in the March 23, 2022 IEP. Parent signed consent to the speech therapy goal and service.

Hutchinson provided Student group speech therapy 30 minutes weekly for the rest of the 2021-2022 school year. Student's accuracy increased on aspects of the March 2022 expressive language goal.

Speech-language pathologist Allen provided Student group speech therapy 30 minutes weekly from August through November 2022. The group size varied between two to four students including Student. Allen testified the single expressive language goal she worked on with Student challenged Student. Allen did not believe Student would have made better progress on the goal if she received more than 30 minutes per week of speech therapy. Allen opined Student had the ability to communicate at a basic level, and Allen was only supporting Student's area of weakness, which was also being supported in Student's special education classroom.

Student failed to present any evidence to rebut Hutchinson's opinion, as a licensed speech-language pathologist with 25 years of experience, that the March 2022 expressive language goal was sufficiently ambitious for Student. Student also failed to present any evidence to rebut Hutchinson's opinion that 30 minutes per week of group pull-out speech therapy was an appropriate level of that related service to support Student from March 2022 until the next annual IEP would be developed in approximately December 2022.

Student failed to present any evidence to rebut Allen's opinion, as a licensed speech-language pathologist with 27 years of experience, that the March 2022 expressive language goal was sufficiently ambitious for Student. Student also failed to present any evidence to rebut Allen's opinion that 30 minutes per week of group pull-out speech therapy was an appropriate level of that related service to support Student from March 2022 until the next annual IEP would be developed in approximately December 2022.

Student failed to prove by a preponderance of the evidence that Elk Grove denied her a FAPE in the March 23, 2022 IEP by failing to offer sufficient language and speech services.

CONCLUSIONS AND PREVAILING PARTY

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

ISSUE 1:

Elk Grove did not deny Student a FAPE by failing to assess Student's speech and language skills for the IEP team meeting on December 6, 2021.

Elk Grove prevailed on Issue 1.

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ISSUE 2:

Elk Grove did not deny Student a FAPE by failing to assess Student's need for adapted physical education for the IEP team meeting on December 6, 2021.

Elk Grove prevailed on Issue 2.

ISSUE 3:

Elk Grove did not predetermine the December 6, 2021 IEP offer by failing to have a general education teacher attend the IEP team meeting on December 6, 2021.

Elk Grove prevailed on Issue 3.

ISSUE 4:

Elk Grove did not deny Student a FAPE in the December 6, 2021 IEP, by failing to:

- a. Offer Student appropriate goals because the goals offered were not sufficiently ambitious;
- b. Offer Student appropriate placement by failing to offer Student placement in a regular, general education classroom for the majority of the school day;

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- c. Offer Student appropriate related services, specifically:
 - i. Adapted physical education;
 - ii. Post-secondary transition services;
 - iii. Sufficient language and speech services;
 - iv. A one-to-one aide; and
 - v. Parent training regarding Student's speech and language needs; or
- d. Address Student's regression.

Elk Grove prevailed on Issues 4(a), (b), (c)(i)-(v), and (d).

ISSUE 5:

Elk Grove did not deny Student a FAPE by failing to assess Student's need for transition services for the IEP team meeting on March 23, 2022.

Elk Grove prevailed on Issue 5.

ISSUE 6:

Elk Grove did not deny Student a FAPE in the March 23, 2022 IEP by failing to offer Student appropriate related services, specifically post-secondary transition services and sufficient language and speech services.

Elk Grove prevailed on Issues 6(a) and (b).

ORDER

All of Student's 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.

Kara Hatfield

Administrative Law Judge

Office of Administrative Hearings