

BEFORE THE  
OFFICE OF ADMINISTRATIVE HEARINGS  
STATE OF CALIFORNIA

PARENT ON BEHALF OF STUDENT,

V.

CHULA VISTA ELEMENTARY SCHOOL DISTRICT.

CASE NO. 2023100984

DECISION

February 15, 2024

On October 31, 2023, the Office of Administrative Hearings, called OAH, received a due process hearing request from Parent on behalf of Student, naming Chula Vista Elementary School District. Administrative Law Judge Brian H. Krikorian heard this matter via Zoom videoconference on December 19, 20, and 21, 2023, and January 3, 4, and 9, 2024.

Attorneys Leroy Sumter, Peter Collisson, and Sheila Bayne represented Student. Parents attended all hearing days on Student's behalf. Attorneys Sarah Sutherland and Thomas Ferrari represented Chula Vista Elementary School District. Sharon Casey, Assistant Superintendent of Special Education, attended all hearing days on Chula Vista's behalf.

At the parties' request, the matter was continued to January 30, 2024, for written closing briefs. The record was closed, and the matter was submitted on January 30, 2024.

## ISSUES

A free appropriate public education is referred to as a FAPE. An individualized education program is referred to as an IEP.

1. Did Chula Vista deny Student a FAPE, in Student's May 10, 2022 IEP, by failing to offer Student goals reasonably calculated to result in more than de minimis progress?
2. Did Chula Vista deny Student a FAPE in Student's May 10, 2022 IEP by failing to offer sufficient special education services in occupational therapy (physical writing skills) and speech/language (expressive language)?
3. Did Chula Vista deny Student a FAPE in Student's May 10, 2022 IEP by failing to offer home Applied Behavior Analysis therapy and clinic meetings?
4. Did Chula Vista deny Student a FAPE in Student's May 10, 2022 IEP, by failing to offer Parent training on:
  - a. How to use assistive technology devices;
  - b. Software or computer programs that Student uses;
  - c. Implementing applied behavior analysis behavior modification techniques at home;
  - d. Data collection by team;

- e. Reinforcing Student's reading curriculum and reinforcing Student's reading skills;
  - f. Any part of Student's supports, services, or eligibility that Parent does not understand;
  - g. Any practice, exercises or routines Student does at school that Parent needs to reinforce at home;
  - h. Autism spectrum disorder, expressive and receptive communication skills, and behavior?
5. Did Chula Vista predetermine Student's May 10, 2022 IEP and deny Student a FAPE by failing to include an occupational therapist at the IEP team meeting?
6. Did Chula Vista predetermine Student's April 18, 2023 IEP and deny Student a FAPE by failing to include an occupational therapist at the IEP team meeting?
7. Did Chula Vista deny Student a FAPE in Student's April 18, 2023 IEP by failing to offer Student goals reasonably calculated to result in more than de minimis progress?
8. Did Chula Vista deny Student a FAPE in Student's April 18, 2023 IEP, by failing to offer sufficient special education services in occupational therapy (physical writing skills) and speech/language (expressive language)?

9. Did Chula Vista deny Student a FAPE in Student's April 18, 2023 IEP, by failing to offer intensive individual support services in the form of a one-to-one academic and behavioral aide?
10. Did Chula Vista deny Student a FAPE in Student's April 18, 2023 IEP, by failing to offer home Applied Behavior Analysis therapy and clinic meetings?
11. Did Chula Vista deny Student a FAPE in Student's April 18, 2023 IEP, by failing to offer Parent training on:
  - a. How to use assistive technology devices;
  - b. Software or computer programs that Student uses;
  - c. Implementing applied behavior analysis behavior modification techniques at home;
  - d. Data collection by team;
  - e. Reinforcing Student's reading curriculum and reinforcing Student's reading skills;
  - f. Any part of Student's supports, services, or eligibility that Parent does not understand;
  - g. Any practice, exercises or routines Student does at school that Parent needs to reinforce at home;
  - h. Autism spectrum disorder, expressive and receptive communication skills, and behavior?

## JURISDICTION

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

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

The IDEA affords parents and local educational agencies the procedural protection of an impartial due process hearing with respect to any matter relating to the identification, assessment, or educational placement of the child, or the provision of a FAPE to the child. (20 U.S.C. § 1415(b)(6) & (f); 34 C.F.R. § 300.511; Ed. Code, §§ 56501, 56502, 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).) In this case, Student has the burden of proof. The factual statements in this Decision constitute the written findings of fact required by the IDEA and state law. (20 U.S.C. § 1415(h)(4); Ed. Code, § 56505, subd. (e)(5).)

Student was 10 years old and beginning fourth grade at the time of hearing. Student resided within Chula Vista's geographic boundaries at all relevant times. Student was eligible for special education under the category of autism, with a secondary eligibility of speech or language impairment. Student presented with concerns in communication and expressive and pragmatic language.

The parties combined most of the issues in their closing briefs. This decision will address the issues as set forth in the closing briefs.

ISSUE 1: DID CHULA VISTA DENY STUDENT A FAPE, IN STUDENT'S MAY 10, 2022 IEP, BY FAILING TO OFFER STUDENT GOALS REASONABLY CALCULATED TO RESULT IN MORE THAN DE MINIMIS PROGRESS?

ISSUE 7: DID CHULA VISTA DENY STUDENT A FAPE, IN STUDENT'S APRIL 18, 2023 IEP, BY FAILING TO OFFER STUDENT GOALS REASONABLY CALCULATED TO RESULT IN MORE THAN DE MINIMIS PROGRESS?

Student contends Chula Vista denied Student a FAPE in the IEPs dated May 10, 2022, and April 18, 2023, by failing to offer goals to appropriately challenge Student and that Student only made de minimis progress. Chula Vista disagrees that it denied Student a FAPE and contends it provided appropriate goals. Chula Vista further argues that although Student did not meet all goals, Student substantially progressed in each of his goals.

A FAPE means special education and related services that are available to an eligible child that meets state educational standards at no charge to the parent or guardian. (20 U.S.C. § 1401(9); 34 C.F.R. § 300.17.) Parents and school personnel

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

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, 137 S. Ct. 988, 1000, 197 L. Ed. 2d 335.)

An IEP team develops an IEP. In developing the IEP, the IEP team must consider the strengths of the child, the concerns of the parents for enhancing the child's education, the results of the most recent evaluation of the child, and the academic, developmental, and functional needs of the child. (20 U.S.C. § 1414(d)(3)(A); 34 C.F.R. § 300.324 (a).) Whether an IEP offers a student a FAPE is assessed considering information available when the IEP was developed, not in hindsight. (*Adams v. State of Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149.) An IEP "is a snapshot, not a retrospective;" it must be evaluated in terms of what was objectively reasonable when the IEP was developed. (*Id.*, quoting *Fuhrmann v. East Hanover Bd. of Educ.*, (3rd. Cir. 1993) 993 F.2d 1031, 1041.)

## THE MAY 10, 2022 IEP

An IEP meeting was held on May 10, 2022. Student was in second grade. The meeting was Student's annual review. The IEP described Student as a soft-spoken,

responsible, respectful, and loving student. Parents reported no concerns related to Student's academic performance, although they were concerned about regression following the COVID-19 pandemic. Parents were pleased with the progress Student had made in his general education classroom.

## STUDENT PROGRESSED DURING THE 2021-2022 SCHOOL YEAR

At the time of the May 2022 IEP meeting, Student showed significant growth in reading and was confident in isolating sounds to decode an unknown word. In writing, Student became more confident with verbally stating his ideas and then writing them down. Student organized his writing by utilizing a graphic organizer. Student did not demonstrate appropriate spacing, sizing, or baseline orientation when writing.

Student continued to require support in mathematics, such as modeling and guidance with what to do when identifying a number sentence. Student practiced setting up the problems and making connections with vocabulary to build on his skills.

In communication, Student did not meet his goals from the prior year. However, he made substantial progress toward meeting the speech and language goals. He could answer higher-level "WH" questions and only occasionally required one prompt to answer in a complete sentence or correct grammar. Student could participate in three-to-five-minute conversations with peers and adults using pragmatic skills such as eye contact and using names. Student independently initiated and participated in conversations with peers throughout the day using his pragmatic skills. Student was outgoing during recess and lunch and would converse and play with friends. Student continued to have deficits in expressive language, adversely affecting his ability to



communicate all of his thoughts and ideas and access the curriculum. His scores on the speech and language assessment still showed him to be at a below-average range of same-aged peers.

In the area of occupational therapy, Student demonstrated appropriate grasp patterns to pick up and manipulate his school tools. Throughout the writing tasks of his occupational therapy assessment, he demonstrated minimal spacing between words. The therapist tried using different thicknesses of pencils and different lined paper with varying results. Overall, it did not improve Student's legibility. Student showed no gross motor deficits or concerns during his assessment.

Student was well-liked by his peers and did not exhibit any extreme behavioral issues. He was described as sweet, respectful, and responsible. Student showed flexibility at changes in his schedule throughout the day. However, Student did not easily express his needs and often would wait for an adult to ask him what he needed. Student showed no significant concerns in his organization and executive functioning.

#### THE MAY 10, 2022 IEP OFFERED FIVE GOALS

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).

The IEP must contain a description of how the child's progress toward meeting the annual goals will be measured and when periodic reports on the progress the child was making toward meeting the annual goals (such as using quarterly or other periodic reports, concurrent with the issuance of report cards) will be provided. (20 U.S.C.A. § 1414(d)(1)(A)(iii).). An examination of the goals in an IEP is central to determining 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.)

Each of the goals in the May 10, 2022 IEP complied with the legal requirements. Goal one was in communication. Student inconsistently produced irregular past tense and prepositions in structured and unstructured language activities. By the annual review in 2023, Student would independently produce age-appropriate grammatical markers for a variety of pragmatic functions in four out of five opportunities across three trial sessions. Goal two was in communication advocacy. Student demonstrated difficulty in asking for help in the classroom and often required adult prompting. By the annual review in 2023, Student would independently request help by raising his hand, calling attention using names, or initiating conversations in five out of five opportunities across three trial sessions.

Goal three was in writing and fine motor. Student had improved in developing simple sentences but did not demonstrate appropriate spacing, sizing, or baseline orientation during writing. By the annual review in 2023, Student would complete a paragraph retelling a familiar grade-level story by stating the topic and main ideas with given support while displaying proper spacing, baseline orientation, sizing, and punctuation with 80 percent accuracy in four out of five trials.

Goals four and five were in mathematics. Goal four focused on addition and subtraction. Student was challenged with independently completing fluency to 10 with both addition and subtraction. Student required support and modeling. By the 2023 annual review, when given a written or illustrated addition and subtraction equation with numbers and solutions within 20, Student would use preferred math manipulatives to solve, state, or write the answer appropriately with 80 percent accuracy for two out of three math fluency activities. Goal five addressed mathematic place value. By the 2023 annual review, Student would be given a list of 15 three-digit numbers and would state the number verbally, represent the number using base 10 blocks, and write the number in the hundreds, tens, and ones with 80 percent accuracy in four out of five opportunities.

By the 2023 annual review, Student had met Goals four and five. Student made substantial progress in Goals one through three, although he did not meet those goals. Student argued this demonstrated that the 2022 IEP goals were insufficient because they did not challenge Student, and that the goals only revealed minimal progress from Student. As discussed in more detail below, the 2022 IEP goals were reasonably calculated to confer educational benefit.

#### THE APRIL 18, 2023 IEP

An annual review IEP team meeting was held on April 18, 2023. Student was in the third grade. Parents reported concerns related to Student's progress in math, writing, and generating complete sentences on his own.

## STUDENT CONTINUED TO MAKE PROGRESS IN THE 2022-2023 SCHOOL YEAR

In reading, Student showed continued growth and progress. Student scored 72 out of 85 on the Reading Foundational Skills Assessment, referred to as the BPST. A passing third-grade score is 85. Student continued to struggle to identify the main idea or main topic of a text. Also, Student was supported by visuals, graphic organizers, and language frames, and could identify character and setting—but needed support to state the appropriate problem or a solution to the story.

In writing, Student was familiar with the topics, and could respond to a modified text and write simple sentences using prior knowledge. He continued to write with combined capital letters and lowercase letters and improper punctuation. He benefited from conferencing with adults to edit his writing for correct grammar and punctuation.

Student had progressed in mathematics. He could add and subtract single-and-double-digit numbers without regrouping or borrowing. He could identify and draw the correct place value for each digit in a three-digit number. He could use manipulatives such as a multiplication table, hundreds chart, and tens frames, and had started to use the algorithm and mental math with teacher direction.

In communication, Student did not meet his goals from the prior year but made progress towards his goals and was producing age-appropriate grammatical markers. Student displayed some inconsistent errors in pronunciation—for example, “bwead” for “bread”—but that did not impact his ability to be understood by his peers or adults.

In occupational therapy, Student continued to demonstrate appropriate grasp patterns to pick up and manipulate his school tools. Student was capable of writing

legibly but often rushed through writing tasks. He would require adult prompting to slow down his writing to make it legible. Student could independently grasp and orient scissors and could cut lines and shapes accurately.

Student was well-liked by his peers and did not exhibit any extreme behavioral issues since his last annual IEP. Student continued not to express his needs easily and waited for an adult to ask him what he needed. Student benefited from modeling and peer support.

#### APRIL 18, 2023 IEP OFFERED FIVE GOALS

Goal one was in mathematics. By the annual review in 2024, Student would use math manipulatives and visuals as needed and fluently add and subtract three-digit numbers involving regrouping and borrowing using strategies based on place value, properties of operations, and the relationship between addition and subtraction with at least 80 percent accuracy in three out of three trials.

Goal two was in writing. By the 2024 annual review, Student would write a five-to-six-sentence paragraph and edit his writing in response to a given prompt based upon a previously read text. Student would exhibit appropriate topics, transitions, facts, sizing, spacing, and baseline orientation with 80 percent accuracy over three out of three trial sessions.

Goal three was in reading comprehension. By the annual 2024 review, Student would ask or answer questions to demonstrate understanding of a text, when given an independent level, mid-third grade text, as measured with 80 percent accuracy in three out of three trials.

Goal four was in self-advocacy. By the 2024 annual review, Student would independently request help by raising his hand, calling attention using names, or initiating conversations when in need of assistance in five out of five opportunities over three trial sessions.

Goal five was in expressive and receptive language. By the annual review, after listening to a short story or video clip, Student would orally retell a story and include four or more grammar elements in retelling the story, using grammatically correct sentences in four out of five opportunities, with no more than three verbal prompts.

By June 2023, the first progress benchmark, Student was making substantial progress towards Goals one and two, with 80 to 90 percent of the goal objective met. Student was making limited progress on Goal three and partial progress on Goal four. Student had met the first benchmark in Goal five and met the second benchmark in September 2023.

STUDENT DID NOT PROVE BY A PREPONDERANCE OF THE EVIDENCE  
THAT THE GOALS IN THE MAY 10, 2022 AND APRIL 18, 2023 IEPs WERE  
INSUFFICIENT

Student called two expert witnesses. Dr. Abbe Irshay was a retired educator. Irshay only engaged in a document review to evaluate the goals in the May 2022 and April 2023 IEPs. Irshay did not meet with, or observe, Student. Irshay noted that while Student made either substantial progress or had met specific benchmarks, he did not meet the goal. Irshay opined that this meant that Student was not challenged sufficiently in the goals he did not meet. Student's second expert witness, Dr. Sookyoung Shin, also reviewed Student's records but did not meet with Student or observe Student

in the classroom. Shin believed Student needed additional articulation goals. Shin opined that by packing so much content into each goal, Student was overwhelmed and the way the goals were written did not appear to consider his autism spectrum disorder.

Irshay's and Shin's opinions lacked credibility. While Irshay had substantial experience as an educator, and had participated in special education meetings, she did not hold a special education certification, or have specific special education training. She had never taught or provided related services to students with disabilities. Irshay did not observe Student, nor did she meet with Student's educators or pathologists. Her opinion was primarily based on Student's IEP records alone, and she exhibited limited detailed knowledge of Student or the school he attended.

While Shin had sufficient educational background and experience in dealing with students with disabilities, she also did not observe Student or meet with any of his teachers or Student's speech and occupational therapy therapists. Shin did not hold a special education teaching credential and had never taught or provided related services to students with disabilities in Student's age range in an educational environment. While Chula Vista argued at the hearing, and in its closing brief, that Shin was biased due to her relationship with Student's attorney's firm, the evidence did not reveal a bias that impacted her credibility. However, like Irshay's testimony, Shin's testimony superficially addressed the issues and did not raise any credible concerns regarding the goals. Both experts contradicted each other—with Irshay arguing the goals were not ambitious and challenging enough and Shin opining the goals were too ambitious. Overall, both Irshay and Shin did not necessarily disagree with the substance of the goals but criticized how they were written or phrased. For example, Shin opined she

would have “split up” the writing and fine motor goals into two goals—but did not necessarily challenge the substance of the goals. For these reasons, the ALJ gave little weight to Irshay’s and Shin’s opinions.

Student also called his teachers and therapists to testify. They provided more credible evidence as to the substantive nature of the goals. Mia Rose Tabuena was a special education teacher for Student. Tabuena watched Student progress from kindergarten through second grade. Half of kindergarten and all of first grade was distance learning. Tabuena stated she loved working with Student, who was a “sweet boy, kind, and flexible.” He was very eager to learn. Tabuena opined Student’s goals were appropriate considering his unique circumstances. Based upon her experience with Student, Tabuena assisted in developing and implementing Student’s goals and accommodations in the IEP.

Jinhui Kiang was a school psychologist with Chula Vista. Based upon Student’s triennial assessments, as well as Student’s present levels, the IEP team proposed goals in the areas of communication—advocacy, writing/fine motor, addition and subtraction, and math: place value. Kiang opined each goal was sufficiently ambitious for Student given his unique challenges, as determined by the IEP team members. Kiang confirmed that the IEP team then reviewed and discussed the continuum of services and determined a level that would assist Student in progressing towards these goals.

The evidence demonstrated that Parents attended the May 2022 IEP team meeting, agreed that the goals were sufficient and consented to the May 10, 2022 IEP. Parents did not raise any substantive concerns regarding the goals at the meeting.



Student's third grade teacher, Vanessa Montes-Jurado attended the April 18, 2023 IEP, and worked on developing Student's goals. She developed each of Student's April 2023 IEP goals after the IEP team reviewed Student's baselines, assessment reports, previous IEP goal progress, and input from staff and Parents. Evidence established that during the IEP team meeting, the Chula Vista team members listened to Parents' concerns and incorporated those concerns into the goals and services. Parents agreed with the changes and did not request any additional services or goals.

Parents testified at the hearing. Father acknowledged that Student struggled with place values, and the IEP team determined that mastery of three-digit numbers would be necessary to progress into the third-grade general curriculum. Father felt Student needed additional goals because of his lack of self-advocacy. Montes-Jurado, Father, and Mother all concurred at hearing and at the IEP team meetings that Student's math and writing goals were sufficiently ambitious and appropriate given Student's present levels. Montes-Jurado opined that, based upon her observations of Student, the self-advocacy goal was reasonably ambitious. While she observed that Student was engaged, Montes-Jurado wanted Student to advocate more for himself and raise his hand when he did not know what to do. Because Student made some progress from the previous year's self-advocacy goal, Montes-Jurado opined the goal was ambitious for Student to achieve within a year.

Areas of need are to be broadly construed to include the child's

- academic,
- social,
- health,
- emotional,

- communicative,
- physical, and
- vocational needs. (*Seattle Sch. Dist. No. 1 v. B.S.* (9th Cir. 1996) 82 F.3d 1493, 1500, citing H.R. Rep. No. 410, 1983 U.S.C.C.A.N. 2088, 2106.)

However, “[t]he IDEA does not require that each identifiable need, deficit, or area of struggle or challenge be addressed in a separate goal as long as the IEP, overall, offers a FAPE.” (*Coleman v. Pottstown Sch. Dist.* (3d Cir. 2014) 581 Fed.Appx. 141, 147-148.) As the Supreme Court stated in *Endrew*, *supra*, 580 U.S. at pp. 403-404:

We will not attempt to elaborate on what “appropriate” progress will look like from case to case. It is in the nature of the Act and the standard we adopt to resist such an effort: The adequacy of a given IEP turns on the unique circumstances of the child for whom it was created .... When all is said and done, a student offered an educational program providing “merely more than de minimis” progress from year to year can hardly be said to have been offered an education at all .... The IDEA demands more. It requires an educational program reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances.

Student did not meet his burden on Issues 1 and 7. Chula Vista offered legally sufficient and appropriate goals in the May 10, 2022 and April 18, 2023 IEPs which were reasonably calculated to enable Student to progress in Student’s circumstances. While Student did not meet three out of five goals in the May 10, 2022 IEP, he was sufficiently challenged, and met many of the goals’ benchmarks. Student continued to show progress on the April 18, 2023 goals. Student did not prove by a preponderance

of the evidence that the goals in the May 10, 2022 and April 18, 2023 IEPs were inappropriate. Chula Vista prevailed on Issues 1 and 7.

ISSUE 2: DID CHULA VISTA DENY STUDENT A FAPE, IN STUDENT'S MAY 10, 2022 IEP, BY FAILING TO OFFER SUFFICIENT SPECIAL EDUCATION SERVICES IN OCCUPATIONAL THERAPY (PHYSICAL WRITING SKILLS) AND SPEECH/LANGUAGE (EXPRESSIVE LANGUAGE)?

ISSUE 8: DID CHULA VISTA DENY STUDENT A FAPE IN STUDENT'S APRIL 18, 2023 IEP, BY FAILING TO OFFER SUFFICIENT SPECIAL EDUCATION SERVICES IN OCCUPATIONAL THERAPY (PHYSICAL WRITING SKILLS) AND SPEECH/LANGUAGE (EXPRESSIVE LANGUAGE)?

Student contends the May 10, 2022, and April 18, 2023, IEPs did not offer services and accommodations in the areas of occupational therapy and speech and language. Chula Vista rejects that contention and argues it provided Student with tailored services that met his unique needs.

The IEP must include a statement of the program modifications or supports that will be provided to the student, to allow the student to advance appropriately toward attaining the annual goals; to be involved in, and make progress in the general education curriculum, and to participate in extracurricular activities and other nonacademic activities. (34 C.F.R. § 300.320(a)(4)(i) - (ii); Ed. Code, § 56345, subds. (a)(4)(A), and (B).)

(This space is intentionally left blank. Text continues on the following page.)

Student did not prove, by a preponderance of the evidence, that Chula Vista failed to meet its obligation regarding services and accommodations in Issues 2 and 8. The May 10, 2022 and April 18, 2023 IEPs proposed the following services for Student:

1. Specialized academic instruction for 925 minutes per week in a group session.
2. Speech and language services 30 minutes per week in a group session.
3. Occupational therapy services 30 minutes per week in a group session.

Parents argued that because Student was not meeting his writing and occupational therapy goals, Chula Vista was therefore providing him insufficient services. Father testified he recalled Mother asking for additional time for occupational therapy services at a meeting, but the IEP team denied that request because it would take time out of Student's instruction. The May 2022 and April 2023 IEPs, however, did not document that either Parent made such a request at the IEP team meetings. In the May 2022 IEP, Parent agreed to all services, and reported no concerns about Student's progress overall. The notes to the April 2023 meeting reflect that the IEP team discussed all services, the amount of time for each service, and the way the services would be delivered. Parents agreed to the service. No other documents were admitted into evidence where Parents made separate requests for more services.

At the hearing, Chula Vista's occupational therapist Elizabeth Cantori explained the IEP team increased Student's occupational therapy time in the May 2022 IEP from 60 minutes per month, to 30 minutes per week. The level of services was increased to respond to Parents concerns that Student was continuing to struggle with his motor skills and related areas. Student made "incredible" progress during the 2020-2021 school year, which is why the IEP team initially reduced his minutes for the previous

2021-2022 school year. However, after reviewing Student's three-year review assessment at the May 10, 2022 IEP team meeting, Chula Vista offered to increase occupational therapy services back to the amount in the 2020-2021 IEP, where Student was making substantial progress.

Speech pathologist, Courtney Sciuto, opined the services the IEP team recommended for expressive language, at the May 2022 and April 2023 IEP meetings, was appropriate. The notes reflect that Parents agreed to those services at each IEP team meeting. Although Mother testified that she raised some concerns about Student's speech and language services, she could not identify who she spoke with. Sciuto testified that neither Parent raised concerns about Student's speech and language progress, and never inquired into whether Student required more or different services.

Student did not raise any specific challenges at hearing to the types of services provided, or the frequency of services. Student did not present any credible evidence that occupational therapy or speech and language services were inadequate for Student to educationally progress, nor did Student present evidence that services were omitted. Student did not meet his burden in establishing by a preponderance of the evidence in Issues 2 and 8 that Chula Vista failed to provide adequate occupational therapy or speech and language services and accommodations in the May 10, 2022 and April 18, 2023 IEPs. The evidence established that Chula Vista addressed Student's specific needs, and the evidence showed he was making substantial progress. Chula Vista prevailed on Issues 2 and 8.

ISSUE 3: DID CHULA VISTA DENY STUDENT A FAPE IN STUDENT'S MAY 10, 2022 IEP, BY FAILING TO OFFER HOME APPLIED BEHAVIOR ANALYSIS THERAPY AND CLINIC MEETINGS?

ISSUE 10: DID CHULA VISTA DENY STUDENT A FAPE IN STUDENT'S APRIL 18, 2023 IEP, BY FAILING TO OFFER HOME APPLIED BEHAVIOR ANALYSIS THERAPY AND CLINIC MEETINGS?

Student contends Chula Vista was obligated to provide home Applied Behavior Analysis therapy, referred to as ABA therapy, and clinic meetings for Parent. Chula Vista denies there was a need for such services, and further argues that Parent never requested such services.

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

Student did not meet his burden of proof on these two issues. During the hearing, Student offered limited evidence that showed he required ABA therapy, at home or at school. There was some evidence that Student had received ABA therapy privately, through Parents' private insurance. However, Student offered no credible

(This space is intentionally left blank. Text continues on following page.)

evidence that showed Student required ABA therapy to receive a FAPE. Moreover, evidence and testimony demonstrated that Student's behavior was not an impediment to his learning. His teachers and Parents described Student as

- loving,
- friendly,
- helpful,
- engaging, and
- getting along with peers.

While Student did lack in self-advocacy skills, Student's speech and language therapy service, increased specialized academic instruction, and the implementation of appropriate goals addressed this need.

Student did not prove by a preponderance of the evidence that he required home ABA therapy, or that Chula Vista denied Student a FAPE by not providing that therapy. Chula Vista prevailed on Issues 3 and 10.

(This space is intentionally left blank. Text continues on following page.)

ISSUE 4: DID CHULA VISTA DENY STUDENT A FAPE IN STUDENT'S MAY 10, 2022 IEP, BY FAILING TO OFFER PARENT TRAINING?

ISSUE 11: DID CHULA VISTA DENY STUDENT A FAPE IN STUDENT'S APRIL 18, 2023 IEP, BY FAILING TO OFFER PARENT TRAINING?

Student contends that in the May 2022 and April 2023 IEPs, Chula Vista should have provided Parent training on:

- how to use assistive technology devices;
- software or computer programs that Student uses;
- implementation of applied behavior analysis behavior modification techniques at home;
- data collection by team;
- reinforcing Student's reading curriculum and reinforcing Student's reading skills;
- student's supports, services, or eligibility that Parent did not understand;
- practice, exercises or routines Student does at school that Parent needs to reinforce at home;
- autism spectrum disorder, expressive and receptive communication skills, and behavior.

Chula Vista argued Student did not require Parent training in those areas to make educational progress, and Parents never requested those services.



School districts are responsible for providing parent counseling and training when the child's IEP team determines that it is necessary for the child to receive FAPE. (See *U.S. Dept. of Educ., Assistance to States for the Education of Children with Disabilities, and Preschool Grants for Children with Disabilities* (71 Fed. Reg. 46573, Aug. 14, 2006).) To determine whether services for a child's parents, such as training or counseling, should be included in a child's IEP, the team developing the IEP must determine that the service is needed for the child to receive an appropriate special education or other required related services in the least restrictive environment. (See *Letter to Dole* (Office of Special Education and Rehabilitative Services (OSERS), (July 25, 1986) at p. 2.)

Student did not meet his burden by proving Chula Vista denied a FAPE in the May 2022 or April 2023 IEPs by failing to provide parent training. Student did not establish Parents needed specific training in any of the eight identified areas for Student to receive a FAPE. The evidence at hearing showed that Parents never requested training or raised any questions that would indicate their need for training for Student to benefit from his education. There was little to no credible evidence that training for Parents in any of the areas would have been necessary for Student to benefit from special education. While some of the testimony suggested that Parents would have liked training, the evidence did not establish that training was necessary for Student to receive a FAPE. Moreover, no evidence was presented that any member of Chula Vista's staff or Student's IEP team ever recommended parent training or denied a parental request for training in any of the eight areas. Student did not meet his burden of proof. Chula Vista prevailed on Issues 4 and 11.

ISSUE 5: DID CHULA VISTA PREDETERMINE STUDENT'S MAY 10, 2022 IEP AND DENY STUDENT A FAPE BY FAILING TO INCLUDE AN OCCUPATIONAL THERAPIST AT THE IEP TEAM MEETING?

ISSUE 6: DID CHULA VISTA PREDETERMINE STUDENT'S APRIL 18, 2023 IEP AND DENY STUDENT A FAPE BY FAILING TO INCLUDE AN OCCUPATIONAL THERAPIST AT THE IEP TEAM MEETING?

Student argues the fact that Chula Vista provided partial excusal forms to Parents, excusing certain members of the IEP team for part of the IEP team meetings in May 2022 and April 2023, constituted predetermination. As such, Student argues this was a procedural violation of the IDEA, and a substantive denial of FAPE. Chula Vista argues that there was no predetermination, that the occupational therapist attended the meeting and participated, and that Parents never raised any concerns about the absence of any members.

Denying parental access to the IEP process is a serious procedural violation of the IDEA. (*Amanda J. v. Clark County Sch. Dist.*, (9th Cir.2001) 267 F.3d 877, 882 n. 1; *Ms. S. ex rel. G. v. Vashon Island Sch. Dist.* (9th Cir. 2003) 337 F.3d 1115, 1132.) Among the most important procedural safeguards are those that protect the parents' right to be involved in the development of their child's educational plan. Parents not only represent the best interests of their child in the IEP development process, but they also provide information about the child critical to developing a comprehensive IEP and which only they are able to know. (*Amanda J.*, 267 F.3d at p. 882.) A school district violates IDEA procedures if it independently develops an IEP, without meaningful

parental participation and then simply presents the IEP to the parent for ratification. (*Ms. S.*, 337 F.3d. at p.1131.) A school district may not enter an IEP meeting with a “take it or leave it” position, and if it does so, then even the parents' decision not to cooperate thereafter may not excuse the district's error. (*Ibid*).

School staff is permitted to meet in advance of an IEP team meeting to form opinions, compile reports, discuss a child’s special education, and otherwise engage in preparatory activities to develop a proposal or response to a parent proposal that will be discussed at a later IEP team meeting. (See 34 C.F.R. §§ 300.501(b)(1) and (b)(3); *N.L. v Knox County Schools*, (6th Circ. 2003), 315 F.3d 688, at p. 694, n. 3, in which the court stated: “Indeed, without some organization and evaluation [by school staff] prior to the IEP Team meeting, it is unclear how an IEP Team could make reasonable and informed decisions.”)

An IEP team must include not less than one regular education teacher of the child, if the child is, or may be, participating in the regular education environment; and at the discretion of the parent or the agency, any other individuals who have knowledge or special expertise regarding the child, including related services personnel as appropriate. (20 U.S.C. § 1414(d)(1)(B)(ii) & (vi); 34 C.F.R. § 300.321(a)(2) & (6); Ed. Code, § 56341, subd. (b)(2); Ed Code, § 56341.1, subd. (e).) A member of the IEP team shall not be required to attend an IEP meeting, in whole or in part, if the parent of the child with a disability and the local educational agency agree, in writing, that the attendance of such member is not necessary because the member submits, in writing, to the parent and the individualized education program team input into the development of the IEP prior to the meeting. (20 U.S.C. § 1414(d)(C)(II); 34 C.F.R. § 300.321(e)(2)(ii); Ed. Code, § 56341, subd. (g).)

Student did not meet his burden of proof on either of these issues. School Psychologist Kiang opined that Chula Vista's normal procedure was to send parents partial excusal forms in advance of the IEP team meetings. The purpose for these forms is to allow teachers and related service providers the flexibility to attend and contribute at the IEP team meeting, but also to provide services to other students when they are no longer needed at the meeting. Kiang testified, and the excusal forms confirmed, that she had sent each form a month before the respective meetings. Parents received the forms and signed the form for the May 10, 2022 IEP meeting on March 17, 2022. The evidence established that the required personnel was present at Student's May 2022 meeting. The April 18, 2023 IEP reflects that Parent signed the partial excusal form on the same day as the IEP. The IEP team members who received a partial excusal first participated in the meeting and addressed Parent's questions or concerns related to their services and Student's education. Sciuto, Cantori, and Casey Meuser, the general education teacher, were present for the entire May 2022 and April 2023 IEP team meetings, or only excused after all of Parent's questions were addressed and they were no longer needed to address Parent's concerns. In addition to signing the partial excusal, neither Parent objected to the Chula Vista IEP team members leaving the meeting once Parents had discussed their concerns. Kiang testified that if Parent did not consent to the partial excusal in advance, those members would not have been excused. Parent, therefore, effectively controlled whether the occupational therapist or the speech pathologist were excused in either meeting. The notes to the May 2022 IEP suggest that both Sciuto and Cantori were present during most of the meeting. The general education teacher, Meuser, answered questions from Parents and stayed in the meeting until they had no further concerns to raise regarding his general education classroom.

No credible evidence established that Chula Vista failed to include required team members at either the May 2022 or April 2023 IEP team meetings, or that the content of either IEP was predetermined as a result. Both the speech therapist and the occupational therapist were present at both meetings, and credibly testified that all required members and members with relevant information were present at both meetings to respond to Parent's concerns. Parents' testimony was consistent with this evidence. The testimony and notes of each IEP show that Chula Vista's personnel were receptive and responsive to Parents' concerns, considered Parents' suggestions and occasionally incorporated Parents' concerns in the IEP offers.

Student did not prove by a preponderance of the evidence that Chula Vista failed to have the required personnel at the May 2022 and April 2023 IEP meetings, or that Chula Vista predetermined an outcome in either IEP. Chula Vista prevailed on Issues 5 and 6.

#### ISSUE 9: DID CHULA VISTA DENY STUDENT A FAPE IN STUDENT'S APRIL 18, 2023 IEP, BY FAILING TO OFFER INTENSIVE INDIVIDUAL SUPPORT SERVICES IN THE FORM OF A ONE-TO-ONE ACADEMIC AND BEHAVIORAL AIDE?

Student contends that because of his lack of self-advocacy and his autism spectrum disorder, Chula Vista was required to provide Student with a one-to-one aide during the school day in his general education classroom. Chula Vista argues that a one-to-one aide was not necessary, and that Student was capable of advocating for himself with the existing services and accommodations. Moreover, Chula Vista claims Student progressed in the 2021-2022 and 2022-2023 school years at issue without a one-to-one aide.

Student did not meet his burden by establishing Chula Vista should have provided a one-to-one aide. Student provided no evidence that he required a change in placement to general education with a one-to-one aide to receive FAPE. In fact, the notes of the May 2022 IEP suggested that general education teacher Meuser believed Student should be more independent and seek help on his own. Student had a classroom aide who assisted him, and Meuser opined that Student relied too heavily on the aide. The April 2023 IEP notes confirm that Montes-Jurado, Student's third-grade teacher, recommended decreasing Student's time in the general education classroom because Student continued to be shy and reserved and cried occasionally. The IEP team recommended a reduction in general education to 33 percent of the school day, and Parents agreed with the change. There was no evidence that a one-on-one aide would have assisted Student in the general education classroom, or that a one-on-one aide would have allowed Student more time in his general education setting.

Based upon her document review, Shin testified that Student would benefit from an aide. However, as noted above, Shin did not spend any time observing Student in either his special education or general education classes, nor did she interview Student's teachers. Parents both testified they believed a one-to-one aide would be helpful for Student because of his shyness and lack of self-advocacy, but neither Parent advocated for a one-on-one aide at the May 2022 or April 2023 IEP team meetings, or at any subsequent time. The evidence did not establish the need for a one-on-one aide, especially when considering Student's overall progress from year to year. All of Student's teachers and related service providers agreed that a one-on-one aide was not necessary, and, to the contrary, would provide a more restrictive environment for Student.

Student did not prove by a preponderance of the evidence that a one-on-one aide was needed to receive a FAPE. Chula Vista prevailed on Issue 9.

## 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:

Chula Vista did not deny Student a FAPE in the IEP dated May 10, 2022, by failing to provide sufficient and appropriate goals.

Chula Vista prevailed on Issue 1.

### ISSUE 2:

Chula Vista did not deny Student a FAPE in the IEP dated May 10, 2022, by failing to provide adequate services in the areas of speech and language and occupational therapy.

Chula Vista prevailed on Issue 2.

### ISSUE 3:

Chula Vista did not deny Student a FAPE in the IEP dated May 10, 2022, by failing to offer home Applied Behavior Analysis therapy and clinic meetings.

Chula Vista prevailed on Issue 3.

#### ISSUE 4:

Chula Vista did not deny Student a FAPE in the IEPs dated May 10, 2022, by failing to provide parent training on

- a. how to use assistive technology devices;
- b. software or computer programs that student uses;
- c. implementing applied behavior analysis behavior modification techniques at home;
- d. data collection by team;
- e. reinforcing student's reading curriculum and reinforcing student's reading skills;
- f. student's supports, services, or eligibility that parent does not understand;
- g. practice, exercises or routines student does at school that parent needs to reinforce at home; and
- h. autism spectrum disorder, expressive and receptive communication skills, and behavior?

Chula Vista prevailed on Issue 4.

#### ISSUE 5:

Chula Vista did not deny Student a FAPE in the IEP dated May 10, 2022, by failing to have appropriate personnel attend the May 10, 2022, IEP meeting, or by predetermining Student's educational program without Parent's input.

Chula Vista prevailed on Issue 5.



#### ISSUE 6:

Chula Vista did not deny Student a FAPE in the IEP dated April 18, 2023, by failing to have appropriate personnel attend the April 18, 2023 IEP meeting, or by predetermining Student's educational program without Parent's input.

Chula Vista prevailed on Issue 6.

#### ISSUE 7:

Chula Vista did not deny Student a FAPE in the IEP dated April 18, 2023, by failing to provide sufficient and appropriate goals.

Chula Vista prevailed on Issue 7.

#### Issue 8:

Chula Vista did not deny Student a FAPE in the IEP April 18, 2023, by failing to provide adequate services in the areas of speech and language and occupational therapy.

Chula Vista prevailed on Issue 8.

#### ISSUE 9:

Chula Vista did not deny Student a FAPE in the IEP dated April 18, 2023, by failing to provide Student with a one-on-one aide.

Chula Vista prevailed on Issue 9 in its entirety.

## ISSUE 10:

Chula Vista did not deny Student a FAPE in the IEP dated April 18, 2023, by failing to offer home Applied Behavior Analysis therapy and clinic meetings.

Chula Vista prevailed on Issue 10.

## ISSUE 11:

Chula Vista did not deny Student a FAPE in the IEP dated April 18, 2023, by failing to provide parent training on

- a. how to use assistive technology devices;
- b. software or computer programs that Student uses;
- c. implementation of applied behavior analysis behavior modification techniques at home;
- d. data collection by team;
- e. reinforcing Student's reading curriculum and reinforcing Student's reading skills;
- f. student's supports, services, or eligibility that Parent did not understand;
- g. practice, exercises or routines Student does at school that Parent needs to reinforce at home; and,
- h. autism spectrum disorder, expressive and receptive communication skills, and behavior.

Chula Vista prevailed on Issue 11.

## ORDER

Student did not prevail on any issues. All requested remedies 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.

Brian H. Krikorian

Administrative Law Judge

Office of Administrative Hearings