BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

CASE NO. 2019101219
CASE NO. 2019090877

THE CONSOLIDATED MATTERS INVOLVING

PARENT ON BEHALF OF STUDENT, AND

OAKLAND UNIFIED SCHOOL DISTRICT.

DECISION

MARCH 3, 2020

On September 23, 2019, the Office of Administrative Hearings, called OAH, received a due process hearing request from Parent on Behalf of Student, naming the Oakland Unified School District as respondent. On October 30, 2019, OAH received a due process hearing request from Oakland Unified School District naming Student. OAH consolidated the two matters on November 5, 2020. Administrative Law Judge Charles Marson heard the matters in Oakland, California, on January 7, 8, 9 and 13, 2020.

Attorney Nicole Hodge Amey represented Student. Student's Parent and Sister attended all hearing days on his behalf. Attorney David R. Mishook represented Oakland. Special Education Local Plan Area Executive Director Neena Bawa Bhabhal,

Coordinator of Psychological Services Stacey Lindsay, Deputy General Counsel Andrea Epps, Coordinator of Related Services Anne Zarnowiecki, Coordinator of Young Adult Program and Career/Transition Services David Cammarata, and Coordinator of Elementary Networks Cary Kaufman attended successive hearing days on Oakland's behalf.

At the parties' request the matter was continued to February 11, 2020, for written closing briefs. The record was closed, and the matter was submitted on February 11, 2020.

ISSUES

STUDENT'S ISSUES

1. Did Oakland Unified School District deny Student a free appropriate public education in the 2018-2019 school year by:

    a. Predetermining Student's placement and the following related services:
        i. Transportation via bus without a one-to-one bus aide and the length of time of travel on the bus;
        ii. Adapted physical education;
        iii. Augmentative and alternative communication; and
        iv. Placement in an inclusion program without a one-to-one aide;
    b. Failing to implement the following components of Student's individualized education program:
        i. One-to-one aide;
        ii. Assistive technology; and
        iii. Augmentative and alternative communication and speech services;

c. Failing to make an appropriate offer based on staffing issues;

d. Failing to design a program that would allow Student to make progress;

e. Failing to develop goals that addressed Student's needs in the following areas:

   i. Communication;

   ii. Adaptability;

   iii. Occupational therapy;

   iv. Self-help;

   v. Academics, specifically reading, writing and math;

   vi. Sensory support; and

   vii. Social interactions; and

f. Denying Parent participation in Student's individualized education program process by not providing written notice when Parent requested a change of placement in August, November, and December 2018?

2. Did Oakland deny Student a free appropriate public education in the 2019-2020 school year by:

   a. Predetermining Student's placement and the following related services:

      i. Transportation via bus without a one-to-one bus aide and the length of time of travel on the bus;

      ii. Adapted physical education;

      iii. Augmentative and alternative communication; and

      iv. Placement in an inclusion program without a one-to-one aide;

   b. Failing to implement the following components of Student's individualized education program:

      i. One-to-one aide;

      ii. Assistive technology; and

iii. Augmentative and alternative communication and speech services;

c. Failing to make an appropriate offer based on staffing issues;

d. Failing to design a program that would allow Student to make progress;

e. Failing to develop goals that addressed Student's needs in the following areas:

i. Communication;

ii. Adaptability;

iii. Occupational therapy;

iv. Self-help;

v. Academics, specifically reading, writing and math;

vi. Sensory support; and

vii. Social interactions;

f. Failing to file for due process to defend its individualized education plan developed in February and May 2019; and

g. Failing to provide Parent with appropriate interpretation and translation services from August 2019 to present?

OAKLAND'S ISSUE

Did Oakland's offer of February 11, 2019, as amended on May 13, 2019, offer Student a free appropriate public education in the least restrictive environment?

JURISDICTION

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

The main purposes of the Individuals with Disabilities Education Act, referred to as the IDEA, are to ensure:

- all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment and independent living, and
- the rights of children with disabilities and their parents are protected.

(20 U.S.C. § 1400(d)(1); see Ed. Code, § 56000, subd. (a).)

The IDEA affords parents and local educational agencies the procedural protection of an impartial due process hearing with respect to any matter relating to the identification, assessment, or educational placement of the child, or the provision of a free appropriate public education, referred to as FAPE, to the child. (20 U.S.C. § 1415(b)(6) and (f); 34 C.F.R. § 300.511 (2006); Ed. Code, §§ 56501, 56502, and 56505; Cal. Code Regs., tit. 5, § 3082.) The party requesting the hearing is limited to the issues alleged in the complaint, unless the other party consents, and has the burden of proof by a preponderance of the evidence. (20 U.S.C. § 1415(f)(3)(B); Ed. Code, § 56502, subd. (i); *Schaffer v. Weast* (2005) 546 U.S. 49, 57-58, 62 [126 S.Ct. 528, 163 L.Ed.2d 387]; and see 20 U.S.C. § 1415(i)(2)(C)(iii).) In these matters, Student has the burden of proving the claims he alleged, and Oakland has the burden of proving the claim it alleged. 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 14 years old and in eighth grade at the time of hearing. He resided within Oakland's geographic boundaries at all relevant times. Student was eligible for special education under the primary category of orthopedic impairment and the secondary category of speech or language impairment.

OAKLAND'S ISSUE: DID OAKLAND'S OFFER OF FEBRUARY 11, 2019, AS AMENDED ON MAY 13, 2019, OFFER STUDENT A FAPE IN THE LEAST RESTRICTIVE ENVIRONMENT?

STUDENT'S ISSUES NOS. 1.E AND 2.E: DID OAKLAND DENY STUDENT A FAPE IN THE 2018-2019 AND 2019-2020 SCHOOL YEARS BY FAILING TO DEVELOP GOALS THAT ADDRESSED STUDENT'S NEEDS IN THE FOLLOWING AREAS:

I. COMMUNICATION;

II. ADAPTABILITY;

III. OCCUPATIONAL THERAPY;

IV. SELF-HELP;

V. ACADEMICS, SPECIFICALLY READING, WRITING AND MATH;

VI. SENSORY SUPPORT; AND

VII. SOCIAL INTERACTIONS?

Oakland contends its February 11, 2019 IEP offer, as amended on May 13, 2019, offered Student a FAPE in the least restrictive environment. Student contends Oakland formulated the offered individualized education program, called an IEP, at meetings not

attended by all required personnel, could not have drafted valid goals without the absent personnel, and did not propose goals that met all his needs.

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 (2006).) Parents and school personnel develop an IEP for an eligible student based upon state law and the IDEA. (20 U.S.C. §§ 1401(14), 1414(d)(1); see Ed. Code, §§ 56031, 56032, 56341, 56345, subd. (a), 56363, subd. (a); 34 C.F.R. §§ 300.320 (2007), 300.321 (2006) & 300.501 (2006).)

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 Sch. Dist. v. Rowley* (1982) 458 U.S. 176, 201-204; *Endrew F. v. Douglas County Sch. Dist. RE-1* (2017) 580 U.S. ____ [137 S.Ct. 988, 1000].)

SUBSTANCE OF THE OFFER

FAILURE OF THE GENERAL EDUCATION PLACEMENT

Student had Down Syndrome and was orthopedically impaired and intellectually disabled. He was generally non-verbal except for a few words, could not read, could not reliably count past one or two, and could not write anything more than his four-letter nickname even with extensive verbal and physical prompting. He required assistance in toileting and did not understand safety signs. He communicated mostly with gestures and with a speech-generating device.

Student attended elementary school in the Berkeley Unified School District, which placed him in a general education inclusion program with a one-to-one aide and other supports and services. Parent believed Student was successful there, and his elementary school teachers reported Student was able to display basic skills in reading, writing and math. Parent and Student's sister testified that he had those basic skills in elementary school because he displayed them both at school and at home. Parent believed that Student was "gifted" at math, and her daughter stated that she saw him write the entire alphabet.

Student entered sixth grade in Berkeley's Willard Middle School in fall 2017, again in a general education inclusion class, but did not have the same success. At his annual IEP team meeting in February 2018, Student's teachers uniformly reported that Student could not display the academic skills attributed to him in elementary school. He could not recognize upper and lower case letters by name and sound and could not spell many words, as had been claimed. He could only speak or approximate five to ten core vocabulary words. He could write only the first three letters of his nickname with extensive prompting and with support for his elbow and pressure on his arm or wrist. He could not read.

Student's elementary school teachers had also claimed he could sequence and write numbers to the thousandth place, count objects with one-to-one correspondence, and add two single-digit numbers and write the answer. Berkeley's middle school teachers did not observe Student display those skills.

Even though Berkeley described Student's instructional level as "far, far below grade level," it did not propose to change his classroom. Its February 2018 IEP offer continued his placement in general education inclusion, with a wide variety of

accommodations, modifications, services and supports. It also proposed 10 goals in the areas of self-help, visual motor skills, fine and gross motor skills, expressive and receptive language, writing and vocabulary. However, the offered IEP proposed reducing adapted physical education support, and also proposed to remove direct support of Student's communication device because Student had learned how to use it. Parent agreed to the IEP except for the reductions.

Student's family moved to Oakland in 2016. Berkeley did not learn this until the end of April 2018. Berkeley then informed Parent that Student would be dis-enrolled for non-residence at the end of the school year.

Berkeley held a final IEP team meeting for Student in June 2018, at which it and Parent resolved some of their remaining differences over services in the February 2018 IEP, and Parent agreed to nearly all of the amended IEP. The February 2018 Berkeley sixth grade IEP, as amended in June 2018, was the last IEP to which Parent agreed, and was still in effect at the time of hearing.

OAKLAND'S ATTEMPTS TO CHANGE THE PLACEMENT

Parent enrolled Student in Oakland in the summer of 2018 and agreed to his placement in Montera Middle School under the terms of the Berkeley IEP. Student started the fall semester late because Parent disliked the one-to-one aide assigned to him and stated she would not send him to school until the aide was replaced. Oakland declined and instituted attendance proceedings, whereupon Parent relented and sent Student to school. He missed at least two weeks of classes, and when his IEP team first met on September 10, 2018, they had little first-hand experience with him.

When Oakland members of the IEP team convened for Student's first Oakland IEP on September 10, 2018, Parent did not appear. The parties dispute whether she was given notice of the meeting. Contrary to Student's characterizations, the Oakland members of the IEP team did not hold a meeting and did not make an offer. It did take the opportunity to write or complete a draft of an offer.

The team reconvened on November 1, 2018, with Parent present. By then, Student's teachers had made the same observations as had Berkeley's middle school teachers: Student was in general education inclusion pursuant to the Berkeley IEP for all his academic classes, but he was not able to show the skills he was said to have had in elementary school. He could write only three letters of his name. He could not add two single-digit numbers, and still could not read.

Oakland wrote several new goals for Student in the November 1, 2019 IEP offer and proposed that his placement be changed to a special day class where he could receive training in core subjects while mixing with typical peers during elective courses, physical education, lunch and recess. The proposal would have kept him out of the general education environment for about one-third of his school day. The November 1, 2019 IEP offer was similar to the Berkeley IEP in its accommodations, modifications, services, and supports. Parent declined to agree to it.

The IEP team met again on February 11, May 13 and September 24, 2019, and could not resolve the basic disagreement between Oakland staff and Parent. Oakland staff believed Student was not learning anything and could not make any progress in general education inclusion because he was unable to access the seventh-grade and eighth-grade curriculum. They believed he should be moved for core subjects to a special day class where his curriculum could be individualized and he could study at his

own pace among others doing the same, while benefiting from smaller class size, a higher adult-to-student ratio, and far more individual attention. Parent, at least throughout the 2018-2019 school year, believed Student could prosper academically in general education inclusion if he were given more and better services and supports, and a greater focus on academics.

At the IEP team meetings in 2019, Oakland continued to offer Student placement in a special day class. Its offers, from the first IEP team meeting on November 1, 2018, to the last one on September 24, 2019, were essentially the same: placement in a special day class for core academic subjects and mainstreaming for electives, physical education, recess and lunch. Oakland seeks a declaration that the offer constitutes a FAPE.

SPECIAL DAY CLASS

Oakland's February 11 and May 13, 2019 offer gave Parent the choice of one of three moderate special day classes, although the parties appeared to regard the special day class at Montera, which is closest to his residence, as the most likely placement. The other two were functionally similar, but at different campuses.

Jennifer Quintanilla taught the Montera special day class for three years, and had previous experience teaching a mild-to-moderate special day class in Oakland. She obtained a bachelor's degree in psychology at the University of California at Berkeley, and a master's degree from Alliant University in 2017. Ms. Quintanilla had a mild-to-moderate educational specialist credential.

Ms. Quintanilla was a persuasive witness. She was well-informed, careful in her statements, willing to admit the limits of her knowledge, and greatly concerned with the

welfare of her students. Her testimony was not damaged or undermined by cross-examination. Ms. Quintanilla's testimony was entitled to substantial weight.

There were 11 students in the Montera moderate special day class at the time Ms. Quintanilla testified. The class was limited to a maximum of 13 students. Typically, the students were eligible for special education in the categories of specific learning disorder, intellectual disability, or speech and language impairment. Their common areas of need were in writing, reading, math, speech and language, and social and behavioral development. Most were globally impaired. Ms. Quintanilla's students usually had deficits in the areas of social communication and receptive or expressive language. Some used speech-generating devices. None of this group of students was nonverbal, but Ms. Quintinella had experience with nonverbal students and was confident such a student could benefit from her class.

Three paraprofessionals were assigned to the class, and usually the students also had one-to-one aides, as Student would have had if he were in the class. The ratio of adults to students varied but was roughly one to three. This enabled Ms. Quintanilla and her aides to pay much more attention to individual students than could be done in general education.

Ms. Quintanilla used "Unique to You," a district-wide curriculum for moderate and moderate-to-severe special day classes. Every month the curriculum alternated between a science unit and a history unit, and also addressed life skills. Reading and writing were embedded in the curriculum, and it was differentiated, so students with varying needs could use it. The curriculum was language-enriched and included audio and visual tools to allow students who did not read at all to access the material.

Ms. Quintanilla also used Oakland's regular curriculum, which she modified individually for each student.

Ms. Quintanilla gave an example of how she mixed academic and life skills instruction in her class. Her curriculum on the day she testified was Oakland's standard United States history curriculum, which she modified for each student. She taught chapter one, on conflict and war, and then immediately afterward taught a life skills component on dealing with conflicts in social settings and among peers.

Oakland used a block schedule, which alternated every day between English and history subjects and science and math subjects. Ms. Quintanilla usually taught the material by combining whole class lessons with small group instruction, using Unique to You and materials she created. She and her aides targeted each student's goals. When she taught math, the students learned addition, subtraction and multiplication but also learned about money and currency manipulation at levels consistent with their goals and individual needs.

An average day in the Montera moderate special day class began with set morning routines. The students began with mindfulness meditation and then assembled for whole class or small group instruction. During the day, students learned movement routines and worked with Ms. Quintanilla individually, and then went as a group to lunch, an elective class like art, and general education PE. In the latter activities, students were being mainstreamed, and were able to talk to typical peers and sometimes form relationships with them.

The activities of the class could have included community outings, but the school was in a hilly residential neighborhood that did not offer many opportunities for outside learning. To compensate, Ms. Quintanilla had her class create mock stores inside the

classroom to practice money exchange. She also used a coffee cart, which a student took around the campus on Fridays, selling coffee to adults on the campus. This encouraged conversational skills and social engagement with adults, and was an opportunity to practice money exchange.

Ms. Quintanilla's students did not present significant behavioral problems. Some of them found it hard to sit still, and frequently protested having to do non-preferred work or simply did not do it, but their behavior was directed to the adults in the class, not other students. None of them engaged in aggressive behavior. They did not hit each other, destroy property, or spontaneously leave the classroom. Most of them just had "a hard time sitting through work."

The class was occasionally noisy, but all public school classes are occasionally noisy. Ms. Quintanilla and other witnesses established that the Montera special day class was no noisier than a general education class, and perhaps less noisy. At hearing, Ms. Quintanilla examined Student's goals and explained how she could implement them in her special day class. Student's goals were similar to the goals of other students in her class, and she and her aides worked on such goals every day. She believed that Student would make academic progress in her class.

Several other Oakland employees who were familiar with Student testified that, based on his needs, they supported moving him to the moderate special day class. Amy Chinn, Student's resource teacher, wrote many of the goals in Oakland's February-May offer and explained at hearing how they would be implemented. She stressed that it was important for a student to be working at approximately the same level as other students in the class, for the purposes of modeling and practicing

pragmatic speech. Ms. Chinn, an inclusion teacher, stated that the whole purpose of inclusion was to have a student doing what the other students were doing.

Ms. Chinn believed the Montera moderate special day class could have met all Student's needs and would have allowed him to make much more progress than he was making at the time of hearing, in the eighth grade general education class. Academics would have been at his level and the higher ratio of adults to students would have allowed him to receive a lot more individual attention to his goals. In the special day class, students worked on their own goals. In a general education class, they worked on state common core standards.

Jenna Williams was a speech-language pathologist from the Speech Pathology Group, on contract to Oakland. Her specialty was augmentative and alternative communication. As a clinical supervisor, she supervised and consulted with the Oakland staff who helped Student use his speech generating device, a Saltillo NovaChat tablet with which he communicated his basic wants and needs. The NovaChat was a small computer that produced programmed speech when one of several icons on the screen was touched.

Ms. Williams trained Student's teachers and aides to help him use the device, which Student acquired in the fourth grade and knew how to use. She also provided direct services to Student pursuant to the Berkeley IEP. Ms. Williams believed that Student would have been better able to learn in the Montera moderate special day class because it was smaller and had more structure, and because it offered the language enrichment he needed.

Phoebe Nguyen, a licensed occupational therapist, worked with Student for 60 minutes once a week under the Berkeley IEP. At the time of hearing, she was

encouraging Student to write his name independently, and observed that he needed extensive prompting, repetition and practice. She also assisted him in his daily activities such as washing his hands and cleaning out his backpack. Ms. Nguyen believed that Student would make more progress in the moderate special day class than he was making in general education. She had worked in a moderate special day class, and agreed with other witnesses that it would have provided Student a greater opportunity to progress. The curriculum would have been tailored to his specific needs and delivered at a slower rate than in general education, so he could learn it at his own pace. It would have taught him more functional skills and increased his safety awareness.

Robert Kendall, a school psychologist, had pupil personnel services and school psychologist credentials and was a board-certified behavior analyst with 23 years of experience in assessing students. Oakland assigned Mr. Kendall to assess Student for his 2020 triennial review. Although Mr. Kendall had not completed his report by the time of hearing, he was able at hearing to describe the results of the several standardized tests he administered, or attempted to administer, to Student. Because of his cognitive impairment, Student was unable to produce valid scores on standardized measures such as the Differential Ability Scales, Second Edition, or the Beery-Buktenica Developmental Test of Visual-Motor Integration. Mr. Kendall reviewed the 2014 and 2017 triennial psychoeducational assessments reported by Berkeley, and found his own conclusions commensurate with them. The 2017 assessment concluded that Student was intellectually disabled, and Mr. Kendall concurred. He noted that Student also had substantial deficits in expressive and receptive language.

Mr. Kendall interviewed Student's family and observed Student twice in his classes. Student was friendly, well behaved, and smiled a lot. But Student did not express himself verbally and was not participating in or relating to any of the materials

or instruction being delivered. When the art teacher was demonstrating how to use art materials, Student laid down on the middle of a table and tried to get the attention of the other students by smiling. His aide was unable to redirect him. In Ms. Chinn's resource class, the students were cutting paper snowflakes in preparation for the holidays, but Student could not participate. Even with extensive prompting and hand-over-hand help from Ms. Chinn and an aide, he was unable to cut the paper.

Mr. Kendall concluded Student would be better educated in a special day class or functional skills program where functional academic skills such as basic reading, writing, and math and money handling were taught. In a special day class, he would have more intensive individual support due to the lower ratio of students to adults, and his program could be individually adjusted to his needs and goals. He would also benefit from working with other students doing similar work.

Maria Pious, a speech-language pathologist, delivered direct services to Student at Montera in 30-minute sessions twice a week. She administered a speech and language assessment to Student for his 2020 triennial review, although she had not completed her report at the time of hearing. She believed Student would have more opportunity in a special day class working on a modified curriculum. At the time of hearing, the general education staff did not have enough time to work with him.

Ms. Pious reviewed the speech goals in the February 11 and May 13, 2019 IEP and believed that they were accurate and appropriate. She described the goals as sufficiently lofty to challenge him, but not beyond his capabilities. Like Ms. Chinn and Mr. Kendall, Ms. Pious stressed the importance of being able to work with other students on the same materials, and being able to practice pragmatic language with his classmates.

No professional testified in support of Student's current placement or in opposition to placing him in a special day class. Student called Dr. Jacob Randall, a licensed educational psychologist who had also been a school psychologist, to testify about the importance of having school psychologists at IEP team meetings. However, Dr. Randall only met Student the day before his testimony, so he did not venture an opinion about Student's needs and whether Student should have been placed in a special day class. He candidly stated he did not know enough about Student to know what kind of program he needed without the help of an entire IEP team.

Student also called Rhonda Kimball-Kelly, a case manager for the Regional Center of the East Bay. Student was eligible for regional center support because he was intellectually disabled, and Ms. Kimball-Kelly had been coordinating various vendors to serve him in the home, including providers of applied behavior analysis and respite supporters. Ms. Kimball-Kelly opined that Student should be given a chance to succeed in general education, and that all children, even those with intellectual disability, should be given that chance.

Ms. Kimball-Kelly, who described herself as an advocate for Student and his family, did not have the educational expertise to describe how the general education curriculum could be modified to accommodate Student, although she was convinced that it could. She vigorously advocated, for example, for the modification of the eighth grade science class so Student could participate in it, but did not explain how that could be done. Ms. Kimball-Kelly attended one of Student's IEP team meetings, but never observed him in a classroom. Her opinion was based more on faith in and hope for all disabled children than any educational experience with Student, and as a result was not persuasive. The consensus of Student's teachers was that the general education curriculum could not be modified enough to teach at his level.

The weight of evidence strongly favored Oakland's proposal to move Student to a special day class. Student was not able to benefit from his general education inclusion program, and the special day class offered to Student would have provided him a much better setting for progress and growth. This conclusion was supported by the opinions of Ms. Quintanilla, Ms. Chinn, Ms. Williams, Ms. Nguyen, Mr. Kendall, and Ms. Pious, and the only contrary evidence was the generic opinion of Ms. Kimball-Kelly.

Oakland proved that its offer of February 11, 2019, as amended on May 13, 2019, offered Student an appropriate classroom in which he could learn and benefit.

GOALS

Oakland's offer contained nine annual goals. Oakland contends the goals are measurable, appropriate, and in compliance with all legal requirements. Student does not criticize the content of the goals but argues that additional goals were required to meet his needs.

An annual IEP must contain a statement of the individual's present levels of academic achievement and functional performance, including the manner in which the disability of the individual affects his involvement and progress in the regular education curriculum. (20 U.S.C. § 1414(d)(1)(A)(i)(I); 34 C.F.R § 300.320 (a)(1)(2007); Ed. Code, § 56345, subd. (a)(1).) The present levels of performance create baselines for designing educational programming and measuring a student's future progress toward annual goals.

An annual IEP must also contain a statement of measurable annual goals designed both to meet the individual's needs that result from the individual's disability to enable the pupil to be involved in and make progress in the general curriculum; and

meet each of the pupil's other educational needs that result from the individual's disability. (20 U.S.C. § 1414(d)(1)(A)(i)(II); Ed. Code, § 56345, subd. (a)(2).) Annual goals are statements that describe what a child with a disability can reasonably be expected to accomplish within a 12-month period in the child's special education program. (*Letter to Butler*, 213 IDELR 118 (OSERS 1988); U.S. Dept. of Educ., Notice of Interpretation, Appendix A to 34 C.F.R., part 300, 64 Fed. Reg., pp. 12,406, 12,471 (1999 regulations).)

The February-May 2019 IEP offer contained nine annual goals for Student in the areas of reading, safety/life skills, math, writing, adapted physical education, expressive and receptive language, and pragmatics. The goals bore a close and specific correlation to the present levels of performance in the offered IEP. They were derived from specific baselines which reflected Student's then-current capabilities. They used an adequate level of specificity and sufficient numerical standards.

For example, the baseline of Student's first expressive language goal was: "[Student] is able to use want, go more, [and] like with 80 percent [accuracy] with minimum to medium prompt per instance. Also, he is able to use stop with no prompt when he does not like something (e.g. tickles)." The baseline accurately reflected Student's present level of performance when it was written. The related goal was:

By January 2020, [Student] will use 10 core vocabulary words (more, help, stop, go, I, you, want, it, that, like) from his SGD [speech generating device] in 2-3 word combinations when given no more than 3 verbal, visual, or gestural prompt[s] per session, in a variety of settings (classroom, therapy, small group) with 80% accuracy, as measured by data collection and observation from the SLP, aide, or special education teacher.

The other eight offered goals were similarly quantified and specific. All of them were capable of numeric measurement throughout the year. All of them stated how progress would be measured and who was responsible for measuring it.

For a student taking alternative assessments aligned to alternative achievement standards, as Student was, annual goals must be accompanied by short-term objectives. (20 USC § 1414 (d)(1)(A)(i)(I)(cc).) Short-term objectives are measurable, intermediate steps between the present levels of educational performance and the annual goals that are established for the child. Only one of Oakland's nine proposed goals contained objectives.

The absence of objectives from the other goals constitutes a technical violation of the IDEA. However, the IDEA allows for harmless errors. A procedural violation results in a denial of a FAPE only if the violation: (1) impeded the child's right to a FAPE; (2) significantly impeded the parent's opportunity to participate in the decision making process regarding the provision of a FAPE to the parent's child; or (3) caused a deprivation of educational benefits. (20 U.S.C. § 1415(f)(3)(E)(ii); see Ed. Code, § 56505, subds. (f)(2), (j).)

The absence of objectives is harmless in this case because it would not impede the delivery of a FAPE to Student, cause him educational loss, or impede parental participation in the IEP process. The goals are so basic, mechanical and arithmetical that they do not need interim objectives. For example, both Parent and Oakland staff would be able to calculate Student's progress from five to ten core words over a year, without intermediate objectives.

Ms. Quintanilla addressed at hearing each of the academic goals offered in the February 11 and May 13, 2019 IEP, and opined that Student could make significant

progress on them in her class. She established that each of them could be implemented in the proposed moderate special day class.

Ms. Pious explained each speech and language goal at hearing and described how it would be implemented. The goals emphasized multimodal communication with speech, sign, and Student's augmentative communication device. Ms. Pious believed all the speech and language goals offered in the February-May IEP were appropriate for him.

Independent examination of the nine goals in the offered IEP shows that they complied with all the above requirements except the requirement for objectives. The February 11 and May 13, 2019 IEP recognized that Student's intellectual deficits affected his participation in the general education curriculum to such a degree that he required an alternative curriculum and alternative assessments. The goals met each of the educational needs the evidence showed Student had. The IEP extensively described his present levels of academic and functional performance in general, and then used those levels to establish benchmarks for each of the nine goals. The goals described advances Student could reasonably expect to reach in a year, in light of his deficits. Each goal described in detail how progress would be measured, who would measure it, and how it would be reported to Parent. The goals did all of this with adequate specificity and precision.

For the reasons above, the nine goals in the February 11 and May 13, 2019 IEP and their related baselines were measurable, adequately addressed his unique needs, and complied with legal requirements, with the exception of the omission of short-term objectives from eight of them, which was harmless.

Student's separate argument about goals, in his Issues No. 1.e. and 2.e., is drafted broadly enough to address the November 2018 IEP offer as well as the IEP offer of February and May 2019. However, Student in his closing brief does not mention the goals in the November 2018 IEP offer and appears to have abandoned any argument concerning them. Student's argument is essentially an attack on the goals proposed in the February-May 2019 offer and is addressed here.

Student contends Oakland denied him a FAPE in the February-May 2019 offer by failing to develop goals in the areas of communication, adaptability, occupational therapy, self-help, academics, specifically reading, writing and math, sensory support, and social interactions. Student's closing brief does not mention communications or occupational therapy goals. Student appears to have abandoned those parts of his argument. The evidence did not support those claims.

No professional testified that February-May 2019 IEP was missing any goal in any area of Student's needs. Student's expert Dr. Randall had significant experience with goals but was not asked to evaluate the goals in the February and May 2019 IEP. Nor did Parent or Student's sister identify any additional goals they thought the IEP should have included.

Student's argument for additional goals rests entirely on collecting snippets from testimony and documents in his closing brief and claiming they add up to a need for more goals. For example, Student argues he should have had at least one sensory goal. No professional recognized the existence of such a need, and Student does not explain what a sensory goal might contain. Student notes that in Ms. Chinn's resource class, a corner was set aside for students to take sensory breaks when they felt the need. If a student taking a break wished, a sheet could be pulled down between the break area

and the rest of the class. On at least one day, Student went to the corner for a break and pulled down the sheet separating him from the class. In another incident, Student got distracted by his own image in a mirror. Student then concludes, "[Student] gets distracted by his own image in the mirror when in the bathroom, and the sensory goal will be necessary in any placement." Student's conclusion does not follow from the facts relied upon.

Student in his closing brief assumes that every reference in his files or in testimony to a need, a deficit, a challenge, or an area of struggle means that Oakland was required by law to write a separate annual goal for each. That is not the law. An annual IEP must contain annual goals that are measurable, and are designed to "meet the child's needs that result from the child's disability to enable the child to be involved in and make progress in the general education curriculum" and "meet each of the child's other educational needs that result from the child's disability . . ." (20 U.S.C. § 1414(d)(1)(i)(A)(II)(aa), (bb); 34 C.F.R. § 300.320(a)(2)(i)(A), (B)(2007); Ed. Code, § 56345, subds. (a)(2)(A), (B).) This language does not require that each identifiable need, deficit, or area of struggle or challenge be addressed in a separate goal.

In *Coleman v. Pottstown Sch. Dist*. (E.D.Pa. 2013) 983 F.Supp.2d 543, parents made the same contention as Student does here, but the District Court disagreed:

> Plaintiffs interpret [§ 1414(d)(1)(A)(i)(II)] as requiring a school district to create measurable goals for every recognized educational and functional need of a student with disabilities. . . .[I]t would . . . be inconsistent with the longstanding interpretation of the IDEA to find that providing a FAPE requires designing specific monitoring goals for every single recognized need of a disabled student. As noted above, a FAPE is a threshold

guarantee of services that provide a meaningful educational benefit, not a perfect education.

(*Id.* at pp. 572-573.) The Court of Appeal affirmed that part of the District Court's decision. (*Coleman v. Pottstown Sch. Dist*. (3d Cir. 2014) 581 Fed.Appx. 141, 147-148; see also *N.M. v. The School Dist. of Philadelphia* (3d Cir. 2010) 394 Fed.Appx. 920, 923 [nonpub. opn.]; *L.M. v. Downingtown Area Sch. Dist*. (E.D. Pa., April 15, 2015, No. 12-CV-5547) 2015 WL 1725091, p. 16; *Benjamin A. v. Unionville-Chadds Ford Sch. Dist*. (E.D. Pa., Aug. 14, 2017, Civ. No. 16-2545) 2017 WL 3482089, pp. 12-13.)

Student notes that the February-May 2019 IEP offer provided for consultation to staff in the areas of occupational therapy, augmentative and adaptive communication, assistive technology, physical therapy and speech and language. He then argues that the offered IEP "does not have goals to drive the consultations or measure progress from the consultations." It is not clear what that means, but there is no legal requirement for consultation goals.

Student 's only criticism of the speech and language goals in the February-May IEP offer is to point out that Gloria Zepeda, the advocate from his attorney's office, left the May 13, 2019 IEP team meeting with a version of the speech and language goals that was different from the final version in that it had fewer speech and language goals. The origin and nature of Ms. Zepeda's copy of the offer were not made clear at hearing, and it may have been a draft. The meeting notes stated that Oakland staff requested the advocate return that version at the meeting, which she refused to do. The advocate's version introduced at hearing was also missing a title page and cannot be assumed to be complete. The version the advocate took from the meeting was not necessarily the same as the offer made to Parent. There was no proof the offer made to

Parent was missing anything, and there is no claim that Parent was given a version that was any different from the version introduced in evidence by Oakland.

Student argues the February and May 2019 IEP offer lacked "goals in the areas of social interactions and adaptability that would build upon [Student's] friendly, social nature." That claim is incorrect. One of the offered goals was for pragmatics and was intended to "increase [Student's] language skills for social communication." Two others sought to improve his expressive language and a fourth his receptive language, which are prerequisites to social interaction. Student identifies no evidence that would support the need for a goal for adaptability, which he did not define.

Student also incorrectly claims the offered goals did not address self-help. One of the expressive language goals aimed "to support [Student's] self-advocacy skills" and expand his ability to say such things as "stop" and that he does not like something. His other expressive language goals would also have improved his self-advocacy skills.

Student does not address the previously alleged lack of academic goals in the areas of reading, writing, and math except to argue that there were not enough of them, and that his deficits were so serious there should have been more goals. But the law does not require any particular number of goals. Berkeley's goals were more numerous, but that did not set a legal minimum for Oakland, which believed that many of Berkeley's goals were unattainable by Student.

Student did not prove that the February-May 2019 IEP offer denied him a FAPE due to the absence of any annual goals.

ACCOMMODATIONS, MODIFICATIONS, SERVICES AND SUPPORTS

Oakland contends its February-May 2019 IEP offer contained all the accommodations, modifications, services and supports necessary to allow Student to access the curriculum and benefit from his education. Student does not criticize or mention the accommodations, modifications, services and supports in the February-May 2019 IEP.

An IEP must contain a statement of the related services, supplementary aides and services, program modifications and supports that will allow the student to advance toward his goals, access and make progress in his curriculum, participate in activities and to be educated with other disabled and nondisabled children. (20 U.S.C. § 1414(d)(1)(A)(i)(IV); 34 C.F.R. §§ 300.34 (2006); Ed. Code, § 56345, subd. (a)(4).)

The February-May 2019 IEP contained an extensive variety of accommodations, modifications, supports, and supplementary aids and services. It offered Student preferential seating near positive role models, frequent breaks, extended time, reduction of background noise and distractions, visual cues, a visual schedule, modeling, first/then language, a first/then chart, and alternative response options for reading, writing, and listening. It offered a modified curriculum, modified grading, and alternate assignments when needed. It offered academic instruction at Student's level and in accordance with his IEP goals.

In addition, the February-May 2019 IEP offered technical support, consultation, and any needed training of staff on Student's speech-generating device, adult support for toileting, consultation between the speech-language pathologist and the IEP team, and consultation between the occupational therapist and the IEP team. The IEP also offered Student the full-time support of a one-to-one aide, direct therapy individually

and in groups by a speech-language pathologist, adapted physical education, and similar services during the extended school year.

The accommodations, modifications, services, and supports in the February and May 2019 IEP adequately addressed Student's needs related to his disabilities, and Student does not argue otherwise.

TRANSPORTATION

The February-May 2019 IEP offer provided for transportation of Student to and from school but did not specify the method. At the IEP team meeting of February and May 2019, Oakland offered to transport Student by bus. Oakland contends that offer was adequate. Student contends he was denied a FAPE because the transportation option did not include a one-to-one aide on the bus and the bus would arrive too early in the morning.

In California, related services include transportation must be provided if they may be required to assist a special education student to benefit from his education. (Ed. Code, § 56363, subd. (a).) However, transportation is for the student; it is not measured by its convenience to a parent. (*Fick v. Sioux Falls Sch. Dist.* 49-5 (8th Cir. 2003) 337 F.3d 968, 970; *S.K. v. North Allegheny Sch. Dist*. (W.D.Pa. 2015) 146 F.Supp.3d 700, 712-714.)

Bussing was the obvious method of transportation for Oakland to offer. Student had been bussed to elementary school. Parent drove him to Berkeley's middle school and received reimbursement.

Student's argument that Student needed a one-to-one aide on the bus had no support in the evidence. Parents did not request a one-to-one bus aide, and there was no reason to offer it. Student did not have a bus aide in elementary school. At the

November 2018 IEP team meeting, Parent sought transportation by private car and driver, which would not have involved an aide. It is true that at hearing one teacher, in discussing Student's level of life skills, testified that he could not recognize safety signs and would probably never be able to cross the street independently. That by itself is not proof he needed an aide on the bus.

The school bus would have picked Student up at 6:30 in the morning. Parent stated that was too early and would mean Student would be tired at school. That speculative concern was not enough to invalidate the bus offer. (DeLeon v. Susquehanna Community Sch. Dist. (3d Cir. 1984) 747 F.2d 149, 150; Choruby v. Northwest Regional Educ. Service Dist. (D.Ore, January 14, 2002, Civ. 01–54–JE) 2002 WL 32784016, p. 10 [nonpub. opn.].) Student introduced no evidence concerning the length of the bus trip. In the end, Oakland and Parent agreed that Parents would drive Student to and from school and be reimbursed at the Internal Revenue Service rate, as Berkeley had done. Student did not prove that the transportation portion of the February-May 2019 offer denied him a FAPE.

LEAST RESTRICTIVE ENVIRONMENT

Oakland contends the February and May 2019 IEP complied with the IDEA's requirement that a disabled student must be placed in the least restrictive environment in which he can satisfactorily be educated. Student does not address the issue.

Federal and state law require a school district to provide special education in the least restrictive environment appropriate to meet the child's needs. (20 U.S.C. § 1412(a)(5); 34 C.F.R. § 300.114(a)(2006); Ed. Code, § 56040.1.) This means a school district must educate a special needs pupil with nondisabled peers "to the maximum extent appropriate," and the pupil may be removed from the general education

environment only when the nature or severity of the student's disabilities is such that education in general classes with the use of supplementary aids and services "cannot be achieved satisfactorily." (20 U.S.C. § 1412(a)(5)(A); 34 C.F.R. § 300.114(a)(2)(ii); Ed. Code, § 56040.1; see *Sacramento City Unified Sch. Dist. v. Rachel H.* (1994) 14 F.3d 1398,1403; *Ms. S. v. Vashon Island School Dist*. (9th Cir. 2003) 337 F.3d 1115, 1136-1137.)

Placement in the least restrictive environment is not an absolute. In an appropriate case, it must yield to the necessity that a student receive a FAPE: "The IDEA does not permit, let alone require, a school district to mainstream a student where the student is unlikely to make significant educational and non-academic progress." (*D.F. v. Western School Corp.* (S.D.Ind. 1996) 921 F.Supp. 559, 571 [citation omitted]; see also *Rowley, supra,* 458 U.S. at p. 181, fn. 4.)

Consequently, in appropriate cases, courts frequently approve placements outside of general education. In cases like this one, when it is clear that a student cannot benefit academically or socially from general education, the Ninth Circuit has repeatedly approved placements for all or part of a school day in self-contained special education classrooms. (See *Baquerizo v Garden Grove Unified Sch. Dist.* (9th Cir. 2016) 826 F.3d 1179, 1181, 1187-1188 [approving placement of autistic student in mild-to-moderate special class]; *A.R. v. Santa Monica Malibu Sch. Dist*. (9th Cir. 2016) 636 Fed.Appx. 385, 386 [nonpub. opn.] [approving placement of autistic student in special day class for part of school day]; *B.S. v. Placentia-Yorba Linda Unified Sch. Dist*. (9th Cir. 2009) 306 Fed.Appx. 397, 398-400 [nonpub. opn.][same]; *Ms. S. v Vashon Island Sch. Dist., supra,* 337 F.3d at pp. 1136-1137; *Clyde K. v. Puyallup Sch. Dist., No. 3* (9th Cir. 1994) 35 F.3d 1396, 1398, 1400-1402 [approving placement of student with Tourette's Syndrome in private school for the disabled].)

In *Rachel H.*, *supra*, 14 F.3d 1398, the Ninth Circuit set forth four factors that must be evaluated and balanced to determine whether a student is placed in the least restrictive environment:

- the educational benefits of full-time placement in a regular classroom;
- the non-academic benefits of full-time placement in a regular classroom;
- the effects the presence of the child with a disability has on the teacher and children in a regular classroom; and
- the cost of placing the child with a disability full-time in a regular classroom.

(*Id.* at p. 1404.)

The parties agree Student was not making acceptable progress in his general education inclusion placement. He learned almost nothing academically. Much of the time he hid his face and did not respond to questions. He often guessed at answers, or just smiled and put his head down on his desk. While he greeted and was greeted by typically developing peers with smiles and fist bumps, they did not pay attention to him, or he to them, when class was in session, so he did not benefit socially during class. Student was not disruptive, and the cost of the proposed placement was not an issue addressed by either party.

Oakland's offered placement would have had Student taking core academic classes in the special day class, leaving him outside the general education environment for approximately 33 percent of his school day. He would be in the general education environment for the rest of his day, during lunch, recess, an elective class and physical education. On balance, applying the criteria of *Rachel H., supra,* that placement was the least restrictive environment for him. It would remove him from the general education

environment only for the core academic subjects in which he could not be satisfactorily educated in a general education class.

OTHER IEP REQUIREMENTS

The IDEA requires an IEP to contain a wide variety of matters in addition to those already discussed. Student does not contend the February-May 2019 IEP was defective for failure to contain any of those additional required provisions. Independent examination of the IEP reveals that it does contain all of the matters, statements, and provisions required by law.

PROCEDURAL COMPLIANCE

Student's principal argument in his closing brief in opposition to the February-May 2019 IEP offer is that the IEP was crafted at meetings that did not have the legally required personnel in attendance. Oakland does not address this issue.

An IEP team must include:

- at least one parent;
- a representative of the local educational agency;
- a regular education teacher of the child if the child is, or may be, participating in the regular education environment;
- a special education teacher or provider of the child;
- an individual who can interpret the instructional implications of assessment results;
- other individuals who have knowledge or special expertise regarding the pupil, as invited at the discretion of the district or the parent and
- when appropriate, the student.

(20 U.S.C. § 1414(d)(1)(B); 34 C.F.R. § 300.321(a)(2007); Ed. Code, § 56341, subd. (b).)

The IEP offer was created at two parts of the same IEP team meeting on February 11 and May 13, 2019. Student does not argue that any of the participants expressly listed in the statute were not present. He argues, however, that six additional participants were legally required:

- A school psychologist
- A speech pathologist
- An assistive technology specialist
- A translator or interpreter
- A moderate special day class teacher
- An augmentative and alternative communication specialist

Student does not cite any legal authority in support of his contention that the law required the attendance of these additional team members, and does not mention the statutory list of required attendees. (20 U.S.C. § 1414(d)(1)(B)(i), (iv-vi); Ed. Code, § 56341, subds. (b)(1), (5-6).) Instead, Student argues on the assumption that an adequate goal in a particular area cannot be written except by a specialist in that area. For example, Student implies only a school psychologist can write a lawfully compliant social-emotional goal, only an occupational therapist can write a lawful occupational therapy goal, only a speech pathologist can write a lawful speech and language goal, and so forth.

This argument does not apply to some of Oakland's offer because the speech goals were written by speech-language pathologist Maria Hermana, and the occupational therapy goal by occupational therapist Phoebe Nguyen. More importantly,

the argument is baseless. The IDEA and related laws regulate the quality of goals, not the authorship of drafts. There is no legal requirement that anyone in particular draft any particular kind of goal. Student's argument also assumes that the drafter of a goal unilaterally determines its content, but the IDEA requires that the entire IEP team, including parents, consider and approve a goal's contents, and changes and amendments to proposed goals are routine in IEP team meetings. The argument also denigrates the skills of every other member of the IEP team. For example, Ms. Chinn, Student's case manager and resource teacher, knew him better than any other Oakland team member and wrote several of the goals in the offered IEP. Student's argument wrongly implies she was incompetent to do so. Notably, Student does not directly criticize any of the goals she wrote.

There is no legal requirement that the absent specialists Student lists were required to attend the IEP team meetings at which the February-May 2019 IEP was drafted. The closest rule is that the IEP team must include "at the discretion of the parent or the agency, other individuals who have knowledge or special expertise regarding the child, including related services personnel as appropriate." (20 U.S.C. § 1414(d)(1)(B)(i), (iv-vi); 34 C.F.R. § 300.321(a)(6)(2007); Ed. Code, § 56341, subds. (b)(1), (5-6).) As the statutory language shows, inviting such participants is within the discretion of the parties but is not required. (See *Missouri Dept. of Elementary and Secondary Educ. v. Springfield R-12 Sch. Dist*. (8th Cir. 2004) 358 F.3d 992, 999 ("parents are free to invite other individuals with expertise to participate"); *Cone v. Randolph County Schools* (M.D.N.C. 2004) 302 F.Supp.2d 500, 506-507, aff'd 103 Fed.Appx. 731.)

If Parent had wanted additional specialists to attend the February and May 2019 IEP team meetings, she could have invited them. Student now inaccurately claims that there was "no evidence" Parent was ever informed she could request the attendance of

additional participants at an IEP team meeting. On the contrary, the record contains several examples of meeting notices that advised her of that right. Parent received multiple copies of procedural safeguards in English, and at least one in Arabic. Parent herself did not claim she did not know of this right, and she freely did invite additional participants to meetings. For example, she invited Rhonda Kimble-Kelley, Student's regional center case manager, to the meeting on November 1, 2018, two advocates from Family Resource Navigators to the February 11, 2019 meeting, and another advocate to the May 13, 2019 meeting. Parent was well aware of her right to invite additional participants.

SCHOOL PSYCHOLOGIST

There was no evidence Parent wanted or needed the presence of a school psychologist at the February and May 2019 IEP team meeting. There was no recent psychological report to review or explain. Student's expert witness, the psychologist Dr. Randall, offered few opinions about Student or his IEP's, as he had only met Student the previous day. Dr. Randall was repeatedly asked whether the presence of a school psychologist was "necessary" or "needed" at Student's IEP team meetings, but Oakland successfully objected that the questions called for a legal conclusion. Dr. Randall then testified that the presence of a school psychologist would have been "helpful," that it would be "difficult" to fashion a placement without one, and that he himself would find the presence of a school psychologist necessary to writing an adequate program. However, he testified he did not know if Student's IEP team had acted on sufficient information in its placement decisions. Dr. Randall's testimony did not establish that a school psychologist was a required member of Student's IEP team. That is in any event a legal judgment that Congress has made, not one to be determined by expert opinion.

INTERPRETER OR TRANSLATOR

A district must take whatever action is necessary to ensure that the parent understands the proceedings of the IEP team meeting, including arranging for an interpreter for parents whose native language is other than English. (34 C.F.R. § 300.322(e)(2018).)

Parent spoke a particular dialect of Arabic. She spoke enough English to have unassisted conversations with Oakland staff, though probably not enough to understand an IEP team meeting on her own. Oakland did not bring an Arabic interpreter to the February 2019 meeting because Parent had previously told Student's case manager that she wanted her daughter to interpret during the meeting.

Parent's daughter was a 19-year-old college student studying criminal justice at San Francisco State University who lived with Parent and Student. She was fluent both in the dialect of Arabic spoken by Parent and in English. The daughter attended Student's IEP team meetings since he was in the third grade, and frequently translated for Parent at them. In her testimony at hearing, the daughter showed herself to be highly intelligent and mature, dedicated to her younger brother, and completely familiar with his special education history. There was no reason in the record to believe her interpretation and translation assistance was anything less than excellent. She testified that she was not "trained" to understand special education acronyms like "IEP" but did not claim she did not understand them, and her testimony at hearing showed she did.

Although the facts are not clear, Oakland's understanding with Parent about the use of her daughter as an interpreter probably did not qualify as "arranging" for an interpreter (20 U.S.C. § 1414 (d)(1)(B)(i)). This technical violation was harmless because there was no consequence of the absence of a hired interpreter. Parent had her

daughter immediately available and used her as the interpreter by choice. Oakland did not need to hire an interpreter for the first part of the meeting on February 11, 2019. It did have one present at the second part of the meeting on May 13, 2019.

SPEECH-LANGUAGE PATHOLOGIST

At the February 11, 2019 IEP team meeting, Parent objected to the absence of a speech-language pathologist. Oakland agreed to arrange a second session of the meeting at which a speech-language pathologist could be present, and did so. A speech-language pathologist was present at the second part of the meeting on May 13, 2019, answered Parent's questions, and assisted in drafting speech and language goals for the IEP. The pathologist was a participant the parties desired to have at the meeting, but she was not required by statute to be present. Oakland did not violate the IDEA by failing to have a speech-language pathologist at the first part of the IEP team meeting.

ASSISTIVE TECHNOLOGY/AUGMENTATIVE AND ALTERNATIVE COMMUNICATION SPECIALIST

Jenna Williams, Oakland's assistive technology and augmentative and alternative communication specialist, attended much of the first part of the IEP team meeting on February 11, 2019. She reported on Student's present abilities and explained the consultation staff was receiving on the use of his speech generating device. Parent asked Ms. Williams several questions, which were answered. The meeting notes then state: "The family gave Jenna [Williams] permission to leave early." Apparently this permission was not written.

Student argues that it was unlawful for Ms. Williams to leave the first part of the meeting without written permission from Parent, but Student misreads the applicable

law. The only IEP team members to whom that requirement applies are the members whose presence is mandatory. Members whose presence is not mandatory may be permitted to leave without written permission of the parent. (34 C.F.R. § 321(e)(2007).) Ms. Williams was permitted to leave the meeting with oral permission as she was not a mandatory member of the IEP team. Ms. Williams was again present for the second part of the meeting on May 13, 2019.

MODERATE SPECIAL DAY CLASS TEACHER

There was no teacher of a moderate special day class present at the first session of the annual meeting on February 11, 2019. There is no legal requirement that an IEP team contain the teacher of the class to which the school district proposes to move a student. Sarah Vogelstein, an instructional coach who was a supervisor of most of the attendees, attended the meeting. Ms. Vogelstein was competent to explain the nature of the proposed special day class placement, and did explain its basics. The notes of the second part of the meeting on May 13, 2019, show that a special day class teacher was present.

None of the additional personnel identified by Student as essential the February and May 2019 IEP team meetings was required by law to be present. In formulating the offered IEP, Oakland did not violate the IDEA in selecting the personnel who attended the meeting.

Oakland proved its IEP offer to Student of February and May 2019 was an offer of a FAPE in the least restrictive environment. Student did not prove that Oakland failed to develop any needed goals.

STUDENT'S ISSUES 1.C AND D AND 2.C AND D: DID OAKLAND DENY STUDENT A FAPE IN THE 2018-2019 AND 2019-2020 SCHOOL YEARS BY FAILING TO MAKE AN APPROPRIATE OFFER BASED ON STAFFING AND TO DESIGN A PROGRAM THAT WOULD ALLOW STUDENT TO MAKE PROGRESS?

Student contends that Oakland failed to provide him an adequate offer and program from his entry into seventh grade in Oakland's Montera Middle School in fall 2018 to the start of hearing, causing him to regress in his skills. Oakland contends that all its IEP offers were lawful and appropriate.

THE NOVEMBER 1, 2018 IEP OFFER

The offer presented to Parent at the November 1, 2018 IEP team meeting was essentially the same offer as later presented in the February-May 2019 offer that Oakland seeks permission to implement. Student recognizes this in his closing brief, and does not make any argument specific to the November 2019 offer. Those arguments have already been analyzed and rejected. For those same reasons, Student did not show that the November 1, 2018 IEP offer denied him a FAPE.

THE FEBRUARY-MAY 2019 IEP OFFER

For the reasons already discussed, the February-May 2019 IEP offer was a substantively and procedurally valid offer of a FAPE.

Student argues that Oakland's offers were made "based on staffing," but there was no proof of that. This is an apparent reference to Student's inaccurate claim that speech and language goals were removed from the offer at the February 2019 meeting, only to be restored at a separate meeting in May. In fact, the February and May

meetings were parts of the same meeting, and in February the discussion of speech and language goals was postponed to the May meeting at Parent's request so that a speech-language pathologist could be present.

Student did not prove Oakland failed to make him an appropriate offer, and did not prove Oakland failed to devise a program that would provide him a FAPE.

STUDENT'S ISSUES 1.A. AND 2.A: DID OAKLAND DENY STUDENT A FAPE IN THE 2018-2019 AND 2019-2020 SCHOOL YEARS BY PREDETERMINING STUDENT'S PLACEMENT AND THE FOLLOWING RELATED SERVICES:

I) TRANSPORTATION VIA BUS WITHOUT A ONE-TO-ONE BUS AIDE AND THE LENGTH OF TIME OF TRAVEL ON THE BUS;

II) ADAPTIVE PHYSICAL EDUCATION;

III) AUGMENTATIVE AND ALTERNATIVE COMMUNICATION; AND

IV) PLACEMENT IN AN INCLUSION PROGRAM WITHOUT A ONE-TO-ONE AIDE?

Student contends Oakland predetermined his placement and in addition, predetermined its offer of transportation, adapted physical education, augmentative and alternative communication, and placement in an inclusion program without a one-to-one aide.

Oakland contends it did not and could not predetermine anything because Student arrived in Oakland having an IEP from Berkeley that Oakland was bound to follow and was still following, and that no evidence of predetermination of offers was introduced at hearing.

An educational placement means that unique combination of facilities, personnel, location, or equipment necessary to provide instructional services to an individual with exceptional needs, as specified in the IEP, in any one or a combination of public, private, home and hospital, or residential settings. (Cal. Code Regs. tit. 5, § 3042, subd. (a).)

Predetermination occurs when an educational agency has decided on its offer prior to the IEP meeting, including when it presents one placement option at the meeting and is unwilling to consider other alternatives. (HB. v. Las Virgenes Unified School Dist. (9th Cir. 2007) 239 Fed.Appx. 342, 344-345 [nonpub. opn.].) A district may not arrive at an IEP meeting with a "take it or leave it" offer. (JG v. Douglas County Sch. Dist. (9th Cir. 2008) 552 F.3d 786, 801, fn. 10.) However, school officials do not predetermine an IEP simply by meeting to discuss a child's programming in advance of an IEP meeting. (N.L. v. Knox County Schools (6th Cir. 2003) 315 F.3d 688, 693, fn. 3.) Although school district personnel may bring a draft of the IEP to the meeting, the parents are entitled to a full discussion of their questions, concerns, and recommendations before the IEP is finalized. (Assistance to States for the Education of Children with Disabilities and the Early Intervention Program for Infants and Toddlers with Disabilities, 64 Fed.Reg. 12406, 12478 (Mar. 12, 1999).)

There was no evidence that any of Oakland's offer was predetermined. The Oakland members of the IEP team met in September 2018, shortly after Student's arrival, but Parent did not attend and stated she was not notified. Oakland prepared or completed a draft of an IEP to be presented at a meeting attended by Parent. That did not violate the IDEA.

There was no evidence that Oakland's offer of transportation in the November 2018 and February-May 2019 IEP's was predetermined. Oakland offered bus

transportation, and now Student argues that since there was only one method of transportation offered, it must have been predetermined. There is no requirement that a district present multiple options for a parent's choice to avoid a predetermination claim.

Student's argument that Oakland predetermined its offer of transportation would be without a one-to-one aide rests only on the false assumption that if only one method is offered it must have been predetermined. Student did not introduce any evidence concerning the length of the bus trip.

Student's only argument in support of his claim that his adapted physical education was predetermined is that there was no adapted physical education specialist at some of his IEP team meetings. That fact does not show predetermination.

Student's argument that his assistive technology/augmentative and alternative communications offer was predetermined is unpersuasive because it conflates several separate subjects that do not relate to predetermination. For example, Student argues: "The failure to write expressive language goals using his AAC/SGD device was a predetermination of placement resulting from the absence of a speech pathologist who could report on goals and who could write new communications goals."

Student also charges that Oakland predetermined that Student "would not receive direct AAC services from the SLP." There was no evidence that this part of Oakland's offer was predetermined. In Student's sixth grade year, Berkeley had also proposed to cease direct services for Student's speech generating device, apparently in recognition of the fact that he knew how to use it and did not need further training. Oakland later proposed the same reduction for the same reason. A proposal to reduce a service is not, by itself, predetermination.

Student's argument that placement in an inclusion program without a one to one aide was predetermined is difficult to understand. Student had a one-to-one aide under the Berkeley IEP, and every offer Oakland made included a one-to-one aide, including the February-May 2019 offer. Student's argument in his closing brief simply repeats his claim that essential members were not at IEP team meetings.

Student did not prove that Oakland predetermined any portion of any of its program offers. Student makes a different argument, which he also characterizes as a predetermination claim, but it is mislabeled. Student argues at length that Oakland failed to have all the IEP team members whom the law requires to be present at his various IEP team meetings. This contention is fairly brought against Oakland's case, since Oakland must prove procedural compliance in drafting its February-May 2019 IEP. But Student directs the claim to every other IEP team meeting in the relevant period as well. Student labels this claim predetermination in an apparent effort to introduce a new argument in his case that was not mentioned in his complaint, his prehearing conference statement, or the statement of issues in the order following prehearing conference issued on December 24, 2019.

Student may not introduce a new issue in his case by labeling it as something else. The alleged absence of required personnel from IEP team meetings is separate from any predetermination claim and was never part of Student's case. By law, this Decision may only decide those issues that are presented in Student's complaint. (20 U.S.C. § 1415(f)(3)(B); Ed. Code, § 56502, subd. (i).) In addition, basic fairness requires that the argument not be entertained because Oakland, not having warning of it, has not had an adequate opportunity to introduce evidence concerning it or brief it. This new argument cannot be considered here.

STUDENT'S ISSUES 1.B. AND 2.B.: DID OAKLAND DENY STUDENT A FAPE IN THE 2018-2019 AND 2019-2020 SCHOOL YEARS BY FAILING TO IMPLEMENT THE FOLLOWING COMPONENTS OF STUDENT'S IEP:

I. THE ONE-TO-ONE AIDE,

II. ASSISTIVE TECHNOLOGY; AND

III. AUGMENTATIVE AND ALTERNATIVE COMMUNICATION AND SPEECH SERVICES?

Student contends Oakland did not implement three portions of his Berkeley IEP: the one-to-one aide, assistive technology, and augmentative and alternative communication and speech services. Oakland contends the one-to-one aide was provided, and all or nearly all of the required assistive technology/augmentative and alternative communication and speech services were provided.

A district commits a substantive violation of the IDEA when it departs from a provision of an agreed-upon IEP, unless the deviation is only a minor variation from the IEP. (*Van Duyn v. Baker School Dist. 5J* (9th Cir. 2007) 502 F.3d 811, 822.) The Ninth Circuit held in *Van Duyn* that failure to deliver related services promised in an IEP is a denial of FAPE when "there is more than a minor discrepancy between the services provided to a disabled child and those required by the child's IEP." (*Ibid.*)

ONE-TO-ONE AIDE

There was no lapse in Oakland's delivery to Student of the service of a one-to-one aide. At the start of the fall 2018 semester Parent did not like the aide and

tried to replace her, but that is not relevant to Student's contention. At all times Oakland provided a one-to-one aide.

Later, Parent was angered to learn that the aide sometimes assisted Student with an assigned classroom chore such as folding towels or selling coffee to adults from a cart. The evidence showed that this was a normal part of the curriculum. All students in general education had chores which taught life skills, and in the case of the coffee cart offered opportunity for socializing and pragmatic speech. These chores made up an insignificant proportion of the curriculum and on the average day were not done at all. Far from showing an aide was not provided, the evidence showed the aide assisted Student with his assignments.

ASSISTIVE TECHNOLOGY/AUGMENTATIVE AND ALTERNATIVE COMMUNICATION SERVICES

Student acquired his speech-generating device, the NovaChat, in the fourth grade. He used it regularly since then as his principal communication device. Teachers reported that Student liked the device and took care of it.

There was some initial confusion among Oakland staff about which Berkeley IEP governed the direct services for Student's device. The Berkeley documents were ambiguous with respect to Parent's approval of assistive technology and augmentative and alternative communications supports. That ambiguity complicated the relationship of the parties and continued into the hearing and the parties' briefs. In addition, the evidentiary record was incomplete and Student's argument is not entirely clear.

Part of Student's argument is that Oakland did not deliver all of the direct assistive technology services the Berkeley IEP required because Oakland used

unauthorized aides to deliver the service. During most of the fall of 2018 and spring of 2019, Oakland lacked a licensed speech-language pathologist to deliver services. During that period, it used speech-language pathology assistants under the supervision of a licensed speech-language pathologist to deliver Student's speech-related services. That use was generally authorized by law. (Ed. Code, § 56363, subd. (b)(1); Cal. Code Regs., tit. 5, § 3051.1, subd. (d).) However, the regulation authorizes the use of the pathology assistants only "if specified in the IEP." The governing Berkeley IEP did not specify the use of pathology assistants, so Student reasons that the services they rendered to Student should be regarded as not delivered at all.

Another part of Student's argument is that Student had three expressive language goals in the Berkeley IEP, which were to be executed by a speech-language pathologist and others, but not by pathology assistants, so those goals were not implemented properly because a speech pathology assistant implemented them in part. One of the expressive language goals was to be implemented by a speech-language pathologist only, another by a speech-language pathologist, an aide, or a special education teacher, and a third by a speech-language pathologist and the IEP team. A pathology assistant was not part of the IEP team.

Ms. Williams, a speech-language pathologist as well as an assistive technology expert, testified that she and a pathology assistant implemented the one Berkeley goal that mentioned Student's speech generating device. Sarah Panien, Oakland's lead speech-language pathologist, testified that she supervised a pathology assistant, Janay Mosley, in implementing Student's IEP. There was no reason to doubt their testimony, but the exact division of labor cannot be determined from the record. For example, the log of services Ms. Williams kept did not include all the services she

testified she rendered. The evidence did show that some of the implementation of Student's IEP and goals was left to Ms. Mosley, a pathology assistant.

A third aspect of Student's argument is that Ms. Williams did not provide all the services she should have because she deducted too many days from the services owed Student for Student's frequent absences. Parent testified that Student was sometimes present when Ms. Williams thought he was absent. Student does not attempt to quantify this alleged loss except by reference to a single day, October 7, 2018.

It is not necessary to fully untangle these factual issues because any variation from Student's IEP in the delivery of direct assistive technology support for Student's device, or in the delivery of speech services, had no apparent effect on his education. Student does not argue there was any real-world consequence to the use of a speech pathology assistant rather than a licensed speech-language pathologist during part of the 2018-2019 school year, either to support his use of the communication device or to advance his speech goals. Licensing aside, the services were in fact delivered. There was no showing the work the assistant did was substandard in any way. Any variation from the governing IEP was therefore minor and not material within the meaning of *Van Duyn, supra,* and did not deny Student a FAPE.

STUDENT'S ISSUE .1F: DID OAKLAND DENY STUDENT A FAPE IN THE 2017-2018 SCHOOL YEAR BY FAILING TO PROVIDE PRIOR WRITTEN NOTICE WHEN PARENT REQUESTED A CHANGE OF PLACEMENT IN AUGUST, NOVEMBER AND DECEMBER 2018?

Student contends that Oakland failed to provide Parent prior written notice of its decisions to refuse her requests in August, November, and December 2018 for a change of placement.

Oakland contends that there were no requests for a specific change of placement that it could or did refuse.

A district must give parents prior written notice of a decision to refuse a request for a change of placement. (34 C.F.R. § 300.503(a)(2).) The notice must include:

- a description of the action proposed or refused by the agency;
- an explanation of why the agency made the decision;
- a description of each evaluation procedure, assessment, record, or report on which the decision was based;
- a reminder of parents' procedural safeguards;
- sources for assistance;
- the options considered and the reasons for rejecting the others; and
- a description of other factors relevant to the decision.

(34 C.F.R. § 300.503(b) (2007); Ed. Code, § 56500.4, subd. (b).)

The purpose of the prior written notice requirement is to ensure that parents receive sufficient information about a proposed change to reach an informed conclusion about whether the change will provide an appropriate education. (*Smith v. Squillacote* (D.D.C. 1992) 800 F.Supp. 993, 998.) The notice must be given "a reasonable time before" the district actually changes the student's placement or the provision of a FAPE to the student. (34 C.F.R. § 300.503(a)(2006).) This is to ensure the "parents have enough time to assess the change and voice their objections or otherwise respond before the change takes effect." (L*etter to Chandler* (OSEP 2012) 59 IDELR 110.)

Student no longer claims there was a request for change of placement in August 2018. However, throughout fall 2018, Parent frequently expressed dissatisfaction with

Student's program at Montera. On October 14, 2018, Parent wrote to an Oakland administrator asking for help locating a different school for Student. She requested assistance so she could "explore our options with other Oakland middle schools" and noted, "I am confident that there is a school in the OUSD that contains the special ed program that [Student] needs in order to do well, but we have yet to find it." The administrator responded that such a change had to be accomplished at an IEP team meeting.

At Student's first IEP team meeting on November 1, 2018, Oakland members of the team agreed with Parent that Student needed a change of placement, and formally offered to move him to a moderate special day class. That offer remained pending until the next IEP team meeting on February 11, 2019. Parent was reluctant to accept the offer and did not immediately cooperate with Oakland's efforts to arrange a tour for her of the special day class at Alliance Academy.

On December 20, 2018, Parent wrote to the Superintendent of Schools, requesting a meeting to discuss a change of placement. In the letter she repeated her statement that there was an acceptable school for Student somewhere in Oakland, "but we have yet to find it."

These requests may loosely be termed requests for a change of placement, but they did not trigger the prior written notice requirement because they did not specify a placement to which Student could be moved. "[P]arents' expressions of concern were not enough to trigger the procedural requirements of the Act." (*Evans v. District No. 17 of Douglas County, Neb.* (8th Cir. 1988) 841 F.2d 824, 829 (generalized concerns about change of placement did not require prior written notice).) The notice requirement assumes that there is a specific placement requested; otherwise such a notice would be

meaningless. A district cannot be expected to provide specific information about the reasons it refused to change a placement when no specific change could be considered and no specific information could be relied on.

In addition, Oakland did not refuse to change Student's placement. At the IEP team meeting of November 1, 2018, it agreed to change his placement, and made a specific proposal of an identified special day class. That proposal was outstanding when Parent appealed to the Superintendent.

Student did not prove that Oakland failed to provide prior written notice of any refusal to change his placement in August, November, or December 2018.

STUDENT'S ISSUE 2.G.: DID OAKLAND DENY STUDENT A FAPE IN THE 2019-2020 SCHOOL YEAR BY FAILING TO PROVIDE PARENT WITH APPROPRIATE INTERPRETATION AND TRANSLATION SERVICES FROM AUGUST 2019 TO THE PRESENT?

In his complaint and prehearing conference statement, Student limited this issue to alleged violations from August 2019 to the beginning of hearing. The evidence at hearing, however, showed that Student intended to address the period starting in August 2018. Student contends Oakland failed to provide adequate interpreter services at IEP team meetings and never produced IEP documents translated into Arabic.

Oakland contends that it provided all necessary interpretive services by either having interpreters at the meetings or acceding to Parent's requests to use her daughter as the interpreter. Oakland also contends that it provided IEPs in Arabic on request, but does not address the timeliness of its delivery of those translations.

Oakland provided professional interpreters at IEP team meetings with three exceptions. In November 2018 and February 2019, Parent's daughter interpreted at Parent's request, and at the May 2019 IEP team meeting the translator had to leave early. Rather than rescheduling the meeting, Parent requested that the meeting continue with her daughter interpreting, and the IEP team agreed and continued the meeting.

As stated, Parent's daughter was an excellent and well-informed interpreter, and Oakland did not deny Student a FAPE or interfere with Parent's participation by arranging to use her instead of a professional on the three occasions on which she interpreted for Parent.

The evidence showed that Oakland did produce three IEP documents that Parent asked to be translated into Arabic, but it also showed that Oakland delayed production of them for so long that the translated IEP's likely were not useful in Parent's decisional process. For example, Oakland provided the translation of the November 1, 2018 IEP in February 2019, and the translation of the May 13, 2019 IEP in August 2019.

Normally delays of this length would constitute prejudicial violations of the translation requirement. However, on the unusual facts of this case, those delays had no adverse impact on Parent or Student. At all times Parent was accompanied by her daughter, who could and more likely than not did translate any English document without delay. The notes of the IEP team meetings showed that Parent understood the proceedings in real time. She asked pointed and well-informed questions, and made statements and requests about the matters being discussed, which showed she was very familiar with the contents of Student's IEP's, including the proposals then before the IEP team. Parent did not need to receive Arabic translations of documents her daughter

was already translating for her. Parent could not have participated in the IEP team meetings as intelligently as she did if she had not been well aware of the contents of documents long before she received written translations from Oakland. Student in his closing brief makes no effort to argue there was any IEP Parent did not understand.

Student proved that Oakland technically violated the IDEA's requirements for interpretation at meetings by informally agreeing to Parent's requests to allow her daughter to translate. He also showed that Oakland violated the translation requirements by the tardy production of translated IEP's, but he did not prove that either of those violations had any practical effect. Neither Oakland's acceptance of the daughter as an interpreter nor its excessive delays in delivering IEP's translated into Arabic interfered with the delivery of Student's education, significantly impeded parental participation, or resulted in any educational loss. (20 U.S.C. § 1415(f)(3)(E)(ii); Ed. Code, § 56505, subds. (f)(2), (j).) The violations therefore did not deny Student a FAPE.

STUDENT'S ISSUE 2.F.: DID OAKLAND FAIL TO TIMELY FILE FOR DUE PROCESS TO OVERRIDE LACK OF PARENT'S CONSENT TO THE FEBRUARY-MAY 2019 IEP OFFER?

Student contends even if Oakland's February 11 and May 13, 2019 IEP offer would have provided him a FAPE, Oakland unreasonably delayed in filing a request for due process hearing seeking to validate the offer. As a result, Student argues, Oakland allowed him to remain in his unsuccessful general education placement far longer than he should have, thus denying him a FAPE.

Oakland contends its delay in seeking an order approving its offer was reasonable because it engaged in extensive efforts to persuade Parent to accept the

offer before it turned to litigation, and it was not clear until September 2019 that those efforts had failed.

A school district may not tolerate a denial of FAPE indefinitely, even if caused by a parent. Within a reasonable time, it must file for due process hearing and seek an order declaring that its offered IEP constitutes an offer of FAPE. Education Code section 56346, subdivision (f), provides that a school district "shall" initiate a due process hearing if the school district determines that a portion of an IEP to which a parent does not consent is necessary to provide a child with a FAPE. (*I.R. v. Los Angeles Unified Sch. Dist.* (9th Cir. 2015) 805 F.3d 1164, 1165 (*I.R.*).)

The facts of *I.R.*, *supra*, are quite similar to the facts here: pursuant to a previous IEP, an autistic student was placed in general education with a one-to-one aide, although the district believed she should be placed in a special day class. (*I.R.*, *supra*, 805 F.3d at p. 1166.) In September 2010 the parent, believing that general education with an aide was the proper placement, declined an IEP proposing to move the student to a special day class. In November 2010 the district informed the parent that it believed the student should be moved to a special day class but recognized that the previous IEP governed, so the student remained in general education. (*Ibid.*)

From March 2011 to February 2012, the district in *I.R.*, *supra*, held a series of IEP team meetings during which it unsuccessfully attempted to persuade the parent to accept a special day class placement. Eventually the parent filed for a due process hearing in May 2012. (*I.R., supra,* 805 F.3d at p. 1166.) The Ninth Circuit held that the district's delay, from the first disagreement in November 2010 to parents' filing for due process in May 2012, was too long, and that it was therefore liable for the denial of FAPE "for that unreasonably prolonged period." (*Id.* at p. 1170.) It rejected the district's

defense that it was justified in spending that time attempting to change the parent's mind:

> Once the school district determines that the [IEP] component is necessary, and that the parents will not agree to it, the district cannot opt to hold additional IEP meetings or continue the IEP process in lieu of initiating a due process hearing. Rather, the school district must initiate a due process hearing expeditiously.

(*Id.* at p. 1169.) The district must file for a due process hearing, the court continued, "when the school district and the parents reach an impasse." (*Ibid.*)

In determining that the delay in *I.R.* was too long, the court recognized that a district "must have some flexibility to allow for due consideration of the parents' reasons for withholding consent" but it should be able to determine its course of action "within a reasonable period of time." (*I.R.*, *supra*, 805 F.3d at p. 1169.) The district must act with "reasonable promptness"; "the reason for this urgency is that it is the child who suffers in the meantime." (*Id.* at p. 1170.)

The Ninth Circuit in *I.R.* measured the district's unreasonable delay from the parent's first refusal of the district's offer to the parent's filing for a due process hearing. It recognized that the inquiry about the length of the delay was a question that might in other cases require findings from the district court, but "[i]n this case…it is plain that the delay of LAUSD of more than a year in requesting a due process hearing was unreasonable." (*I.R.*, *supra*, 805 F.3d at p. 1170.) It therefore imposed liability on the district "for that unreasonably prolonged period." (*Ibid.*)

Oakland unreasonably delayed filing a request for due process hearing when it arrived at an impasse with Parent. Oakland was quick to realize, when Student entered Montera, that his placement was inappropriate. Oakland states in its brief, "By the time [Student] arrived in the District's inclusion program in seventh grade, it became evident to District staff that his 'stay put' program was not appropriately designed to meet his needs." Ms. Chinn, Student's special education teacher, testified that between September 2018 and the first IEP team meeting for Student on November 1, 2019, she realized Student's placement was inappropriate "because he could not access the middle school curriculum." At that first meeting, Student's teachers recounted their experiences with Student and agreed with Ms. Chinn, who told the IEP team Student's curriculum required more modifications than could be done in the general education environment. Parent expressed concern about the offer of a special day class due to a previous experience and would not agree to the IEP.

Oakland's November 1, 2018 offer of a special day class, disagreeing with Parent that Student belonged in general education, corresponded closely with the letter Los Angeles Unified School District sent the parent in *I.R.,* disagreeing that a general education placement was appropriate and proposing a special day class. The Ninth Circuit held that letter triggered the requirement of compliance with Education Code section 56346, subdivision (f). The court held that the district's actions in preparing its first offer of a special day class and presenting it to the parents constituted a recognition that a placement in a special day class was necessary to provide the student a FAPE. It held that the district's period of delay began "when Mother failed to consent to I.R.'s placement in a special education environment." (*I.R., supra,* 805 F.3d at 1169.)

Strict application of the *I.R.* ruling here would mean Oakland's unreasonable delay in filing a due process complaint began on November 1, 2018. Since it did not file

for due process until October 30, 2019, one year passed before it acted. That delay was similar to the delay in *I.R.*

However, Oakland correctly points out that it was not entirely clear on November 1, 2018, that Parent would flatly reject a special day class placement. At that meeting she agreed to inspect a special day class at Alliance Academy in Oakland, and Oakland agreed to organize the visit. Parent delayed making the visit and then refused the visit until she saw "better" goals in an IEP, but Oakland did not know, on November 1, 2018, that she would delay, bargain, and ultimately reject the placement.

For ten months after the November 1, 2018 IEP team meeting, Oakland refrained from filing a due process complaint and instead engaged in a series of IEP team meetings designed to persuade Parent to accept a special day class placement. This was exactly the excuse for not filing for due process that was rejected in *I.R.*: "[T]he district cannot opt to hold additional IEP meetings or continue the IEP process in lieu of initiating a due process hearing." (*I.R., supra*, 805 F.3d at 1169.) Hoping that it could write goals to satisfy Parent so that she would at least look at a possible placement was part of the negotiating process *I.R.* found impermissible.

Oakland waited until Student's annual IEP team meeting on February 11, 2019, to renew its offer of a special day class. The meeting was rancorous and included a lengthy discussion of Parent's claim that Oakland was not providing all the services required by the Berkeley IEP. Parent generally adhered to her view that if Oakland would only faithfully implement the Berkeley IEP in the general education environment, Student would be successful. The next day, Parent summarized the placement discussion in an email: "We stated that if Oakland didn't have what [Student] needed, we were willing to

transfer him to other districts if they can offer us some [sic.] that has the resources he needs."

This intransigence should have made it clear to Oakland that Parent was not going to consent to placement in a special day class at any time in the near future. Rather than initiating due process, however, Oakland chose to continue to negotiate. Shortly after the February 11, 2019 IEP team meeting, in a prior written notice to Parent, Oakland threatened to file for due process to validate a part of its IEP, but stated it would refrain from doing so because it wanted "to work collaboratively with the family." That choice was erroneous under *I.R., supra,* and was eventually unsuccessful as well.

Giving Oakland the benefit of the doubt, it is fair to hold that calculation of the period in which it unreasonably delayed filing for due process began after the failure of the February 11, 2019 IEP team meeting. By then, Oakland could have been reasonably certain that, at best, it faced a long struggle to obtain its goal, and at worst, Parent would never agree to the change of placement. That was the last juncture at which Oakland could persuasively claim its delay was reasonable.

Oakland scheduled a second session of the annual meeting for May 13, 2019, at which it offered Parent the choice of one of three special day classes. It was again unsuccessful, and scheduled a final session of the meeting for May 29, 2019. Parent, however, refused to go to that meeting, and explained at hearing that she did not go because Student was not benefiting from the IEP and it would be a waste of her time. Also at the end of May 2019, Parent made her last visit to a special day class and rejected it.

By June 1, 2019, the conclusion should have been unescapable to Oakland that it had to file for due process to provide Student a FAPE. It had already delayed for seven

months. There was another reason for urgency: Oakland was aware Student had also spent the 2016-2017 school year in general education in a Berkeley middle school, which was equally inappropriate. Oakland was not responsible for that year, but it must have realized Student had not received a FAPE since his entry into middle school in August 2016. Yet Oakland scheduled another IEP team meeting for September 24, 2019, at which it again tried and failed to persuade Parent to agree to the change of placement. On September 23, 2019, the day before that meeting, Parent filed a request for due process hearing. In response, on October 30, 2019, Oakland finally filed its own request.

In accordance with *I.R., supra,* Oakland cannot excuse its delay on the ground that it was holding a series of IEP team meetings in an effort to change Parent's mind, or that it was unclear whether the negotiations would succeed. The delay became unreasonable on February 11, 2019, when it was clear Parent could not be persuaded to accept a special day class any time in the near future. The period of Oakland's unreasonable delay, then, was from February 11 to September 24, 2019, a period of six and one half months. (See *I.R., supra*, 805 F.3d at p. 1169 (period of unreasonable delay ended when parent filed for due process).)

Student proved Oakland violated the IDEA by unreasonably delaying filing a due process complaint from February 11 to September 23, 2019. This delay was severely detrimental to Student's education. It left him for several additional months in an inappropriate placement where he could not understand the curriculum, could not participate in the class, and could not learn anything of significance. If Oakland had filed for due process in February 2019, it could have obtained a decision by or close to the start of the 2019-2020 school year. Instead, by its delays, it postponed Student's transfer to an appropriate class until, at best, the effective date of this Decision, which

will come in March of the school year. Student lost most of a school year as the result of Oakland's delay.

Oakland's delay therefore impeded Student's right to a FAPE and caused a deprivation of educational benefits, thus denying him a FAPE and requiring relief. (20 U.S.C. § 1415(f)(3)(E)(ii); Ed. Code, § 56505, subd. (f)(2).)

CONCLUSIONS AND PREVAILING PARTY

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

Issue 1: Oakland did not deny Student a FAPE in the 2018-2019 school year by predetermining aspects of its offers, failing to implement specific aspects of his IEP, failing to make an appropriate offer of placement based on staffing issues, failing to design a program that would allow Student to make progress, failing to develop goals in his areas of need, or failing to provide Parent prior written notice. Oakland prevailed on all those issues.

Issue 2: Oakland did not deny Student a FAPE in the 2019-2020 school year by predetermining aspects of its offers, failing to implement specific aspects of his IEP, failing to make an appropriate offer of placement based on staffing issues, failing to design a program that would allow Student to make progress, failing to develop goals in his areas of need, or failing to provide adequate interpretation and translation assistance. Oakland prevailed on all those issues as well.

However, Student prevailed on Issue 2.F, regarding Oakland's failure to timely file for a due process hearing to obtain a determination that the IEP developed in February and May 2019 offered Student a FAPE.

Issue 3: The IEP developed in February and May 2019 offered Student a FAPE, and Oakland may implement it without Parent's consent. Oakland prevailed on Issue 3.

REMEDIES

REMEDIES FOR STUDENT

ALJ's have broad latitude to fashion appropriate equitable remedies for FAPE denials. (*School Comm. of Burlington v. Department of Educ.* (1985) 471 U.S. 359, 370 [105 S.Ct. 1996, 85 L.Ed.2d 385]; *Parents of Student W. v. Puyallup Sch. Dist., No. 3* (9th Cir. 1994) 31 F.3d 1489, 1496 (*Puyallup*).) In remedying 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)(2006).) 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.)

Compensatory education is an equitable remedy that depends upon a fact-specific and individualized assessment of a student's current needs. (*Puyallup, supra,* 31 F.3d at p. 1496; *Reid v. District of Columbia* (D.C.Cir. 2005) 401 F.3d 516, 524 (*Reid*).) The award must 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*, *supra*, 401 F.3d at p. 524.)

This Decision holds that by February 11, 2019, Oakland should have realized it had to file a request for a due process hearing under *I.R., supra*, to provide Student a FAPE. It would have been reasonable for Oakland to use as much as a month after that meeting to prepare and file its request.

Student is therefore entitled to relief for the period from March 11. 2019 to the September 23, 2019 filing of Student's request for due process hearing. (See *I.R., supra*, 805 F.3d at p. 1169). During that period, Student should have been in a moderate special day class like the one at Montera described by Ms. Quintanilla. That period of time included 52 school days in the 2018-2019 regular school year. It also included 20 days of extended school year in the summer of 2019. Student was entitled to extended school year under the Berkeley IEP that was still in effect, and would have been entitled to it if Parent had agreed to the February-May 2019 offer. Finally, Student would have been in a special day class for 30 school days at the start of the 2019-2020 regular school year. Student therefore missed a total of 102 days of education in core academic subjects in a special day class as the result of Oakland's failure to comply with Education Code section 56346, subdivision (f).

However, hour-for-hour relief for a denial of FAPE is not required by law. (*Puyallup, supra*, 31 F.3d at p. 1497.) "[E]quitable considerations are relevant in fashioning relief." (*Burlington, supra*, 471 U.S. at p. 374.) Student will be finishing middle school this spring and starting high school in the fall, and will have a full day of educational activities on schooldays in the normal course of events. Student might not be able to take advantage of a substantial award of compensatory hours on top of his normal educational program unless the hours are spread out over time so that using them is not onerous to him and does not become such a burden as to discourage their full use. Student will therefore be awarded one hour a week of tutoring to be

administered throughout the next four years of his education, supporting his normal curriculum as set forth below.

Student's one hour a week of tutoring shall be delivered by a credentialed special education teacher and shall be divided equally between core academic subjects and life skills training. The tutoring shall resemble Ms. Quintanilla's method of combining the two approaches in her special day class. It is the intent of this order that Student's compensatory education hours be coordinated by the tutor with the curriculum Student is studying at the times the services are delivered.

REMEDIES FOR OAKLAND

Oakland proved that its offer of February 11, 2019, as amended on May 13, 2019, was an offer of FAPE in the least restrictive environment. Oakland may implement the IEP offer in the absence of parental consent.

ORDER

1. Oakland shall provide Student one hour a week of individual tutoring by a licensed special education teacher, or a teacher with equivalent credentials, to be divided evenly between core academic subjects and life skills training by the tutor. The core academic subjects shall be the same subjects as Student would be studying if he were in a moderate special day class at the time. Oakland shall keep the tutor informed of the range of academic subjects Student is studying in any given semester so that the tutor may conform Student's compensatory education hours to his current curriculum.
2. Oakland shall make the tutoring hours ordered above reasonably available to Student starting after spring break 2020 and until the end of the 2023-2024

regular school year. Oakland shall ensure that the hours are delivered during the regular school year, and during the extended school year if Student is eligible for it and actually attends it. Oakland's obligation shall cease at the end of the regular 2023-2024 academic year notwithstanding any incomplete usage of the services. Oakland's obligation shall also cease if Student is no longer a resident of the district.

3. Oakland shall ensure that the tutor delivers the compensatory education in one hour-long session a week, two thirty-minute sessions a week, or on such other schedule as is most consistent with Student's other obligations, to be determined in the sole discretion of the tutor.
4. If Student is absent from any scheduled tutoring session without 24-hours' notice, Oakland may subtract that session from the total. With or without adequate notice, if Student is absent from any scheduled tutoring session for a reason that is not treated as an excused absence under Oakland's standard practices, Oakland may subtract that session from the total. If Student's excused or unexcused absences fall disproportionately on days scheduled for life skills training or academic training, the tutor shall adjust the next sessions accordingly to maintain a roughly equal proportion of academic and life skills sessions.
5. The terms of this award may be altered by a written agreement between the parties. An IEP can constitute such an agreement.
6. All Student's other requests for relief are denied.
7. Oakland's IEP offer of February 11, 2019, as amended on May 13, 2019, was an offer of a free appropriate public education in the least restrictive environment. Oakland may implement the offer without parental consent.

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/

Charles Marson

Administrative Law Judge

Office of Administrative Hearings