

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

PARENT ON BEHALF OF STUDENT,

v.

SAN LORENZO UNIFIED SCHOOL DISTRICT.

CASE NO. 2024050391

DECISION

JULY 26, 2024

On May 8, 2024, the Office of Administrative Hearings, called OAH, received a due process hearing request from Student, naming San Lorenzo Unified School District. Administrative Law Judge Cole Dalton heard this matter by videoconference on June 25 and 26, 2024.

Leah Zabel represented Student. Parent attended all hearing days on Student's behalf. Shawn Olson Brown represented San Lorenzo. Coordinator of alternative dispute resolution and secondary special services Suzy Williams attended the first day and part of the second day of hearing on San Lorenzo's behalf. Coordinator of elementary special services Thomas Mills attended a portion of the second day of hearing on San Lorenzo's behalf.

At the parties' request, the matter was continued to July 10, 2024, for written closing briefs. The record was closed, and the matter was submitted on July 10, 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 San Lorenzo deny Student a FAPE during the 2022-2023 school year by failing to appropriately assess Student in executive functioning?
2. Did San Lorenzo deny Student a FAPE during the 2022-2023 school year, beginning November 15, 2022, by materially failing to implement Student's IEP accommodations and modifications?
3. Did San Lorenzo deny Student a FAPE during the 2022-2023 school year, beginning November 15, 2022, by failing to offer adequate goals for executive functioning?
4. Did San Lorenzo deny Student a FAPE during the 2022-2023 school year, beginning November 15, 2022, by significantly impeding Parent's ability to participate in the decision making process, by denying Parent's request for an IEP team meeting?
5. Did San Lorenzo deny Student a FAPE during the 2023-2024 school year by failing to appropriately assess Student in executive functioning?

6. Did San Lorenzo deny Student a FAPE during the 2023-2024 school year by materially failing to implement Student's IEP accommodations and modifications?
7. Did San Lorenzo deny Student a FAPE during the 2023-2024 school year, by failing to offer adequate goals for executive functioning?
8. Did San Lorenzo deny Student a FAPE during the 2023-2024 school year by significantly impeding Parent's ability to participate in the decision making process by failing to appropriately respond to Parent's request to assess Student in executive and cognitive functioning?

Issues 2 and 6 were clarified to reflect the law regarding a material failure to implement, rather than a failure to materially implement, Student's IEPs. This change in wording did not change the nature of the Issues or law applicable to them. (*Van Duyn v Baker School Dist.*, 5J (9th Cir. 2007) 502 F.3d 811 (*Van Duyn*).)

JURISDICTION

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

- all children with disabilities have available to them a FAPE that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living, and

- the rights of children with disabilities and their parents are protected. (20 U.S.C. § 1400(d)(1); see Ed. Code, § 56000, subd. (a).)

The IDEA affords parents and local educational agencies the procedural protection of an impartial due process hearing with respect to any matter relating to the identification, assessment, or educational placement of the child, or the provision of a FAPE to the child. (20 U.S.C. § 1415(b)(6) & (f); 34 C.F.R. § 300.511; 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 the issues Student brought to hearing. 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 17 years old and in 11th grade for the 2023-2024 school year at the time of hearing. Student resided within San Lorenzo's geographic attendance boundaries with Parent at all relevant times. At the time of hearing, Student was eligible for special education under the category of other health impairment, as a child diagnosed with attention deficit hyperactivity disorder.

Student brought eight issues to hearing, beginning with the 2022-2023 school year, Student's 10th-grade year. The 2022-2023 school year began on August 18, 2022, and ended June 7, 2023. During the 2022-2023 school year, San Lorenzo held Student's annual IEP team meeting on November 15, 2022. Parent consented to implementation of the November 15, 2022 IEP at the May 12, 2023 amendment IEP team meeting.

During the 2023-2024 school year, San Lorenzo held Student's three-year-review IEP team meeting, on December 14, 2023, during which the IEP team reviewed San Lorenzo's psychoeducational evaluation. San Lorenzo held no other IEP team meetings before the filing of Student's complaint.

STUDENT'S REQUEST FOR OFFICIAL NOTICE

On June 25, 2024, at approximately 10:54 a.m., Student filed a request for judicial notice of the term "executive function," nearly one and a half hours after the hearing began. The motion was untimely as it was not filed three days before the prehearing conference, called PHC, such that it could be heard during the PHC. Student did not make a showing of good cause for the late-filed motion. Under the specific circumstances of this case, however, the ALJ provided Student an opportunity to be heard on the substance of the motion, given that executive function lies at the heart of Student's Issues 1 and 5. After oral argument by the parties, the ALJ took the matter under submission and issued a ruling on the record during the hearing.

Judicial notice is generally called official notice when taken by an administrative tribunal. (See, e.g., Gov. Code, § 11515.) No specific statute or regulation governs the taking of official notice in special education due process proceedings. For guidance, OAH looks to provisions of the California Evidence Code.

Evidence Code section 452 provides, in relevant part, that judicial notice may be taken of:

- (g) Facts and propositions that are of such common knowledge within the territorial jurisdiction of the court that they cannot reasonably be the subject of dispute.

- (h) Facts and propositions that are not reasonably subject to dispute and are capable of immediate and accurate determination by resort to sources of reasonably indisputable accuracy. (Evid. Code § 452, subds. (g) & (h)).

Student argued that the definition of executive function is a matter so widely accepted as established by experts and specialists in the natural, physical, and social sciences, which can be verified by reference to treatises, encyclopedias, almanacs, and the like or by persons learned in the subject matter, citing *Gould v. Maryland Sound Industries, Inc.* (1995) 31 Cal.App.4th 1137, 1145. Student also argued that matters of scientific certainty are subject to judicial notice, citing *McAllister v. Workmen's Comp. App. Bd.* (1968) 69 Cal.2d 408, 414 (*McAllister*).

Student requested the ALJ take official notice of the fact that the term "executive function" is a general term that comprises a set of cognitive control processes, mainly supported by the prefrontal cortex, that regulates lower-level processes such as perception and motor responses.

Student's requested definition itself presented more problems than it attempted to solve. First, the definition described "executive function" as a general term. Official notice applies to matters of a scientific certainty, not a scientific generality. For example, *McAllister* involved a claim by a deceased firefighter's spouse for death benefits and burial expenses, alleging that smoke inhalation over the course of the firefighter's employment caused his death. The California Supreme Court heard the spouse's review of the appeal board's decision holding the firefighter's death did not arise from his employment. The Court found that both common knowledge and ordinary language supported the recognition that smoke is visible, and that, as a matter beyond scientific

dispute, smoke is visible precisely because it contains incompletely oxidized materials. The Court relied on definitions of smoke found in Webster's International Dictionary, Second Edition, and Encyclopædia Britannica, 1954 Edition. Here, Student does not turn to an established definition of "executive function," but instead relies on lengthy articles describing but not defining the term.

Second, if perception and motor response are but two lower-level processes regulated by cognitive control processes, Student's proposed definition did not identify the others. Also, Student's proposed definition did not identify or describe cognitive control processes. The IDEA requires local educational agencies to offer children a FAPE in IEPs designed to address their unique needs. Student's definition purports to identify two lower-level processes that may be areas of need related to executive function. Student's definition does not explain all areas of need that may be related to executive function, or even, to his own executive function specifically.

Third, Student submits two different articles in support of his request for official notice, which have two different descriptions of "executive function." The fact that multiple, varying descriptions are made of the same term underscores that Student's request for official notice failed to provide a definition based upon scientific certainty.

Fourth, articles submitted by Student contained multiple levels of hearsay that could not be explained, supported, or relied on by any witnesses at the hearing as Student called no expert witness to testify. Moreover, neither the authors of the articles, nor authors upon which they relied, would be subject to cross-examination at hearing.

Accordingly, Student's request for official notice was denied on the record during the hearing.

STUDENT'S MOTION REGARDING SUBPOENAS OF WITNESSES

At hearing, Student sought an order compelling subpoenaed witnesses Alfrieda Scott and Susie Lautaimi to testify and an order continuing the hearing to serve psychologist Dr. Quan Ngo with a subpoena to testify. Scott was Student's case manager at the November 15, 2022 and May 12, 2023 IEP team meetings. Lautaimi was Student's case manager at the December 14, 2023 IEP team meeting. Dr. Ngo conducted San Lorenzo's November 2023 psychoeducational assessment.

During the PHC, San Lorenzo advised Student that San Lorenzo employee witnesses would need to be subpoenaed to testify as San Lorenzo did not maintain control over the witnesses while they were on summer break. San Lorenzo did not agree to accept service of subpoenas on employee witnesses, opting instead to provide last known addresses and telephone numbers of employee witnesses whom Student wished to subpoena. Neither San Lorenzo nor the witnesses agreed to accept service of subpoenas by email. Neither did the parties agree to a shortened time for serving the subpoenas.

At the PHC, the parties were ordered to meet and confer regarding witnesses and evidence and submit a joint list of witnesses to the ALJ on the first day of hearing. The parties did so and, by the time of the meet-and-confer, Student withdrew all witnesses except for Scott and Lautaimi. Student no longer intended to call Dr. Ngo in his case in chief.

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Student purported to serve Scott and Lautaimi by email on June 24, 2024, at 3:00 p.m., requesting each appear at hearing on June 26, 2024. The subpoenas were sent to the witnesses' work email addresses. Student did not submit evidence that either witness received the emails, whether either witness worked between June 24 and June 26, 2024, during the summer break, or whether either witness had been out of town or out of the country.

On June 24, 2024, at approximately 3:59 p.m., the day before the hearing, Student filed with OAH subpoenas for Scott and Lautaimi to appear at hearing on June 26, 2024, at 9:30 a.m. and 1:30 p.m., respectively. With the subpoenas, Student filed a document entitled "subpoena list" confirming that Student did not intend to call any expert witnesses to the hearing.

OAH's subpoena forms specifically state that service of process is regulated by state law and that it is the responsibility of the person serving the subpoena to determine applicable laws and comply with them. California law does not provide for service of a subpoena for witness testimony by email. Though the parties may agree to accept service of process on behalf of a witness, that did not happen here.

Moreover, subpoenas must be served in a manner allowing the witness a reasonable time for preparation and travel to the place of attendance. (Code Civ. Proc., § 1987, subd. (a).) Though the witnesses would merely need to appear by videoconference, one business days' notice could hardly be considered reasonable, particularly considering the manner of service, which did not warrant a high probability that Scott or Lautaimi had notice of the subpoenas. Student provided no explanation for failing to appropriately or timely serve the subpoenas.

Likewise, Student provided no explanation for withdrawing Dr. Ngo as a witness but then requesting a mid-hearing continuance to serve him with a subpoena.

Student's motion to compel the appearances of Scott and Lautaimi and to continue the hearing to subpoena Dr. Ngo was denied on the record during the hearing.

ISSUES 1 AND 5: DID SAN LORENZO DENY STUDENT A FAPE DURING THE 2022-2023 AND 2023-2024 SCHOOL YEARS BY FAILING TO APPROPRIATELY ASSESS STUDENT IN EXECUTIVE FUNCTIONING?

Student argues the IEP team meeting notes from the 2020-2021 school year indicate that Student required a behavior plan, and that meant San Lorenzo should have assessed in functional behavior during the 2022-2023 and 2023-2024 school years. San Lorenzo argues that Dr. Ngo assessed Student's executive function as part of the three-year psychoeducational assessment conducted in November 2023 and Student failed to demonstrate that assessment was deficient or that Student required a reevaluation, earlier.

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);

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Ed. Code, § 56381, subd. (a)(2).) Analyzing the IDEA and state law regarding reevaluations, the California Supreme Court held that a local educational agency had no duty to conduct a reevaluation of a student where

- the local educational agency did not determine that reevaluation was necessary,
- the student's parents had not requested a reevaluation,
- the student's teacher had not requested a reevaluation, and
- fewer than three years had elapsed since the student's last evaluation. (*M.S. v. Lake Elsinore Unified School District* (9th Cir. 2017) 678 Fed. Appx. 543, 544 (*Lake Elsinore*) (nonpub. opn.).)

2022-2023 SCHOOL YEAR THROUGH NOVEMBER 2023

Here, during the 2022-2023 school year through November 2023, the evidence established that neither Parent nor teachers requested a reevaluation of Student's executive function and that San Lorenzo had not determined that a reevaluation of Student's executive function was necessary. Moreover, Student did not demonstrate that more than three years elapsed since San Lorenzo last evaluated Student's executive functioning.

Student presented no expert witnesses or evidence defining

- executive functioning,
- appropriate practices for assessing executive functioning,
- Student's needs in executive functioning, or
- deficiencies in San Lorenzo's assessment of Student's executive functioning.

Student argued, in his closing brief, that San Lorenzo had notice that Student required additional assessments due to his chronic and excessive absenteeism. Student failed to connect Student's absenteeism to executive functioning deficits, making the argument merely speculative.

Rather than focusing on executive functioning, Student focused on a red herring theory that failure to conduct a functional behavior assessment and develop a behavior intervention plan demonstrated that San Lorenzo failed to conduct appropriate assessments in executive function. Student's theory fails in several respects.

First, the argument related to IEP team meeting notes from the 2020-2021 school year. Student failed to link the nearly two-year old discussion to Student's needs as they existed during the 2022-2023 school year or beyond. Second, Student failed to identify which specific behaviors he believed related to executive function. Third, Student failed to produce evidence that a functional behavior assessment could, in any fashion, address his needs in executive function.

Throughout the hearing, the ALJ admonished Student that he had not brought the issue of failure to conduct a functional behavior assessment to hearing. Rather, Student focused Issues 1 and 5 on assessment to address his executive functioning needs. The ALJ discussed and clarified the issues with counsel for Student and San Lorenzo on the record during the PHC. Issues clarified during the PHC inform the parties on what witnesses and evidence they require for hearing. The hearing ALJ discussed the issues again on the first day of hearing. (See Ed. Code, §§ 56502, subd. (i), and 56505, subd. (e)(6).) Student cannot change the issues for hearing once hearing has begun, absent agreement by the opposing party, which did not happen here.

Throughout the hearing, the ALJ reminded Student that nothing prevented him from bringing additional issues in another hearing, but that the ALJ would not consider issues not identified in the complaint, as clarified during the PHC. (Ed. Code, § 56509.)

NOVEMBER 2023 THROUGH MAY 2024

Student presented no evidence or argument that San Lorenzo inappropriately assessed Student's executive functioning as part of Dr. Ngo's November 2023 psychoeducational assessment. Student did not demonstrate that San Lorenzo denied him a FAPE from November 2023 through the filing of his complaint in May 2024, for failing to appropriately assess in executive functioning.

As Student presented no expert testimony, the following was derived from Dr. Ngo's report and demonstrates that San Lorenzo assessed Student's executive functioning and made recommendations for his IEP team. Dr. Ngo assessed Student in executive functioning and attention by administering the Wide Range Assessment of Memory and Learning, Third Edition. Dr. Ngo's report did not explain the relationship between executive functioning and attention. He described the Wide Range Assessment as a reliable, norm-referenced test composed of six core subtests to yield standard scores in three areas of learning and memory.

As part of his executive functioning and attention testing, Dr. Ngo administered the finger windows and number letter subtests, which are tests of auditory and visual rote sequential recall, respectively. Student scored in the average range on the visual subtest and below average on the auditory subtest, resulting in a standard score of 84 on the attention/concentration index, below average. Dr. Ngo concluded Student had

weak abilities in processing and recalling rote information across verbal and visual input, compared to same-age peers. He also concluded that Student would have difficulty with attention/concentration in academic, work, and home settings.

In another portion of Dr. Ngo's assessment report, entitled "memory and learning," Dr. Ngo explained that he administered the visual immediate memory index and Student scored in the below average range. In the visual immediate memory index tests for design learning, Student was unable to recall the designs and did not want to attempt the task. In the verbal learning subtest, Student scored in the very low range. Dr. Ngo opined these results indicated Student likely would learn and remember relatively unrelated information at a slower pace compared to same-age peers. This could impact his ability to remember dictated homework assignments. Student scored low average on the story learning subtest, indicating he had weakness with short-term recall of narrative tasks like remembering the content of a conversation or news on the radio. This information seemed, generally, consistent with Sister's testimony. However, given the lack of expert evidence, the question remained whether this testing demonstrated any need, and specifically a need in executive functioning. This evidence did not demonstrate a failure to assess Student's executive functioning.

Dr. Ngo determined that Student met continued special education eligibility requirements as a child with other health impairment due to a diagnosis of attention deficit hyperactivity disorder, among other things. Dr. Ngo made recommendations in his assessment report for the IEP team to consider. He recommended reminders to slow down and scan all directions before attempting tasks, and encouragement to refer to visual models or teacher samples when available.

San Lorenzo reviewed Dr. Ngo's assessment at Student's three-year-review IEP team meeting on December 14, 2023. Parent attended on behalf of Student. Dr. Ngo, assistant principal Gena Kurzfeld, and case manager Lautaimi attended on behalf of San Lorenzo. According to the IEP team meeting notes, the general education teacher had been excused from attending the meeting. Parent had technical issues with Zoom, so the IEP team held the meeting telephonically. Dr. Ngo described his assessment results, but the IEP team agreed to hold the meeting in a second part, where he would provide more in-depth results. Parent testified that she received a copy of Dr. Ngo's assessment report by January 2024. Sister received a copy of Dr. Ngo's report one month or so before the hearing. Personnel from San Lorenzo contacted her between the December 14, 2023 IEP team meeting and May 2024, trying to arrange another IEP team meeting. Sister could not attend the meeting and recalled back and forth emailing between her and San Lorenzo regarding scheduling.

San Lorenzo had not held the second part of the IEP team meeting before Student filed his due process complaint. On May 16, 2024, San Lorenzo sent a letter to Parent seeking an agreement to meet on one of 10 offered dates, ranging from April 16 through May 10, 2024. The letter reflected an 11th date, which had been offered to Parent in a prior telephone conversation and email. The evidence demonstrated that Parent did not agree to any of many dates offered to complete the IEP team meeting.

A school district must use "assessment tools and strategies that provide relevant information that directly assists persons in determining the educational needs of the child. Student presented no evidence that San Lorenzo should have assessed Student's executive functioning during the 2022-2023 school year. San Lorenzo conducted executive functioning assessments as part of its three-year-review psychoeducational evaluation conducted during the 2023-2024 school year. Student did not present

evidence that Dr. Ngo's November 2023 psychoeducational assessment failed to use assessment tools and strategies that provided relevant information directly assisting his IEP team in determining his educational needs.

Student failed to demonstrate that San Lorenzo denied Student a FAPE by failing to appropriately assess him in the area of executive functioning during the relevant portions of the 2022-2023 and 2023-2024 school years. Student did not prevail on Issues 1 or 5.

ISSUES 2 AND 6: DID SAN LORENZO DENY STUDENT A FAPE DURING THE 2022-2023 SCHOOL YEAR, BEGINNING NOVEMBER 15, 2022, AND DURING THE 2023-2024 SCHOOL YEAR BY MATERIALLY FAILING TO IMPLEMENT STUDENT'S IEP ACCOMMODATIONS, AND MODIFICATIONS?

Student's closing brief made no argument regarding a material failure to implement his IEPs. At hearing, Parent testified that she observed Student's classroom six or seven times and that his teacher failed to implement any accommodations. San Lorenzo argued Student failed to meet his burden of proof on this issue. In support, San Lorenzo pointed to Parent's generalized and contradictory testimony, lack of knowledge regarding what accommodations the IEPs offered, and mistaken belief that accommodations should have been implemented while Student worked from home on days he did not attend school.

A school district must implement all components of a student's IEP. (20 U.S.C. § 1414(d)(2)(A); 34 C.F.R. § 300.323(c).) When a student alleges the denial of a FAPE based on the failure to implement an IEP, in order to prevail, the student must prove that any failure to implement the IEP was "material," which means that the services

provided to a disabled child fall “significantly short of the services required by the child’s IEP.” (*Van Duyn, supra*, 502 F.3d at p. 822.) A minor discrepancy between the services provided and the services required in the IEP is not enough to amount to a denial of a FAPE. (*Ibid.*) “There is no statutory requirement of perfect adherence to the IEP, nor any reason rooted in the statutory text to view minor implementation failures as denials of a free appropriate public education.” (*Ibid.*) A brief gap in the delivery of services, for example, may not be a material failure. (*Sarah Z. v. Menlo Park City School Dist.* (N.D.Cal., May 30, 2007, No. C 06-4098 PJH) 2007 WL 1574569 at p. 7.)

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

Student did not demonstrate that San Lorenzo materially failed to implement any accommodations or modifications from his IEPs beginning November 15, 2022, through May 8, 2024, when Student filed his complaint. Student failed to demonstrate what accommodations or modifications existed from November 12, 2022, through May 12, 2023, when Parent consented to the former IEP. The November 12, 2022 IEP offered no modifications.

Student failed to demonstrate, by a preponderance of the evidence, that San Lorenzo materially failed to implement accommodations consented to on May 12, 2023, through May 8, 2024.

NOVEMBER 15, 2022, THROUGH MAY 12, 2023

Student presented no evidence regarding accommodations or modifications in effect between November 15, 2022, and May 12, 2023. Notes for the November 15, 2022 IEP included notes from part two of an annual review IEP team meeting held on March 29, 2021, a transition-to-high-school IEP team meeting held on March 31, 2021, and part two of an annual IEP team meeting held on December 7, 2021. The IEP notes do not delineate the program, services, accommodations, modifications, or goals offered in the prior IEPs. Notes for the March 29, 2021, IEP team meeting reflect a discussion with Parent and the rest of the IEP team regarding Parent's request that Student's reading material be modified "as needed" to his ability level rather than his grade level. At the time, Student was in eighth grade during the 2020-2021 school year. The evidence did not demonstrate that the modification requested, if included in the IEP, carried over to Student's 10th-grade year, the 2022-2023 school year.

Student's November 15, 2022 IEP offered Student specialized academic instruction for 600 minutes, three times weekly, in resource specialist program classes for study skills, math, and English. San Lorenzo offered 400 minutes, two times weekly, for push-in resource specialist services in world history and living earth. San Lorenzo also offered college awareness and career awareness for 60 minutes yearly, each.

The IEP, consistent with testimony at the hearing, discussed Student's difficulty keeping up with assignments due to extensive absences. The evidence demonstrated that Student had 26 excused absences, 36 unexcused absences, and 68 trancies during the 2022-2023 school year. The IEP identified Student's needs in the areas of

- reading comprehension,
- math calculation,

- written expression,
- planning and organization,
- executive function, and
- transition.

San Lorenzo offered Student goals addressing each of these areas of need.

The November 15, 2022, IEP offered Student 15 accommodations required in his general education classes:

- Reduce distractions to the Student
- Graphic organizer Streamline – reading, writing, listening
- Check for understanding by having Student restate or paraphrase information
- Extended time
- Calculation devices
- Reduced or shorted assignments as needed
- Teacher check-ins for understanding and chunking of work so that it is manageable for Student
- Flexible grading: option for pass/no pass and/or option to grade only work that Student was present for and had access to, so that he would not be penalized for class and homework that he could not access that was not his fault
- Ability to have an alternate assignment, possibly oral, to show mastery of concepts in lieu of a classwork assignment

- Access to teacher notes at the beginning of each class to follow along with and highlight or check off as the class moves through the daily tasks
- Text-to-speech technology or read aloud, and speech-to-text technology
- Breaks within a class period to help with attention and sustained effort
- Visuals for comprehension and to support what is asked or told aloud
- Paraphrase directions or what is written in assignments
- Access to modified content when applicable

MAY 12, 2023, THROUGH MAY 8, 2024

San Lorenzo did not offer program modifications in the November 15, 2022 IEP. Student presented no evidence that San Lorenzo materially failed to implement accommodations between May 12, 2023, and May 8, 2024. Notes from the November 15, 2022 IEP, May 12, 2023 IEP amendment, and December 14, 2023 three-year-review IEP did not demonstrate that Parent expressed any concerns regarding accommodation implementation. San Lorenzo did not complete the December 14, 2023 IEP by May 8, 2024, leaving the November 15, 2022 IEP in effect. Student presented no emails or letters expressing concern regarding accommodations throughout the relevant time frame.

Parent's testimony did not support a finding of material failure to implement accommodations. Parent testified so inconsistently as to make her testimony unreliable. Much of her testimony on direct examination consisted of yes or no answers. Questions calling for narratives resulted in confusing and often contradictory responses. Parent confused time periods, testifying about things that happened during prior school years as though they happened during the 2022-2023 school year.

For example, Parent often spoke of Student's prior case manager Swatt making recommendations during the relevant period, but Swatt worked with Student during middle school, not high school. Parent testified that Swatt attended the May 12, 2023 amendment IEP team meeting and that Swatt informed the IEP team Student's executive functioning prevented him from turning in his assignments. However, Swatt was Student's case manager two years before the May 12, 2023 IEP team meeting. Furthermore, IEP team meeting notes from the 2020-2021 school year did not support Parent's recollection even of further-past meetings.

Parent also testified that Student needed accommodations when he attempted schoolwork from home and that San Lorenzo did not provide them. She claimed this happened during the 2022-2023 school year. At other times, she seemed to confuse that testimony with asking for work to be sent home in January 2022, during the 2021-2022 school year, due to a rise in COVID-19 cases. The evidence did not demonstrate that San Lorenzo offered Student remote learning as an accommodation during the 2022-2023 or 2023-2024 school years. The evidence did not demonstrate that San Lorenzo offered accommodations either for make-up work he attempted at home or for homework. Moreover, Parent's testimony contradicted Sister, who observed Student's ability to access make-up assignments using his computer, without assistance. Sister described the problem as an inconsistent internet connection.

Parent contended San Lorenzo should have accommodated Student by excusing more absences, because the absences related to asthma and upper respiratory infections. The evidence did not demonstrate long-term medical issues and, more importantly, Student did not allege failure to accommodate either absences or medical problems as an issue for hearing. Student alleged a material failure to implement accommodations, not a failure to offer appropriate accommodations. Parent opined that clearing Student's absences was important as proof of the reason why he did not complete so many assignments. She later agreed that she was concerned about clearing his absences because he was "under truancy."

Parent testified that the IEP team on November 15, 2022, considered Student using a notebook to track assignments, and that such an accommodation was implemented through the time of the May 12, 2023 IEP team meeting. Parent opined that this did not always help Student with missing assignments. But neither the IEP team meeting notes nor the November 15, 2022 IEP offered an accommodation for tracking missing assignments.

Parent expressed confusion and made contradictory statements regarding

- whether Dr. Ngo assessed Student's executive functioning,
- whether she received a copy of his assessment report,
- whether Student used a Chromebook or accessed San Lorenzo's internet portal for missing work, or
- whether he was given homework.

In summary, Parent's testimony proved unreliable. Parent's testimony constituted the bulk of the evidence presented by Student at hearing.

Parent's testimony did not demonstrate that accommodations provided to Student fell significantly short of what his IEPs required under *Van Duyn*. Parent testified that she knew San Lorenzo materially failed to implement his accommodations because she observed Student in class six to seven times, or more, for approximately 30 minutes each time. Parent did not specify which classes she observed, during which school years, or which accommodations she believed teachers failed to implement.

At hearing, Sister read the accommodations in Student's IEP for the 2022-2023 school year. Sister's testimony, though credible, did not support a finding that San Lorenzo materially failed to implement accommodations. She related that Student called her several times between 2022 and 2024 regarding frustration that he was having a hard time, and the teacher was moving too fast. She did not describe how many times Student called her out of frustration. She did not specify which accommodations may not have been implemented, or how frequently.

Student failed to demonstrate that San Lorenzo offered modifications to his program during the relevant time frame, and therefore that San Lorenzo failed to implement any modifications. Neither documentary nor testimonial evidence supported a finding of material failure to implement accommodations. Student did not meet his burden of proof on the issue of material failure to implement accommodations between November 15, 2022, through May 8, 2024. Student did not prevail on Issues 2 and 6.

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ISSUES 3 AND 7: DID SAN LORENZO DENY STUDENT A FAPE DURING THE 2022-2023 SCHOOL YEAR, BEGINNING NOVEMBER 15, 2022, AND DURING THE 2023-2024 SCHOOL YEAR BY FAILING TO OFFER ADEQUATE GOALS FOR EXECUTIVE FUNCTIONING?

Student argued that San Lorenzo changed goals in the November 15, 2022 IEP without prior written notice. San Lorenzo argued that Student agreed the two executive functioning goals in the November 15 2022, IEP addressed his needs and did not produce evidence the goals were deficient or that other goals should have been offered to address executive functioning.

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

Failure to provide a statement of appropriate annual goals is a violation of the IDEA's procedural requirements for the formulation and revision of IEPs. (See 20 U.S.C. § 1415(d)(1)(A)(i); Ed. Code 56345, subd. (a).)

The purpose of goals is to permit the IEP team to determine whether the pupil is making progress in an area of need. (Ed. Code, § 56345.) In developing the IEP, the IEP team shall consider

- the strengths of the child,
- the concerns of the parents for enhancing the education of their child,
- the results of the initial evaluation or most recent evaluation of the child, and
- the academic, functional, and developmental needs of the child.

(20 U.S.C. § 1414(d)(3)(A).)

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* (United States Department of Education, Office of Special Education and Rehabilitation Services (OSERS) March 25, 1998); Notice of Interpretation, Appendix A to 34 C.F.R., part 300, Question 4 (1999 regulations).)

An IEP is evaluated in light of information available at the time it was developed; it is not judged in hindsight. An IEP is "a snapshot, not a retrospective." (*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*).) 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”).)

San Lorenzo offered Student two goals addressing executive functioning at the November 15, 2022 IEP team meeting. The IEP description of Student’s present levels of performance reflected needs in executive function.

The executive functioning goal, goal number one, required Student to advocate for himself when he was confused or lacked understanding of an assignment by saying, “I don’t understand” or “can you explain that again” within the first 15 minutes of class or after preliminary explanation of a lesson and after an oral check for understanding from the teacher, so Student could obtain the support he needed within the class period. The baseline for the goal stated that Student needed to be able to ask for help when he did not understand or had fallen behind in his assignments.

Parent agreed that Student needed the executive functioning goal. Both Parent and Sister agreed that Student was often confused during instruction and that repetition or rephrasing helped him. Sister explained that Student had difficulty holding onto information and skills and that instructions, when provided orally or quickly, were difficult for him to understand. Student presented no evidence that the goal was not based on Student’s needs, not measurable, or otherwise not appropriate.

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Goal number five did not identify an area of need but addressed organization and planning. The goal required Student to increase his ability to break down long tasks into pieces by filling in a graphic organizer with four pertinent task steps or components, with 80 percent accuracy over three days, as measured by teacher-charted data.

Sister testified that the graphic organizer had been helpful to Student and that use of visuals helped address Student's executive functioning deficits. She opined that visual stimulus helped Student access information. In his November 2023 assessment, Dr. Ngo determined that Student had some relative strengths in visual skills and opined that he should be encouraged to reference visual models.

Parent denied the IEP team ever discussed this goal at the IEP team meeting. Parent agreed that the goal addressed an area of need but later said she did not know whether the goal appropriately addressed task or work completion.

In his closing brief, Student argued that San Lorenzo modified goals in the November 15, 2022 IEP without prior written notice. Student relied on notes from the March 2021 IEP team meeting for the argument that San Lorenzo agreed to draft a behavior intervention plan with strategies addressing executive functioning. Just what these strategies were and whether a behavior plan had been drafted in March 2021 remained a mystery. The evidence did not demonstrate what goals San Lorenzo offered in March 2021 and did not demonstrate that San Lorenzo changed any such goals without prior written notice. More importantly, Student did not bring the issues of the alleged change in goals or failure to provide prior written notice to hearing.

Student did not demonstrate that San Lorenzo failed to offer adequate executive functioning goals from November 15, 2022, through May 8, 2024. Student presented evidence demonstrating the goals of the November 15, 2022 IEP were appropriate to meet Student's identified needs.

Accordingly, Student did not prevail on Issue 3 or Issue 7.

ISSUE 4: DID SAN LORENZO DENY STUDENT A FAPE DURING THE 2022-2023 SCHOOL YEAR, BEGINNING NOVEMBER 15, 2022, BY SIGNIFICANTLY IMPEDING PARENT'S ABILITY TO PARTICIPATE IN THE DECISION MAKING PROCESS BY DENYING PARENT'S REQUEST FOR AN IEP TEAM MEETING?

Student made no argument regarding San Lorenzo denying Parent's request for an IEP team meeting in his closing brief. San Lorenzo argues Parent offered no evidence of a request for an IEP team meeting, and that San Lorenzo held an amendment IEP team meeting in May 2023 and again in May 2024. San Lorenzo also argues that it contacted Parent multiple times, offering various dates for meetings, without response.

The parents of a child with a disability must be afforded an opportunity to participate in meetings with respect to the identification, evaluation, and educational placement of the child and the provision of FAPE to the child. (34 C.F.R. § 300.501(a); Ed. Code, § 56500.4.) A parent has meaningfully participated in the development of an IEP when he or she is informed of the child's problems, attends the IEP meeting, expresses disagreement regarding the IEP team's conclusions, and requests revisions in the IEP. (*N.L. v. Knox County Schools* (6th Cir. 2003) 315 F.3d 688, 693; *Fuhrmann, supra*, 993

F.2d at p. 1036 [parent who has an opportunity to discuss a proposed IEP and whose concerns are considered by the IEP team has participated in the IEP process in a meaningful way].)

The evidence demonstrated that during the November 15, 2022 IEP team meeting, Parent requested Sister attend. The IEP team agreed to schedule another meeting. Parent agreed to let San Lorenzo know when Sister was available for an “emergency” meeting. Eventually, an amendment IEP team meeting was held on May 12, 2023.

The evidence did not demonstrate what transpired between the November 2022 meeting and the May 2023 meeting. Student presented no evidence of further communication between Parent and San Lorenzo supporting his claim.

On December 14, 2023, the IEP team met to review Dr. Ngo’s three-year-review psychoeducational assessment. Parent requested that Sister be invited to a second session of the IEP team meeting. San Lorenzo sent notice to Sister that day, beginning the process for scheduling a second session of the assessment review.

The evidence demonstrated that San Lorenzo made attempts to reconvene the IEP team meeting by telephone and email. The evidence did not demonstrate how many attempts to reconvene were made or how Parent responded to the requests if she did. In all, San Lorenzo offered 11 different dates to hold the IEP team meeting. Sister testified that, because of her work schedule and a death in the family, she could not attend. Sister admitted she and San Lorenzo emailed back and forth regarding scheduling.

San Lorenzo responded to Parent's request for an IEP team meeting after the December 2023 meeting. San Lorenzo provided Parent with numerous opportunities for Parent to participate in a reconvened IEP team meeting by providing her with several different IEP team meeting dates.

The evidence did not demonstrate that San Lorenzo denied Parent's request for an IEP team meeting since November 15, 2022. Student did not prevail on Issue 4.

ISSUE 8: DID SAN LORENZO DENY STUDENT A FAPE DURING THE 2023-2024 SCHOOL YEAR BY SIGNIFICANTLY IMPEDING PARENT'S ABILITY TO PARTICIPATE IN THE DECISION MAKING PROCESS, BY FAILING TO APPROPRIATELY RESPOND TO PARENT'S REQUEST TO ASSESS STUDENT IN EXECUTIVE AND COGNITIVE FUNCTIONING?

Student argued that San Lorenzo should have conducted a functional behavior assessment, based upon information from the March 2021 IEP team meeting notes, which had been incorporated into the November 15, 2022 IEP. San Lorenzo argued that it assessed Student's executive functioning in November 2023, which Student failed to demonstrate was inappropriate.

Student relied on evidence from March 2021 to prove his claim that San Lorenzo failed to assess executive functioning during the 2023-2024 school year. This evidence was not at all persuasive. Student presented no evidence that Dr. Ngo's assessment in executive functioning was in any way deficient. Student argues San Lorenzo should have conducted a functional behavior assessment based upon the March 2021

discussion of a list of strategies to address executive functioning that could also be considered a behavior plan. That evidence bears no relation to the 2023-2024 school year.

Student did not produce evidence of Parent's request for an assessment in executive or cognitive function. Student produced no evidence that a functional behavior assessment addresses executive or cognitive function. Student presented no evidence that Parent requested a functional behavior assessment.

Dr. Ngo's November 2023 assessment report indicated that San Lorenzo assessed in areas for which Parent provided consent. The report also indicated that Parent had not consented for areas of social-emotional or adaptive behaviors. Regardless of how illusory Student's argument about a functional behavior assessment was, Student failed to demonstrate any writing or reliable testimony to establish Parent asked for an assessment in behavior to which San Lorenzo failed to respond.

Student failed to demonstrate that San Lorenzo's assessment of Student's executive functioning was in any way deficient. Student did not prevail on Issue 8.

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.

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ISSUE 1:

San Lorenzo did not deny Student a FAPE during the 2022-2023 school year by failing to appropriately assess Student in executive functioning.

San Lorenzo prevailed on Issue 1.

ISSUE 2:

San Lorenzo did not deny Student a FAPE during the 2022-2023 school year, beginning November 15, 2022, by materially failing to implement Student's IEP accommodations and modifications.

San Lorenzo prevailed on Issue 2.

ISSUE 3:

San Lorenzo did not deny Student a FAPE during the 2022-2023 school year, beginning November 15, 2022, by failing to offer adequate goals for executive functioning.

San Lorenzo prevailed on Issue 3.

ISSUE 4:

San Lorenzo did not deny Student a FAPE during the 2022-2023 school year, beginning November 15, 2022, by significantly impeding Parent's ability to participate in the decision making process, by denying Parent's request for an IEP team meeting.

San Lorenzo prevailed on Issue 4.

ISSUE 5:

San Lorenzo did not deny Student a FAPE during the 2023-2024 school year by failing to appropriately assess Student in executive functioning.

San Lorenzo prevailed on Issue 5.

ISSUE 6:

San Lorenzo did not deny Student a FAPE during the 2023-2024 school year by materially failing to implement Student's IEP accommodations and modifications.

San Lorenzo prevailed on Issue 6.

ISSUE 7:

San Lorenzo did not deny Student a FAPE during the 2023-2024 school year by failing to offer adequate goals for executive functioning.

San Lorenzo prevailed on Issue 7.

ISSUE 8:

San Lorenzo did not deny Student a FAPE during the 2023-2024 school year by significantly impeding Parent's ability to participate in the decision making process by failing to appropriately respond to Parent's request to assess Student in executive and cognitive functioning.

San Lorenzo prevailed on Issue 8.

ORDER

1. All Student's claims 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.

Cole Dalton

Administrative Law Judge

Office of Administrative Hearings