

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

CASE NO. 2020050465

PARENT ON BEHALF OF STUDENT,

v.

LOS ANGELES UNIFIED SCHOOL DISTRICT.

DECISION

AUGUST 24, 2020

On May 18, 2020, the Office of Administrative Hearings, referred to as OAH, received a due process hearing request from Student, naming Los Angeles Unified School District, referred to as LAUSD. Administrative Law Judge Robert G. Martin heard this matter on July 7, 8, 14 and 15, 2020. The hearing was conducted by videoconference.

Parent represented Student, and attended all hearing days. Attorney Patrick Balucan represented LAUSD. Due Process Specialist Genetha Hicks-Cleveland attended all hearing days on LAUSD's behalf.

At the parties' request the matter was continued to August 3, 2020 for written closing briefs. The record was closed, and the matter was submitted on August 3, 2020.

ISSUES

1. Did LAUSD deny Student a free appropriate public education, called a FAPE, from March 16, 2020, through the filing of the complaint, by changing Student's educational program to a distance learning program that did not adequately implement Student's operative May 23, 2019 individualized education program, referred to as an IEP?
2. Did LAUSD deny Student a FAPE from March 16, 2020, through the filing of the complaint, by failing to assist Student's search for an adult day program, and ensure Student's transition to such a program?

At the beginning of the hearing, the issues were clarified consistent with *J.W. v. Fresno Unified School Dist.* (9th Cir. 2010) 626 F.3d 431, 442-443, and *Ford v. Long Beach Unified School Dist.* (9th Cir. 2002) 291 F.3d 1086, 1090. (But see *M.C. v. Antelope Valley Union High School Dist.* (9th Cir. 2017) 858 F.3d 1189, 1196, fn. 2 [dictum].)

JURISDICTION

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

- all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to

meet their unique needs and prepare them for further education, employment, and independent living, and

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

The IDEA affords parents and local educational agencies the procedural protection of an impartial due process hearing with respect to any matter relating to the identification, assessment, or educational placement of the child, or the provision of a 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; and see 20 U.S.C. § 1415(i)(2)(C)(iii).) Student requested the hearing in this matter, and had 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).)

At the time of hearing, Student was 22 years old. Student was in 12th grade at The Help Group's Bridgeport Vocational West school, a nonpublic school referred to as Bridgeport. Student and Parent resided within LAUSD's geographic boundaries at all relevant times. Parent held Student's educational rights.

ISSUE 1: DID LAUSD DENY STUDENT A FAPE FROM MARCH 16, 2020 THROUGH THE FILING OF THE COMPLAINT, BY CHANGING STUDENT'S EDUCATIONAL PROGRAM TO A DISTANCE LEARNING PROGRAM THAT DID NOT ADEQUATELY IMPLEMENT STUDENT'S MAY 23, 2019 IEP?

Student contends the distance learning program implemented by LAUSD through Student's nonpublic school beginning March 16, 2020 in response to the novel coronavirus COVID-19 pandemic was inadequate to implement Student's IEP and provide Student a FAPE. Student contends the virtual instruction time provided was far less than Student's previous in-class instruction. Student was not able to meaningfully benefit from virtual, as opposed to in-class, instruction, and Student was unable to participate in community-based instruction critical to developing the life skills and vocational training necessary for her transition to life post-high school.

LAUSD contends the distance learning program provided to Student complied with state and county guidelines for educating children with disabilities during the COVID-19 pandemic, appropriately implemented Student's IEP, and provided Student educational benefit and a FAPE.

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

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

To provide a student a FAPE, a school district must deliver special education and related services "in conformity with" the student's IEP. (20 U.S.C. § 1401(9)(D).) "IEPs are clearly binding under the IDEA, and the proper course for a school that wishes to make material changes to an IEP is to reconvene the IEP team pursuant to the statute – not to decide on its own no longer to implement part or all of the IEP." (*Van Duyn v. Baker School Dist.* 5J (9th Cir. 2007) 502 F.3d 811, 821 (*Van Duyn*) (citing 20 U.S.C. §§ 1414(d)(3)(F), 1415(b)(3)).) A school district that fails to implement an IEP exactly does not violate IDEA "unless it is shown to have materially failed to implement the child's IEP. A material failure occurs when there is more than a minor discrepancy between the services a school provides to a disabled child and the services required by the child's IEP." (*Van Duyn*, 502 F.3d at p. 815.)

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

or deteriorated during the 2001–02 school year, we clarify that the materiality standard does not require that the child suffer demonstrable educational harm in order to prevail.” (502 F.3d at p. 822.) However, the court also noted that a child's educational progress, or lack of it, might be one indicator of whether a discrepancy in services was material. (*Ibid.*) Presenting the example of a child not provided the reading instruction called for in their IEP, the court noted, “a shortfall in the child's reading achievement . . . would certainly tend to show that the failure to implement the IEP was material. On the other hand, if the child performed at or above the anticipated level, that would tend to show that the shortfall in instruction was not material.” (*Ibid.*)

In *N.D. v. Hawaii Dept. of Education* (9th Cir. 2010) 600 F.3d 1104, where the court held that a one day per week shutdown of public schools statewide to address a fiscal crisis did not constitute a change of placement for special education students, it suggested in dicta that the student's claim was “more properly characterized as a 'material failure to implement the IEP.'” (*Id.* at p. 1117, citing *Van Duyn, supra*, 502 F.3d at p. 822.) The court explained, “A school district's failure to provide the number of minutes and type of instruction guaranteed in an IEP could support a claim of material failure to implement an IEP.” (*Ibid.*)

FEDERAL AND STATE GUIDANCE ON PROVIDING SPECIAL EDUCATION DURING THE COVID-19 PANDEMIC

The Centers for Disease Control and Prevention, referred to as CDE, publicly confirmed the first case of COVID-19 in the United States on January 21, 2020. (Press Release, First Travel-Related Case of 2019 Novel Coronavirus Detected in United States (January 21, 2020.)) On March 4, 2020, California Governor Gavin Newsom proclaimed a State of Emergency in California as a result of the threat of COVID-19. On March 12, 2020, the United States Department of Education Office of Special Education

and Rehabilitative Services, also called OSERS, published guidance to states for educating children with disabilities during the COVID-19 outbreak. (OSERS, Questions and Answers on Providing Services to Children with Disabilities During the Coronavirus Disease 2019 Outbreak (March 12, 2020) (OSERS Q & A).) OSERS advised it was providing informal guidance that did "not create or confer any rights on any person" and was "not intended as a replacement for careful study" of the IDEA. (OSERS Q & A at p.1.)

OSERS noted the IDEA did not specifically address the possibility of school closures for an extended period of time due to exceptional circumstances, such as a disease outbreak. (OSERS Q & A, Question A-1.) It advised local educational agencies they would not violate the equal access provisions of Section 504 of the Rehabilitation Act of 1973 (29 U.S.C. § 701 et seq.), or the Americans with Disabilities Act (Title 42 U.S.C. §§ 1201, et seq.) if they closed schools to slow or stop the spread of COVID-19 and provided no special education, as long as they did not provide any educational services to the general student population during the same period. (OSERS Q & A Question A-1.)

If a local educational agency continued to provide educational opportunities to the general student population during a school closure, OSERS stated the local agency "must ensure that, to the greatest extent possible, each student with a disability can be provided the special education and related services identified in the student's IEP." (OSERS Q & A, Question A-1.) If school resumed after a closure, the local educational agency was to "make every effort to provide special education and related services to the child in accordance with the child's IEP." (*Ibid.*)

Significantly, OSERS did not state that a school district could satisfy the IDEA's requirements for providing a FAPE by "mak[ing] every effort" to provide special education and related services, or by providing them "to the greatest extent possible." No such safe harbor, or other waiver or relaxation of pre-COVID-19 IDEA requirements was suggested. Instead, OSERS acknowledged that local educational agencies might not be able to provide FAPE to some students through educational programs developed in response to COVID-19, and would need to evaluate whether those students needed compensatory education as a result. "There may be exceptional circumstances that could affect how a particular service is provided. . . . "[A]n IEP team . . . would be required to make an individualized determination as to whether compensatory services are needed under applicable standards and requirements." (OSERS Q & A, Question A-1.)

In subsequent guidance, OSERS addressed educator concerns that federal disability law presented insurmountable barriers to providing special education through remote education. Recognizing that "educational institutions are straining to address the challenges of this national emergency," OSERS assured school districts "the U.S. Department of Education . . . does not want to stand in the way of good faith efforts to educate students on-line." (OSERS, Supplemental Fact Sheet Addressing the Risk of COVID-19 in Preschool, Elementary and Secondary Schools While Serving Children with Disabilities, (March 21, 2020) at p. 1) (OSERS Supplemental Fact Sheet).) "To be clear: ensuring compliance with [the IDEA] . . . should not prevent any school from offering educational programs through distance instruction." (*Ibid.*) "[T]he provision of FAPE may include, as appropriate, special education and related services provided through distance instruction provided virtually, online, or telephonically." (*Id.* at pp. 1-2.)

OSERS recognized "these exceptional circumstances may affect how all educational and related services and supports are provided," and indicated the Department [of Education] "will offer flexibility where possible." However, as in its prior guidance, OSERS did not suggest any waiver or relaxation of existing law governing the provision of FAPE to disabled Students. OSERS reiterated its March 12, 2020 guidance on compensatory education, stating, "Where, due to the global pandemic and resulting closures of schools, there has been an inevitable delay in providing services . . . IEP teams . . . must make an individualized determination whether and to what extent compensatory services may be needed when schools resume normal operations. (*Id.* at p. 2.)

On March 13, 2020, California Governor Gavin Newsom issued Executive Order N-26-20. This Order provided that local educational agencies that closed their schools to address COVID-19 would continue to receive state funding. It directed the California Department of Education, also called CDE, to issue guidance on how to ensure that students with disabilities received a FAPE consistent with their IEP and how to meet other procedural requirements under the IDEA and California law. On March 19, 2020, Governor Newsom issued Executive Order N-33-20, directing all Californians to stay home except to go to an essential job or to shop for essential needs, and to practice social distancing from others.

On March 20, 2020, CDE published guidance on school closures and the provision of special education during the COVID-19 pandemic. (CDE, Special Education Guidance for COVID-19, COVID-19 School Closures and Services to Students with Disabilities (March 20, 2020) (CDE March 20, 2020 Guidance).) Noting the federal government had not waived any existing IDEA requirements, CDE advised local educational agencies to "do their best in adhering to IDEA requirements . . . to the

maximum extent possible," "[u]ntil and unless [the U.S. Department of Education] ultimately provides flexibilities under federal law." CDE encouraged local educational agencies to "consider ways to use distance technology to meet these obligations." (*Ibid.*)

CDE specifically addressed the question, "If an LEA offers distance learning for instructional delivery in lieu of regular classroom instruction during a school site closure for students, what is the obligation to implement the IEP for students with disabilities?" (CDE March 20, 2020 Guidance, Frequently Asked Question 1.) CDE advised local educational agencies, "[i]f the local educational agency can continue providing special education and related services as outlined in the IEP, or an agreed upon amendment to the existing IEP, through a distance learning model, they should do so." (*Ibid.*) CDE encouraged local educational agencies to work with nonpublic schools to ensure continuity of services, including moving to virtual platforms for service delivery as feasible and appropriate, and advised that "[t]eachers and specialists should work collaboratively to ensure instruction is accessible for the student based on the student's individualized needs." (*Ibid.*)

Like OSERS, CDE did not indicate that there was any waiver or relaxation of existing IDEA or Education Code requirements for providing FAPE to students with disabilities. CDE acknowledged that the unprecedented situation created by the threat of COVID-19 might lead to learning being provided that did not mirror the offer of FAPE in a student's IEP. (CDE March 20, 2020 Guidance, Frequently Asked Question 3.) In such a situation, CDE counseled, "[O]nce the regular school session resumes," [districts] should plan to make individualized determinations, in collaboration with the IEP team, regarding whether or not compensatory services may be needed for a student." (*Ibid.*)

STUDENT'S CLASSROOM-BASED EDUCATION PROGRAM PRIOR TO THE IMPLEMENTATION OF DISTANCE LEARNING

Student's last agreed upon IEP was her three-year review dated May 23, 2019, for which LAUSD assessors and Student's special education teacher at Bridgeport conducted assessments in the areas of psychoeducation, speech and language, health, and transition. Student's IEP team determined she continued to be eligible for special education under the category of autism. In addition, Student's education was adversely impacted by intellectual disability, with Student functioning well below average cognitively, and with deficits in speech and language and social-emotional functioning. Student also had deficits in adaptive behaviors necessary for living independently and functioning in daily life with respect to communication, home living, community use, health and safety, leisure, self-care, social skills, self-direction, functional academics, and work.

Student was kind, respectful and compliant. She showed little, if any, interest in interacting with her peers, engaged in self-stimulatory behaviors, did not volunteer during lessons, had difficulty remaining focused on a task or activity, and only asked for help with preferred tasks. Student communicated verbally, typically using single-word utterances, which she could expand to three-to-five words given prompts and cues from adults. Student did not ask questions, elaborate on her answers, or make follow-up comments or questions, and required direct cues to take turns in conversation. Student required frequent prompting to maintain attention or appropriate eye contact, and to keep from giggling and making distracting sucking sounds. Student had difficulty understanding other people's thoughts and feelings, and anticipating what others would say or do in social and vocational situations.

Student enjoyed community-based activities with her class. She showed some awareness of her surroundings, such as alerting the class when the pedestrian sign showed it was safe to walk, and turning her head left and right before stepping off the curb into the crosswalk. However, Student could not tell time on a clock with hands, seek help for someone who needed help, or understand she should avoid someone who might take advantage of her.

With redirection, reminders, and constant prompting, Student could make change from \$20, and engage in hands-on work activities for a classroom-based food business, including wrapping cutlery in napkins, labeling food containers with the names of customers, and following through on designated steps of a recipe. Interning at a pet store and restaurant, Student swept, dusted shelves, restocked items, folded and made pizza boxes, and labeled cookie bags with instructions and assistance.

Student's IEP team developed nine goals for Student in the areas of expressive language, pragmatic language, behavior, functional reading, functional writing, functional math, vocational skills, social skills, and community skills. All Student's goals were directed towards preparing Student to live independently and function in daily life after high school. The IEP team also developed a behavior intervention plan to address Student's off-task behavior of giggling and making distracting sucking sounds, and an individual transition plan to assist Student towards her post-high school education, vocational, and independent living goals.

The IEP team determined Student required a small, structured, therapeutic learning environment with immediate response to her behavior, communication, and academic needs to make progress on her goals. Student also required hands-on vocational training and community-based instruction to develop her vocational, social, and community living skills. Student's IEP team offered continued placement at

Bridgeport, studying an alternative curriculum focused on developing vocational and independent living skills. The team concluded Bridgeport was the least restrictive environment appropriate for Student because it offered an academic curriculum with hands-on life skills training and vocational services for students with cognitive delays and autism-related challenges in the areas of social communication and language development.

The IEP provided Student would receive 1,570 minutes per week, or approximately 314 minutes per day, of special education in a special day class at Bridgeport, during the regular school year. This included 60 minutes per week of in-class small group speech and language services. Student received no other special education related services during the regular school year. Because Student demonstrated significant regression and limited recoupment of reading, writing and math skills after breaks in her instruction, the IEP team also offered Student her instruction and speech and language services during the extended school year.

Student raised no objection to the May 23, 2019 IEP, or its implementation, from May 23, 2019 through March 13, 2020. During that time, LAUSD implemented Student's May 23, 2019 IEP as follows: Student attended a special day class at Bridgeport taught by Jacqueline Prince. Student arrived at school each day at 9:30 A.M. and went home at 3:15 P.M. During the 1,950 minutes Student attended school each week, she received approximately 1,545 minutes per week of special education instruction, plus 60 minutes of small-group speech and language services. Non-instructional minutes were devoted to morning check-in, lunch, recreation, and breaks between some activities. Forty percent of Student's weekly schedule – 630 minutes – was devoted to community based instruction. This included a major shopping trip on Mondays from 9:30 A.M. to 1:45 P.M., in which the class traveled on foot and by bus, shopped in various mall stores,

and ordered and ate lunch in the community. On Tuesdays through Fridays, the class took shorter 120 minute, 75 minute, and 30-minute walking trips to nearby stores. Student's weekly schedule also included 240 minutes per week of hands-on vocational skills training, working at the school snack cart, coffee shop, clerical service, or library on Tuesdays, and selling hot food on campus on Fridays. Student received the required 60 minutes of group speech and language services on Wednesdays from 2:00 P.M. to 3:00 P.M., from speech and language provider Lyuba Rozenbaum. This was delivered in class, or during community-based instruction, during which Student interacted with members of the community to help develop her expressive and pragmatic language skills.

STUDENT'S DISTANCE LEARNING PROGRAM DEVELOPED IN RESPONSE TO COVID-19

On March 13, 2020, LAUSD announced it would be closing all LAUSD public schools starting March 16, 2020, while it evaluated how to respond to the health threat posed by COVID-19. Following LAUSD's announcement, Bridgeport announced it, too, would be closed starting March 16, 2020. LAUSD and Bridgeport provided general education and special education students a lesson plan and materials to work on at home, but did not provide instruction or services to general education or special education students from March 16 through 18, 2020. During that time, Prince created a virtual classroom for her Students using Google Classroom, to provide her students a distance learning platform they could access from home with the help of their parents. On March 19, 2020, Student's instruction resumed using distance learning. Prince posted links to a video for her students to watch, and to several short assignments to be completed and submitted electronically. Prince emailed parents to let them know of the

assignments, and made herself available by telephone. Students and parents could also post questions for Prince using Google Classroom.

For the first six school days of distance learning, Prince's virtual classroom did not include videoconferencing technology and Student received no interactive instruction. Instead, Student and Parent together watched the videos posted by Prince, and completed the assignments, a process that generally took approximately 30 minutes each day. Beginning March 27, 2020, Prince introduced videoconferencing capability to her teaching tools using ZOOM software. This made it possible for Prince to meet virtually online with her class and their parents. Rozenbaum did not provide speech and language services on March 18, 2020. This missed day was never made up, but Rozenbaum began providing virtual speech and language services using ZOOM on April 25, 2020.

In the week of March 30 through April 3, 2020, Prince began implementing a new distance learning schedule for Student's class. Following LAUSD's spring break from April 3 through 10, 2020, this new schedule remained in place through the filing of the complaint. The schedule identified activities for the class each day from 10:30 A.M. to 3:00 P.M., with 30 minute breaks at 11:45 A.M. and 1:00 P.M. The students began their day from 10:30 A.M. to 11:15 A.M. by watching and working out with a body movement video, and reviewing the calendar for the day. From 11:15 A.M. to 11:45 A.M., the students completed a non-interactive online activity and assignment posted in the Google Classroom, in the areas of functional reading, writing and math, independent living, career development, and virtual community-based instruction. The virtual community-based instruction involved watching videos of visits to interesting places like Denmark, or the International Space Station. Parent and Student typically were able to complete the activities scheduled for 10:30 A.M. to 11:45 A.M. in 30 minutes.

From 12:15 P.M. to 1:00 P.M. each day except Wednesday, the class met virtually with Prince and/or another instructor, for job club, personal fitness, career development, and music. On Wednesdays, there was no virtual class meeting or other activity at that time. Instead, Rozenbaum provided 60 minutes of group speech services to each of two groups of students, who met virtually with Rozenbaum at either 1:00 P.M. or 2:00 P.M. Student met with Rozenbaum on Wednesdays from 2:00 P.M. to 3:00 P.M.

From 1:30 P.M. until 2:30 P.M., except Wednesdays, Prince met virtually with her class to review the day's assignments. From 2:30 P.M. to 3:00 P.M. each day, except Wednesdays, Prince met virtually with two students and their parents, to provide individualized attention and address issues and concerns. This meeting took place on Tuesdays for Student and Parent.

Student made some progress on her functional academic goals and in speech and language, but minimal progress on her vocational, social skills, or community skills goals. In those areas, Student's educational progress depended heavily on in-person participation in job training, or personal interaction with peers and others in her community, neither of which were possible under Student's distance learning program. Student was also unable to engage in community volunteer and work training activities, as called for in her IEP to support her transitional goals. Student made only minimal progress in her behavioral goal of reducing her off-task behavior of giggling and making distracting sucking sounds, because Prince was no longer with Student five hours each day to monitor and redirect her. Prince and Rozenbaum each agreed that Student would have made more progress towards her goals under a classroom-based learning model with in-person instruction.

On April 28, 2020, Student's IEP team held a virtual final IEP team meeting to prepare for Student aging out of special education at the conclusion of the 2020 extended school year on July 31, 2020. Team members discussed Student's course of study, course credits, progress towards a certificate of completion, and a summary of her academic and functional performance. The IEP team made no changes to Student's existing program or services as described in Student's existing IEP. The IEP stated Student "will continue to receive educational services by participating in distance learning until July 31, 2020." Prior written notice sent district-wide by LAUSD on May 1, 2020 to parents of children with IEP's, including Parent, stated distance learning was "not an amendment or alteration of your child's current IEP. Rather, it is a means to implement that IEP while your child is 'Safer at Home.'"

Parent did not object to Student's distance learning program at Student's April 28, 2020 IEP team meeting, but did not consent to the IEP. Parent disagreed in writing to the entirety of the IEP on May 14, 2020. Parent acknowledged "District's best efforts," but objected "stay-at-home learning is inadequate to fulfill the mandate of providing a FAPE . . . to special needs students." Parent asked LAUSD to allow Student to continue in school with her existing placement and services after the end of the 2020 extended school year through the fall/winter semester of the 2020-2021 regular school year. LAUSD did not respond to Parent before the filing of the complaint. LAUSD continued to teach through distance learning through Student's last day of school on July 31, 2020, and did not resume regular school sessions. LAUSD did not make any individualized determination whether Student needed any compensatory services to make up for differences between the offer of FAPE in Student's May 23, 2019 IEP, and the educational program provided to Student through distance learning.

The guidance OSERS and CDE gave local educational agencies regarding the provision of special education and related services during the COVID-19 pandemic expressly made no change to existing law regarding requirements and standards for providing students a FAPE. The relevant inquiry in this case remains whether LAUSD and Bridgeport adequately implemented Student's IEP and provided Student a FAPE under the pre-COVID-19 standards set forth in *Van Duyn* (*supra*, 502 F.3d at p. 815) and *N.D. v. Hawaii Dept. of Education* (*supra*, 600 F.3d at p. 1117.) Guidance to districts that they should do "their best in adhering to IDEA requirements to the maximum extent possible," and insure "to the greatest extent possible," that students with disabilities were provided the special education and related services identified their IEP were goals, but there was no suggestion that complying with them was sufficient to establish that a student received a FAPE. Indeed, the guidance from OSERS and CDE clearly contemplated that, even if it did its best, a district might be unable to provide a student a FAPE under IDEA and Education Code requirements. In instances where this occurred, OSERS and CDE instructed that, once the regular school session resumed, districts would need to make individualized decisions regarding whether an affected student required compensatory services.

In this case, applying the standards of *Van Duyn* and *N.D. v. Hawaii Dept. of Education*, the distance learning program delivered to Student from March 16, 2020 to May 18, 2020 fell materially short of adequately implementing Student's IEP by providing Student the number of minutes of instruction required by Student's May 23, 2019 IEP, and the type of instruction required for Student to make meaningful progress on her vocational, social skills, community skills, behavioral, and transition goals. Prior to distance learning, Student received 1,545 minutes per week of instruction and 60 minutes per week of group speech and language services, delivered in class, or through community-based instruction. This was slightly more than the 1,570 minutes

called for in Student's IEP, and all of it was delivered in person. By contrast, under distance learning, Student received, at most, 450 minutes of interactive instruction and 60 minutes of speech and language services per week, delivered in virtual meetings with Prince, Rozenbaum, and other instructors beginning in April 2020. Theoretically, Student was to devote another 375 minutes per week to individual online learning from 10:30 to 11:45 A.M. each day, reviewing videos and completing assignments posted by Prince, but Student and Parent were able to complete this work in only 150 minutes per week, meaning Student actually received, at most, 600 minutes of instruction per week, plus 60 minutes of speech and language services, or approximately 42 percent of the total weekly instruction and services called for in her IEP. From March 16, 2020, to the first week of April, Student received less than 10 percent of her IEP-specified instructional minutes. Student received no instruction for three days, and her online learning from March 19, 2020 until the end the first week of April 2020 was limited to the 150 minutes per week she and Parent needed to review videos and complete assignments. Student also missed one group speech and language session, which was not made up.

In addition to the materially-reduced amount of instruction Student received under distance learning, the type of instruction provided did not allow her to make meaningful progress on her goals. In particular, Student's weekly participation in in-person community-based instruction and vocational training fell from a total of 870 minutes – more than half of her total instruction, to zero. Instead of spending 630 minutes each week navigating her community and interacting with the businesses and people in it, Student received 30 minutes of non-interactive virtual community instruction, visiting interesting places online. Student's total minutes of vocational training fell less drastically – from 240 minutes to 120 per week – but Student received none of the hands-on job training that had allowed her to make progress prior to

distance learning. As indicated by the amount of community-based instruction and vocational training Student received before distance learning, her acquisition of life skills and vocational skills was especially critical for her to live independently and function in daily life after high school. Similarly, although Student continued to receive her IEP-specified 60 minutes per week of speech and language services, except for one missed session, Student had no opportunity to develop her expressive and pragmatic language in community-based instruction, and her speech and language provider acknowledged this reduced the progress Student made towards her language goals.

Here, Bridgeport's distance learning program from March 16, 2020 to May 18, 2020, the date the complaint was filed, provided Student less than half the number of instructional minutes required by her May 23, 2019 IEP, and none of the in person, hands-on community life skills and vocational instruction necessary for Student to make meaningful progress towards her goals necessary for her transition to post-high school life. This was a material failure to implement Student's May 23, 2019 IEP, and denied Student a FAPE. (*Van Duyn, supra*, 502 F.3d at p. 815; *N.D. v. Hawaii Dept. of Education, supra*, 600 F.3d at p. 1117.)

ISSUE 2: DID LAUSD DENY STUDENT A FAPE FROM MARCH 16, 2020 THROUGH THE FILING OF THE COMPLAINT, BY FAILING TO ASSIST OR ENSURE STUDENT'S TRANSITION TO AN ADULT DAY PROGRAM?

Student contends LAUSD denied her a FAPE beginning March 16, 2020 by failing to invite outside agencies involved her post-high school transition to her April 28, 2020 IEP team meeting, and by failing to identify specific adult programs suitable for Student in the summary of performance Bridgeport prepared for Student. Student's closing brief also argued new issues regarding Student's transition goals which were not asserted in

Student's complaint or litigated at hearing. Accordingly, this Decision does not address these claims raised for the first time in Student's closing brief. (See, e.g., *H.B. v. Las Virgenes Unified School Dist.* (9th Cir. 2007) 239 Fed.Appx. 342, 344-345 [nonpub. opn.])

LAUSD contends it did not invite any outside agencies to the IEP team meetings based on its determination there were no LAUSD agencies currently or prospectively paying for transition services for Student. It also asserts that it provided Student appropriate information regarding adult programs that might be available for her.

FAILURE TO INVITE OUTSIDE AGENCY REPRESENTATIVES

Beginning at age 16, a student's IEP must include a statement of needed transition services for the child. (Ed. Code, § 56043, subd. (h).) It must include appropriate measurable postsecondary goals based upon age appropriate transition assessments related to training, education, employment and, where appropriate, independent living skills. (20 U.S.C. § 1414(d)(1)(A)(i)(VIII); Ed. Code, §§ 56043, subd. (g)(1), 56345, subd. (a)(8).) The plan must also contain the transition services needed to assist the pupil in reaching those goals. (34 C.F.R. § 300.320(b); Ed. Code, § 56345, subd. (a)(8)(A); *Board of Education of Township High School Dist. No. 211 v. Ross, et al.* (7th Cir. May 11, 2007) 47 IDELR 241, 107 LRP 26543.)

Transition services are a coordinated set of activities that are (1) designed within an outcome-oriented process that is focused on improving the academic and functional achievement of the child to facilitate movement from school to post-school activities, including postsecondary education, vocational education, integrated employment, continuing and adult education, adult services, independent living, or community participation; (2) based on the student's individual needs, taking into consideration the student's strengths, preferences and interests; and (3) include instruction, related

services community experiences, the development of employment and other post school adult living objectives, and, if appropriate, acquisition of daily living skills and functional vocation evaluation. (20 U.S.C. § 1401(34); Ed. Code, § 56345.1, subd. (a).)

If a purpose of an IEP team meeting is to consider postsecondary goals for the student and the transition services needed to assist the child in reaching those goals, the school district must invite a representative of any participating agency that is likely to be responsible for providing or paying for transition services, with the consent of the parents or a child who has reached the age of majority. (34 C.F.R. § 300.321(b).) A failure to invite such a representative is a procedural violation of the IDEA. (*Carrie I. ex rel. Greg I. v. Dept. of Education, Hawaii* (D.Hawaii 2012) 869 F.Supp.2d 1225, 1246.)

A procedural violation of the IDEA only results in the denial of a FAPE if the procedural violation impeded the child's right to a FAPE, significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE, or caused a deprivation of educational benefits. (Ed. Code, § 56505, subd. (f)(2); see also *W.G. v. Board of Trustees of Target Range School Dist. No. 23* (9th Cir. 1992) 960 F.2d 1479, 1484.) With respect to a member of a student's IEP team whose actual attendance at the student's IEP team meeting is specifically required by the IDEA and Education Code, such as the parent or student's special education teacher, (see, 34 C.F.R. § 300.321(a)(1)–(7); Ed. Code, § 56341, subd. (b)(1)–(7)), the failure to have such a person present at the IEP is likely to significantly impede the parents' participation or deprive student of educational benefits, and thus result in a denial of FAPE. (See, e.g., *M.L. v. Federal Way School Dist.* (9th Cir. 2005) 394 F.3d 634,642.) However, because an outside agency representative is not a member of a student's IEP team whose attendance at an IEP team meeting is mandatory, the failure of a district to invite an agency representative will only result in a denial of FAPE if it is demonstrated

that the representative, if invited, would have provided information to the IEP team necessary for parent to meaningfully participate in the decision-making process, or that would have led to the student receiving educational benefits not received due to the lack of an invitation.

At all relevant times, Student was a client of the Westside Regional Center. Parent began looking for a post-high school adult program for Student in 2018, and obtained a list of adult day programs from Student's service coordinator at Westside Regional Center. In February 2020, Parent visited two adult day programs he thought might be suitable for Student, and discussed funding possibilities for one of them with Student's service coordinator. Parent decided in February 2020 that he wanted to observe some other adult programs before moving forward with the paperwork necessary to explore funding options. He decided to wait until summer 2020 to further pursue those options.

When LAUSD contacted Parent to schedule Student's April 28, 2020 IEP team meeting to prepare for Student aging out of special education at the conclusion of the 2020 extended school year, parent asked LAUSD to invite Student's Westside Regional Center service coordinator to the meeting. Parent also directly asked the service coordinator to attend the IEP team meeting. Additionally, in both Student's May 23, 2019 and April 28, 2020 IEP's, LAUSD identified Regional Center and the California Department of Rehabilitation as agencies currently or prospectively providing or paying for transition services, and obtained Parent's permission to invite them to "the next IEP in which transition services will be reviewed." For reasons not explained at hearing, despite Parent's request that LAUSD invite Student's existing Regional Center service coordinator, and after having obtained Parent's permission to invite the Regional Center and Department of Rehabilitation to Student's IEP team meeting, LAUSD in both

IEP's also responded "no" to the question "Are there agencies currently or prospectively providing or paying for transition services?" In its closing briefs, LAUSD contended for the first time that this response reflected its determination that there were no LAUSD agencies currently or prospectively providing or paying for transition services, but LAUSD did not argue that such a determination would justify its failure to invite outside agencies such as Regional Center and Department of Rehabilitation to Student's IEP. In any event, LAUSD did not invite either Westside Regional Center or the California Department of Rehabilitation to attend Student's April 28, 2020 IEP team meeting. No outside agencies attended the meeting. At the meeting, Student's IEP team confirmed she would be finishing her education with LAUSD on July 31, 2020. Team members discussed Student's course of study, course credits, progress towards a certificate of completion, and a summary of her academic and functional performance. The team stated Student's existing goals and transition plan would remain in effect until July 31, 2020.

LAUSD committed a procedural violation of the IDEA by failing to invite Student's Regional Center service coordinator, or a representative of the California Department of Rehabilitation, to her April 28, 2020 IEP team meeting. That IEP team meeting was Student's final IEP meeting before Student's transition from high school to postsecondary life, and the IEP team's last opportunity to review Student's postsecondary goals, and the transition services needed to assist her, with the outside agencies working with Student during and after her transition.

As to whether LAUSD's procedural violation denied Student a FAPE, the potential benefits of outside agency participation in Student's IEP were clear. Representatives from the Regional Center and Department of Rehabilitation might have been able to provide Student's IEP team information, for example, about postsecondary adult

programs still available for Student during the COVID-19 pandemic, ways for Student and Parent to evaluate such programs, and suggestions for modifying Student's IEP and individual transition plan with changed goals, or vocational or life skills training, such as training in the use of masks or social distancing, to better prepare her over her last three months of high school for her transition into available adult programs. However, no evidence was presented that a representative from either of these agencies would have participated in Student's IEP, or otherwise provide input to Parent and the rest of Student's IEP team regarding Student's postsecondary goals or transition services, if LAUSD had extended invitations to the agencies. To the contrary, Parent invited Student's Regional Center service coordinator to attend the April 28, 2020 IEP, but the coordinator did not attend. The evidence therefore did not prove that LAUSD's failure to invite the outside agencies actually deprived Student's IEP team of important information, or by doing so significantly impeded Parent's opportunity to participate in the decision-making process regarding the provision of a FAPE to Student, or deprived Student of educational benefits. LAUSD did not deny Student a FAPE by failing to invite outside agency representatives to Student's April 28, 2020 IEP team meeting.

FAILURE TO IDENTIFY SPECIFIC ADULT PROGRAMS APPROPRIATE FOR STUDENT

For a child whose eligibility terminates due to exceeding the age eligibility for a FAPE under state law, a public agency must provide the child with a summary of the child's academic achievement and functional performance, including recommendations on how to assist the child in meeting the child's postsecondary goals. (34 C.F.R. § 300.305(e)(3); Ed. Code, § 56381 subd. (i)(2).) The IDEA does not specify the information that must be included in the summary, and state and local officials have flexibility to determine the appropriate content to be included in a child's summary of

performance, based on the child's individual needs and postsecondary goals. (Questions and Answers on Secondary Transition, 57 IDELR 231 (OSERS 2011); Assistance to States for the Education of Children With Disabilities and Preschool Grants for Children With Disabilities, 71 Fed. Reg. 46,645 (2006).) "The purpose of the [summary of performance] is to provide the child with a summary of the child's academic achievement and functional performance in order to assist the child to transition beyond high school." (Questions and Answers, *supra*, 57 IDELR 231.)

Approximately a week after Student's April 28, 2020 IEP, LAUSD gave Parent a Summary of Performance for Student dated April 28, 2020, for Student to present to agencies and programs that might provide Student postsecondary services. It included a summary of Student's academic achievement and functional performance, and recommendations on assisting Student in meeting her postsecondary goals in the areas of learning, work, living, play, travel, and community. It recommended Parent "collaborate with Regional Center service coordinator for program options" to achieve Student's goals for education and training, employment, and independent living. The summary of performance also identified the California Department of Rehabilitation, and the California State Council on Developmental Disabilities as agencies that might assist in Student's transition to postsecondary life. It did not list specific postsecondary adult programs appropriate for Student.

Parent did not provide Student's summary of performance to any agencies or programs, because he believed it was futile to search for an adult program for Student while COVID-19 stay-at-home and social distancing orders were in effect. Parent's May 14, 2020 written notice to LAUSD that he did not agree to any components of Student's April 28, 2020 IEP stated it was untenable for Student to exit LAUSD during the disruption of education and transition services caused by the COVID-19 pandemic.

LAUSD did not deny Student a FAPE by failing to identify specific postsecondary adult programs appropriate for Student. LAUSD was not required to provide such information under the IDEA or Education Code, either in the statement of needed transition services that must be included in a transitioning student's IEP (Ed. Code, § 56043, subd. (h)), or in summary of performance provided to students aging out of special education. (20 U.S.C. § 1414(c); 34 C.F.R. § 300.305 (e)(3); Ed. Code, § 56381 subd. (i)(2).)

Even if LAUSD had been required to identify specific adult service programs appropriate for Student, there is no evidence that its failure to do so during the time period at issue impeded Student's right to a FAPE, deprived her of educational benefits, or significantly impeded Parent's opportunity to participate in the decision-making process regarding the provision of a FAPE. After Parent identified several programs he thought might be appropriate for Student, Parent decided in February 2020 to suspend the search for an adult program for Student until summer 2020. Although he was aware of several adult programs that might be suitable for Student, Parent subsequently concluded it was futile to search for an adult program for Student so long as orders to stay-at-home and social distance were in effect due to the COVID-19 pandemic. No evidence was presented that Parent would have pursued other adult programs identified by LAUSD, or that LAUSD was aware of adult programs unaffected by the COVID-19 pandemic that it could failed to recommend to Student.

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.

1. LAUSD denied Student a FAPE from March 16, 2020 to the filing of the complaint by changing Student's educational program to a distance learning program that did not adequately implement Student's operative May 23, 2019 IEP. Student prevailed on Issue 1.
2. LAUSD did not deny Student a FAPE from March 16, 2020 to the filing of the complaint by failing to assist Student's search for an adult day program, and ensure Student's transition to such a program. LAUSD prevailed on Issue 2.

REMEDIES

Student prevailed on Issue 1, that LAUSD denied Student a FAPE by failing to implement her May 23, 2029 IEP from March 16, 2020 to the filing of the complaint on May 18, 2020. As a remedy, Student requested the proposed remedy of returning to her class at Bridgeport for a semester when in-class instruction resumes.

Administrative Law Judges have broad latitude to fashion equitable remedies appropriate for the denial of a FAPE. (*School Committee of Burlington, Mass. v. Dept. of Education* (1985) 471 U.S. 359, 370 (*Burlington*); *Student W. v. Puyallup School Dist., No. 3* (9th Cir. 1994) 31 F.3d 1489, 1496 (*Puyallup*)). The broad authority to grant relief extends to the administrative law judges and hearing officers who preside at administrative special education due process proceedings. (*Forest Grove School Dist. v. T.A.* (2009) 129 S.Ct. 2484, 2494, fn. 11; 174 L.Ed.2d 168.)

To remedy a FAPE denial, the student is entitled to relief that is appropriate in light of the purposes of the IDEA. (20 U.S.C. § 1415(i)(2)(C)(iii); 34 C.F.R. § 300.516(c)(3).) The purpose of the IDEA is to provide students with disabilities a FAPE which emphasizes special education and related services to meet their unique needs. (*Burlington, supra*, 471 U.S. 359, 374.) Appropriate relief means relief designed to

ensure that the student is appropriately educated within the meaning of the IDEA. (*Puyallup, supra*, 31 F.3d at p. 1497.) The award must be fact-specific and be reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place. (*Reid ex rel. Reid v. Dist. of Columbia* (D.D.C. Cir. 2005) 401 F.3d 516, 524.)

A school district may be ordered to provide compensatory education or additional services to a student who has been denied a FAPE. (*Park v. Anaheim Union High School Dist., et al.* (9th Cir. 2006) 464 F.3d 1025, 1033.) Compensatory education is a prospective award of educational services designed to catch-up the student to where he should have been absent the denial of a FAPE. (*Brennan v. Regional School Dist. No. 1* (D.Conn. 2008) 531 F.Supp.2d 245, 265.) An award of compensatory education need not provide a day-for-day compensation. (*Puyallup, supra*, 31 F.3d at pp. 1496-1497.) The conduct of both parties must be reviewed and considered to determine whether equitable relief is appropriate. (*Id.* at p. 1496.)

Compensatory education is clearly an appropriate remedy in this case for LAUSD's being unable to implement Student's May 23, 2019 IEP by providing Student through distance learning the in person vocational and community skills training Student required to make progress towards her transitional goals. Compensatory education was, in fact the remedy suggested by OSERS and CDE in their guidance that IEP teams should be prepared to address shortfalls in the implementation of student IEPs by making individualized determinations regarding whether compensatory education and services might be needed for a student, after schools resumed regular school sessions.

The particular remedy of having Student's IEP team consider her needs for compensatory education, as suggested by OSERS and CDE, was not, and is not, available

to Student. LAUSD did not resume regular operations during the 2019-2020 school year or 2020 extended school year, and Student's IEP team did not consider whether she might need compensatory education. Even if LAUSD were to resume regular school sessions in the 2020-2021 school year, Student would not be entitled to an IEP team meeting to determine her need for compensatory education, because she aged out of eligibility for special education at the close of LAUSD's extended school year on July 31, 2020, based on her having turned 22 in March 2020. (Ed. Code, § 56026, subd. (c)(4)(A).) Student's right to the protections and benefits of the IDEA, including the right to any IEP team meeting or educational program provided by LAUSD, ended at that time. (See, *Honig v. Doe* (1988) 484 U.S. 305, 318; Ed. Code, § 56026 subd. (c)(4)(D) ("No local educational agency may develop an individualized education program that extends these eligibility dates, and in no event may a pupil be required or allowed to attend school under the provisions of this part beyond these eligibility dates solely on the basis that the individual has not met his or her goals or objectives.").) Student's proposed remedy of an additional semester at Bridgeport nonpublic school when in-class instruction resumes is similarly not available because Student no longer has the right to any educational program provided by LAUSD.

For the eight school weeks from March 16, 2020 to May 18, 2020, Student demonstrated a loss of approximately 116 hours of hands-on community-based instruction and vocational training necessary for Student to make meaningful progress towards her vocational, social skills, community skills, behavioral, and transition goals, critical to her postsecondary life. In a typical week prior to distance learning, Student received approximately 870 minutes, or 14.5 hours, of such instruction, compared to no such instruction in her distance learning program.

Ordinarily, an award of compensatory education would involve ordering some amount of the hands-on instruction she missed. However, the COVID-19 pandemic is still present, LAUSD and other districts are continuing distance learning in the 2020-2021 school year, and there is no evidence that in-person vocational and community skills training is available from any nonpublic agencies or private providers, or that it would be safe for Student at this time if it were available. It would not make sense to try to compensate Student by providing her the same sort of virtual vocational and community skills training that was insufficient to benefit Student in the first place.

It is likely that at some point in-person instruction and transition services of the type needed by Student will resume. However, it would not be appropriate to order a remedy of hands-on vocational and community-based training, and making it available to Student over a long period of time in the expectation that such training will become safe and available. There is no evidence when such hands-on training will again become available, and Student has demonstrated a need for an immediate remedy. Student has completed her high school education as of July 31, 2020, and in the past has shown significant regression in her skills after breaks in her instruction.

To avoid regression of her vocational skills and community skills and begin an effective transition to postsecondary life, Student has an immediate need for assistance in locating an adult day program and/or employment in which she can continue to develop her vocational and community living skills. Such assistance in developing employment and other post-school adult activities is one type of transition service. Unlike other transition services such as the vocational instruction, related services community experiences, and acquisition of daily living skills that Student's distance learning program did not adequately provide, assistance in locating adult programs and

employment can be effectively provided to Student by providers who do not need to meet in person with Parent or Student.

Based on the unique circumstances presented here, it is appropriate to provide Student available transition services in the form of transition counseling that will immediately assist Student in reaching her postsecondary goals, rather than providing Student virtual vocational and community skills training transition services that do not benefit her, or delaying the provision of services until they can be provided hands-on. Given the nature of such counseling, which would primarily involve assisting Parent in coordinating with agencies and locating appropriate adult programs for Student, rather than training Student herself, it would not be appropriate to replace the 116 hours of vocational and community skills training with an equal amount of counseling. However, providing Student five hours per week of transition counseling for each of the eight weeks in which she did not receive hands-on vocational and community skills training is an appropriate remedy reasonably calculated to allow Student to make progress towards her postsecondary goals. Accordingly, as a remedy for its failure to fully implement Student's May 2020 IEP between March 16, 2020 and May 18, 2020, by failing to provide her with approximately 116 hours of hands-on community-based instruction and vocational training, LAUSD shall fund a total of 40 hours of postsecondary transition counseling by an appropriately-credentialed counselor of Parent's choice, to assist Student with coordinating with Westside Regional Center, the California Department of Rehabilitation, and other agencies and programs, as appropriate, to locate such a program and/or employment. Additionally, as compensatory education for Student's missed group speech and language session on March 18, 2020, LAUSD shall fund one hour of group speech and language focused on expressive and pragmatic language, by a provider of Student's choice. The cost for each of these services shall not to exceed the average hourly rate for such services in the

community, and Student shall have until July 31, 2021, to use the hours awarded. Any time not used by that date shall be forfeited.

ORDER

1. LAUSD shall fund a total of 40 hours of postsecondary transition counseling by an appropriately-credentialed counselor of Parent's choice, to assist Parent with coordinating with Westside Regional Center, the California Department of Rehabilitation, and other agencies and programs, as appropriate, to locate such a program and/or employment for Student.
2. LAUSD shall fund one hour of group speech and language services for Student, focused on expressive and pragmatic language, by a provider of Student's choice.
3. The cost for each of the above services shall not exceed the average hourly rate for such services in the community. Student shall have until July 31, 2021, to use the hours awarded. Any time not used by that date shall be forfeited.

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.

/s/

Robert G. Martin

Administrative Law Judge

Office of Administrative Hearings