

BEFORE THE  
OFFICE OF ADMINISTRATIVE HEARINGS  
STATE OF CALIFORNIA

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CASE NO. 2020030412  
CASE NO. 2020030928

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THE CONSOLIDATED MATTERS INVOLVING

PARENT ON BEHALF OF STUDENT, AND  
SAN DIEGO UNIFIED SCHOOL DISTRICT.

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DECISION

SEPTEMBER 10, 2020

On March 10, 2020, the Office of Administrative Hearings, called OAH, received a due process hearing request from Parent on behalf of Student, naming San Diego Unified School District. On March 23, 2020, OAH received a due process hearing request from San Diego, naming Parent on behalf of Student. OAH ordered the cases consolidated on April 1, 2020, with the 45-day timeline for issuance of the consolidated decision based upon the date of filing of Student's complaint. The matter was continued on April 9, 2020.

Administrative Law Judge Alexa Hohensee heard this matter by videoconference on July 14, 15, 16 and 17, 2020.

Corrin Johnson and Matthew Storey, Attorneys at Law, represented Student. Parent attended all days of hearing on Student's behalf. Sarah Sutherland and Daniel Lowe, Attorneys at Law, represented San Diego. Brian Spry, Due Process Program Specialist, attended all days of hearing on San Diego's behalf.

At the parties' request the matter was continued to August 10, 2020, for written closing briefs. The briefs were timely filed, the record closed, and the matter was submitted on August 10, 2020.

## ISSUES

### STUDENT'S ISSUES

1. Did San Diego deny Student a free appropriate public education, called FAPE, during the 2019-2020 school year by failing to:
  - a. timely and appropriately assess Student in speech and mental health;
  - b. make a clear offer of services in academics, behavior, and mental health;
  - c. offer an appropriate behavior intervention plan;
  - d. offer appropriate supports and services in academics, behavior, and mental health;
  - e. offer an appropriate placement; and
  - f. implement Student's behavior intervention plan, behavior supports, and accommodations, including by disciplining and removing Student from the classroom?

## SAN DIEGO'S ISSUES

2. Was San Diego's mental health and related services assessment, memorialized in an October 30, 2019 report, legally compliant?
3. Was San Diego's pragmatic language assessment, memorialized in a March 6, 2020 report, legally compliant?

Student affirmed on the record that Student did not assert claims arising prior to the first day of San Diego's 2019-2020 school year, August 26, 2019. In his closing brief, Student withdrew former Issue 1b, alleging that San Diego had not offered appropriate and measurable goals. That issue is dismissed with prejudice, as Student withdrew the issue after the hearing commenced. (Code Civ. Proc., § 581, subd. (d).) The remaining issues have been renumbered. A typographical error in Issue 2 was corrected to identify the mental health assessment report as dated October 30, 2019, not October 31, 2019.

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

The IDEA affords parents and local educational agencies the procedural protection of an impartial due process hearing with respect to any matter relating to the identification, assessment, or educational placement of the child, or the provision of a free appropriate public education, referred to as a FAPE, to the child. (20 U.S.C. § 1415(b)(6) & (f); 34 C.F.R. § 300.511; Ed. Code, §§ 56501, 56502, and 56505; Cal. Code Regs., tit. 5, § 3082.) The party requesting the hearing is limited to the issues alleged in the complaint, unless the other party consents, and has the burden of proof by a preponderance of the evidence. (20 U.S.C. § 1415(f)(3)(B); Ed. Code, § 56502, subd. (i); *Schaffer v. Weast* (2005) 546 U.S. 49, 57-58, 62 [126 S.Ct. 528, 163 L.Ed.2d 387]; see 20 U.S.C. § 1415(i)(2)(C)(iii).) In these consolidated cases, Student had the burden of proof on Student's issues, and San Diego had the burden of proof on San Diego's issues. The factual statements in this Decision constitute the written findings of fact required by the IDEA and state law. (20 U.S.C. § 1415(h)(4); Ed. Code, § 56505, subd. (e)(5).)

Student was eight years old and had just completed second grade at the time of the hearing. Student resided with Parent within San Diego's geographic boundaries at all relevant times. Student was eligible for special education under the category of Other Health Impairment, due to reported diagnoses of post-traumatic stress disorder, anxiety and post-concussion syndrome that adversely affected his educational performance. Student switched schools before the start of 2019-2020 school year, and began the school year at Gage Elementary School, a San Diego school.

Student was described by all witnesses as a very sweet child, but frequently dysregulated and frustrated by reading difficulties. At the beginning of the 2019-2020 school year, Student had a history of engaging in task refusal, noncompliance, and extreme behavioral outbursts, such as throwing things, pushing, kicking, running away and climbing fences. Student would easily give up on academic tasks and act out, did

not respect the personal space of his peers, and had mood fluctuations that could result in aggression.

ISSUES 1a, 2 AND 3: DID SAN DIEGO TIMELY AND APPROPRIATELY ASSESS STUDENT IN THE AREAS OF SPEECH AND MENTAL HEALTH, AND WERE ITS ASSESSMENTS LEGALLY COMPLIANT?

### SAN DIEGO'S SPEECH ASSESSMENT

Student contends that Parent's email to Student's teacher on September 18, 2019 triggered an obligation to assess Student in the area of pragmatics, or social communication, but San Diego failed to promptly assess in that area. Student also contends that the speech assessment completed by San Diego was untimely and insufficient because the assessor did not review a private report, did not see Student speaking with peers during the observation, and did not receive appropriate input from Student's then-current teacher. San Diego contends that it timely initiated the assessment of Student's language needs, and performed an appropriate assessment.

A FAPE means special education and related services that are available to an eligible child and that meet 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 individualized education program, referred to as an IEP, for an eligible student based upon state law and the IDEA. (20 U.S.C. §§ 1401(14), 1414(d)(1); see Ed. Code, §§ 56031, 56032, 56341, 56345, subd. (a) and 56363 subd. (a); 34 C.F.R. §§ 300.320 (2007), 300.321 (2007), and 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 School Dist. v. Rowley* (1982) 458 U.S. 176, 201-204 [102 S.Ct. 3034]; *Andrew F. v. Douglas County School Dist. RE-1* (2017) 580 U.S. \_\_ [137 S.Ct. 988, 1000].)

## ASSESSMENT REQUIREMENTS

School district evaluations of students with disabilities under the IDEA serve two purposes. First, identifying students who need specialized instruction and related services because of an IDEA-eligible disability. And second, helping IEP teams identify the special education and related services an eligible student requires. (34 C.F.R. §§ 300.301 (2007), 300.303 (2006).) The first refers to the initial evaluation to determine if the child has a disability under the IDEA, while the latter refers to follow-up or repeat evaluations. (See Comments, 71 Fed. Reg. 46,640 (Aug. 14, 2006).) California law refers to evaluations as assessments. (Ed. Code, § 56302.5.)

The IDEA provides for reevaluations to be conducted no more frequently than once a year, but at least once every three years, unless the parent and school district agree otherwise. (20 U.S.C. § 1414(a)(2)(B); 34 C.F.R. § 300.303(b)(2006); Ed. Code, § 56381, subd. (a)(2).) A reassessment must be conducted if the pupil's parents or teacher request a reassessment. (20 U.S.C. § 1414(a)(2)(A)(i); 34 C.F.R. § 300.303(a)(1)(2006); Ed. Code, § 56381, subd. (a)(1).)

Reassessment generally requires parental consent. (20 U.S.C. § 1414(c)(3); Ed. Code, § 56381, subd. (f)(1).) To start the process of obtaining parental consent for a

reassessment, the school district must provide proper notice to the student's parent. (20 U.S.C. §§ 1414(b)(1), 1415(b)(3) & (c)(1); Ed. Code, §§ 56321, subd. (a), 56381, subd. (a).) A plan for reassessment must comply with the same requirements as an assessment plan for an initial assessment. (Ed. Code, § 56381, subd. (e).)

The notice consists of the proposed written assessment plan and a copy of parental rights and procedural safeguards under the IDEA and companion State law. (20 U.S.C. §§ 1414(b)(1), 1415(b)(3) & (c)(1); Ed. Code, §§ 56321, subd. (a), 56381, subd. (a).) The assessment plan must be in language easily understood by the general public, and provided in the native language of the parent. It must explain the types of assessments the district proposes to conduct, and state that an IEP will not result from the assessment without the consent of the parent. (Ed. Code, § 56321, subs. (b)(1)-(4); see also 34 C.F.R. § 300.304(a)(2006).)

In addition, the proposed assessment plan must include a description of any recent assessments conducted, including available independent assessments. It must include any assessment information the parent requests to be considered, and information indicating the pupil's primary language and the pupil's language proficiency in the primary language. (Cal. Code Regs., tit. 5, § 3022.)

The assessment plan must be accompanied by notice that advises parents that an IEP team meeting will be scheduled to discuss the assessment results and recommendations. (Ed. Code § 56329, subd. (a)(1).) The notice must also explain limitations on eligibility for special education and related services, and that parents will receive a copy of the assessment report and documentation of the determination of eligibility. (Ed. Code, § 56329, subs. (a)(2), (3).) It must state that a parent has the right to obtain, at public expense, an independent educational assessment under certain

circumstances, and explain the procedure for requesting such an assessment. (Ed. Code, § 56329, subd. (b).) It must explain the due process hearing procedure that a school district may initiate to defend against a request for an independent assessment at public expense, and the rights of a school district to observe a student in a proposed publicly financed nonpublic school placement. (Ed. Code, § 56329, subds. (c), (d).)

The school district must give the parent 15 days to review, sign, and return the proposed assessment plan. (Ed. Code, § 56321, subd. (a).)

An IEP team meeting to review the assessment must take place within a total time not to exceed 60 days, not counting days between the student's regular school sessions, terms, or days of school vacations in excess of five school days, from the date of receipt of the parent's written consent for assessment, unless the parent agrees to an extension in writing. (Ed. Code, § 56344, subd. (a).)

In conducting an assessment, the school district must use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information, including information provided by the parent. (20 U.S.C. § 1414(b)(2)(A); 34 C.F.R. § 300.304(b)(1)(2006).) No single measure or assessment may be the sole criterion for determining whether a child is a child with a disability. (20 U.S.C. § 1414(b)(2)(B); 34 C.F.R. § 300.304(b)(2)(2006); Ed. Code, § 56320, subd. (e).) Assessments must be sufficiently comprehensive to identify all of the child's special education and related service needs, whether or not commonly linked to the disability category of the child. (34 C.F.R. § 300.304(c)(6)(2006).) The assessor must use technically sound testing instruments that demonstrate the effect that cognitive, behavioral, physical, and developmental factors have on the functioning of the student. (20 U.S.C. § 1414(b)(2)(C); 34 C.F.R. § 300.304(b)(3)(2006).)



The assessments used must be selected and administered so as not to be discriminatory on a racial or cultural basis, and provided in a language and form most likely to yield accurate information on what the child knows and can do academically, developmentally, and functionally. They must be used for purposes for which the assessments are valid and reliable, administered by trained and knowledgeable personnel, and administered in accordance with any instructions provided by the producer of such assessments. (20 U.S.C. § 1414(b) & (c)(5); Ed. Code, §§ 56320, subds. (a) & (b), 56381, subd. (h).)

Individuals who are both knowledgeable of the student's disability and competent to perform the assessment, as determined by the school district, county office, or special education local plan area, must conduct assessments of students' suspected disabilities. (Ed. Code §§ 56320, subd. (g), 56322; see 20 U.S.C. § 1414(b)(3)(B)(ii).) The assessor must be competent in the student's primary language or mode of communication, and have knowledge and understanding of the cultural and ethnic background of the student. (Cal. Code Regs., tit. 5, § 3023, subd. (a).) The determination of what tests are required is made based on information known at the time. (See *Vasherese v. Laguna Salada Union School Dist.* (N.D. Cal. 2001) 211 F.Supp.2d 1150, 1157-1158 [assessment adequate despite not including speech and language testing where concern prompting assessment was a deficit in reading skills].)

The personnel who assess the student must prepare a written report that includes, without limitation, the following:

1. whether the student may need special education and related services;
2. the basis for making that determination;

3. the relevant behavior noted during observation of the student in an appropriate setting;
4. the relationship of that behavior to the student's academic and social functioning;
5. the educationally relevant health, development, and medical findings, if any;
6. if appropriate, a determination of the effects of environmental, cultural, or economic disadvantage; and
7. consistent with superintendent guidelines for low incidence disabilities (those effecting less than one percent of the total statewide enrollment in grades K through 12), the need for specialized services, materials, and equipment.

(Ed. Code, § 56327.)

The assessment report must be provided to the parent. (Ed. Code, § 56329, subd. (a)(3).)

A school district's failure to conduct appropriate assessments, or to assess in all areas of suspected disability, may constitute a procedural denial of a FAPE. (*Park v. Anaheim Union School District* (9th Cir. 2006) 464 F.3d 1025, 1031-1033.) In the event of a procedural violation, a denial of FAPE may only be found if that procedural violation impeded the child's right to a FAPE, significantly impeded the parents' opportunity to participate in the decision making process regarding the provision of a FAPE, or caused deprivation of educational benefits. (20 U.S.C. § 1415(f)(1)(E)(ii); Ed. Code, § 56505, subd. (f)(2).)

In accordance with Student's April 26, 2019 IEP, which is not at issue, Student began the 2019-2020 school year in Michelle Sinkovich's general education class. Student went to Janette Rogers's special education resource classroom for 3.5 hours each week, for specialized academic instruction in reading and writing for English

language arts. Rogers typically had eight students in her room, and worked with four at a time while the other four worked independently. She would provide individualized instruction as needed.

There was no evidence that Student had a history of suspected speech or language difficulties in Fall 2019. However, Parent thought that Student's poor interactions with peers might be due to language deficits, and inquired about a speech assessment through the family's medical insurer, Kaiser. On September 18, 2019, Parent emailed Rogers that Kaiser was doing a speech assessment. Parent stated that the assessor had mentioned Student could be assessed for pragmatics and social communication by his school district and asked Rogers for her opinion. The email impliedly stated that Parent did not want to act until she received the Kaiser result. Parent regularly emailed Rogers, and none of her subsequent emails suggested Parent had made an assessment request.

Rogers responded by setting up a meeting with Parent and Gage's speech pathologist, Leslie Wedner, a few days later. Both Rogers and Wedner told Parent that they thought Student was able to communicate effectively. Parent did not request an assessment. No Kaiser speech assessment report was produced at hearing, nor was one ever given to San Diego for IEP team review.

At an IEP team meeting held on November 1, 2019, to review how Student was adjusting to Gage, Parent requested, for the first time, an assessment of Student's pragmatics and social communication. The district IEP team members opined that communication skills were not an area of concern, but prepared an assessment plan Parent signed that same day.

Parent removed Student from school from Wednesday, December 4, through Friday, December 6, 2019, for a trial period of attendance at Springall Academy, a nonpublic school. Student did not return to school on Monday, December 9, 2019, and Parent informed school staff that she was removing Student from Gage. Parent gave San Diego notice of unilateral placement at Springall on December 13, 2019, and unilaterally enrolled Student at Springall on December 16, 2019. This made Student unavailable for assessment of his pragmatic language skills in a school setting until Parent consented to allow San Diego's assessors to speak with his Springall teachers and observe Student there.

San Diego attempted to schedule an IEP team meeting for December 29, 2019, to discuss the assessment and Parent's concerns, but Parent could not attend. After further scheduling attempts by San Diego, Parent requested the meeting be held at the end of February 2020. San Diego was on Winter break from December 23, 2019 through January 3, 2020.

On February 4, 2020, Parent emailed San Diego that the speech assessor, Wedner, could observe Student at Springall. Parent also signed a written authorization for Springall to share educational information with Wedner that same day.

On February 13, 2020, Springall prepared a report on Student's present levels of educational performance. That report indicated no concerns with Student's communication development, and stated that Student could communicate his wants and needs.

Wedner observed Student at Springall on February 20, 2020, conducted formal testing at Springall, reviewed Student's records, and presented her report at an IEP team meeting on March 6, 2020.

San Diego timely assessed Student. Communication development was not a suspected area of disability at the beginning of the 2019-2020 school year, and Parent's September 18, 2019 email was not an assessment request. When Parent requested an assessment of Student's pragmatic skills at the November 1, 2019 IEP team meeting, San Diego immediately prepared an assessment plan and obtained Parent's signature.

San Diego had 60 days from November 1, 2019, excluding the Winter vacation of 10 school days, to complete the assessment and review the results at IEP team. This gave San Diego 70 days, or until January 11, 2020, to comply. However, 32 days in, beginning December 4, 2019, Student was removed from school and unavailable for assessment. Parent did not authorize San Diego to exchange information with Springall or observe Student at school to complete the assessment until February 4, 2020, on which date the timeline began again with 38 days remaining. San Diego completed the assessment and conducted an IEP team meeting for review on March 6, 2020, well within 38 days from February 4, 2020.

San Diego complied with all procedural requirements in conducting its speech assessment. Parent consented to a San Diego assessment of Student in the area of pragmatic language, also called social communication, which was specifically described in the November 1, 2019 assessment plan as an assessment of language and speech communication development. The plan clearly explained, in Parent's native English and in language easily understood by the general public, that Student would be evaluated for his ability to understand and use speech and language to communicate effectively with others. It specified that the assessment would be done by a speech language pathologist, and that no IEP would result without Parent's consent. The assessment plan was accompanied by a notice of parents' rights, and a written explanation of all the safeguards related to assessment under the IDEA and California law. Parent not only

gave informed consent, but expressly requested the assessment of language skills as a possible cause of Student's inappropriate interactions with peers. The assessment plan did not reference any prior language assessments, because there were none.

Wedner was properly credentialed and had the necessary experience to conduct a speech assessment. She had both Bachelor's and Master's degrees in Communicative Disorders. She had been licensed and credentialed in Rehabilitative Services for Language, Speech and Hearing for almost 30 years. She had assessed, written goals for, provided speech therapy to, and consulted with teachers on approximately 2,000 students in the school setting. She had worked as a speech pathologist in Southern California, where Student was born and raised, since 1990. Wedner was familiar with Student's learning, behavioral, and emotional difficulties, and had experience assessing children with these disabilities. In Fall 2019, Wedner worked at Gage from a partitioned portion of Roger's classroom. She had observed Student's interactions with peers inside and outside the classroom frequently, and had conversed with him many times. Wedner answered questions without reservation and with good recall, and she was a credible witness. Her opinions were well-reasoned and persuasive.

Wedner used multiple assessments and a variety of assessment tools including records review, observation, interview, and standardized and non-standardized instruments to evaluate Student in all areas of language. Wedner chose assessment instruments designed to provide information about Student's ability to receive information, understand it, and respond appropriately, focusing specifically on Student's social language skills. Wedner was aware of Student's history of reading difficulties because he attended Rogers's special education classroom for English language arts, and of his inappropriate peer interactions, and chose assessment instruments or strategies appropriate in light of Student's disabilities.

The assessment instruments were not racially, sexually, or culturally biased, were given in Student's primary language of English, and valid for the purpose for which they were used. Wedner administered a standardized comprehensive assessment of spoken language, with pragmatic language subtests, over two days in a quiet room at Springall. Student hugged her when he greeted her at Springall, and seemed to enjoy the testing sessions. Wedner gave Student movement breaks every 10 minutes, and breaks between each subtest, which did not interfere with the administration of the tests. The assessment results were valid, sufficiently comprehensive, and provided useful information regarding Student's communication abilities. Student scored in the average or above average range in all areas, with above average pragmatic language skills. The formal assessment results demonstrated that Student did not have pragmatic language deficits that adversely affected Student's educational progress and performance.

Wedner obtained responses to a standardized pragmatic language skills rating scale questionnaire from Parent, Rogers and Sinkovich. Parent rated Student's pragmatic language skills in the low range, but both teachers from Fall 2019 rated Student in the solidly average range. Wedner did not obtain a rating scale response from Student's Springall teacher, but Student had only been attending Springall for four to five weeks at the time of the assessment, and information from the three reporters chosen was adequate to determine how Student had functioned across time and settings. Wedner could not observe Student interacting with peers at Springall because Student was placed in a classroom with students who did not have age-expected language skills, and Student did not interact with them much during the 60-minute observation permitted by Springall. The adults in the Springall classroom made no attempt to facilitate peer-to-peer interaction, and during recess Student chose to stay in the classroom to work by himself. However, Wedner had observed Student

interacting with peers and adults on a daily basis at Gage for the first semester of the school year, and reasonably completed her assessment of Student's pragmatic skills despite the lack of observed social interactions at Springall. Pragmatic language disorder causes a breakdown in communication in all settings, and Wedner's current and past observations of Student's interactions with peers and adults provided sufficient information. The interaction with adults that Wedner observed at Springall was consistent with what she had observed at Gage.

Wedner prepared a report of her assessment results. She concluded that Student did not need special education and related services to address a pragmatic language deficit, and explained the basis for that conclusion. She reported that Student's efforts during testing were good, and that no behaviors interfered with the assessment results. She included the relationship of Student's behavior to his academic and social functioning, and educationally relevant health, development and medical findings, including a private psychoeducational assessor's concern with Student's ability to put his speaking skills to appropriate use in a social setting. Wedner's assessment report noted no concerns with environmental, cultural, or economic disadvantage, and showed that Student did not have a low incidence disability.

On or before the March 6, 2020 IEP team meeting, Parent was provided with the speech assessment report, called a pragmatic language diagnostic evaluation, that explained the assessment and results. The report was presented by Wedner and discussed at an IEP team meeting that was attended by all necessary people, and in which Parent fully participated.

Student offered no evidence to contradict the results of San Diego's assessment, or to persuasively criticize the assessment instruments or methods utilized. An



independent psychoeducational evaluation done by Elia Jimenez, Ph.D., presented at the November 1, 2019 IEP team meeting, recommended a speech assessment. However, in a later evaluation done by Dr. Jimenez in May 2020, after Student's due process complaint was filed, Student scored in the average range on all oral language subtests administered by Dr. Jimenez. Dr. Jimenez was a clinical psychologist, not a speech language pathologist, and her opinions at hearing on Student's pragmatic language skills were not persuasive. Wedner was unaware of any test that could be administered by a psychologist to diagnose language disorders.

Student also contended that the information gathered by the standardized rating scales was insufficient to determine if Student was able to understand directions. Student presented no evidence from a speech language pathologist to contradict Wedner's opinion regarding the adequacy of the assessment instruments, the information elicited, or the validity of the assessment results and recommendations. Wedner's opinions were persuasive, and given substantial weight.

Student was critical of Wedner's failure to consider the Kaiser speech assessment report, but Parent did not give the report to Wedner for consideration. More importantly, there was no persuasive evidence that a Kaiser assessment was completed, or that the results were inconsistent with those of San Diego's assessment. Student failed to produce the Kaiser speech assessment at hearing, and it can be inferred that the results would not have shown that Student had a language deficit. (See *Williamson v. Superior Court of Los Angeles County* (1978) 21 Cal.3d 829, 836, fn. 2 [If a party does not produce evidence that naturally would have been produced, he must take the risk that the trier of fact will infer, and properly so, that the evidence, had it been produced, would have been adverse].)

Student failed to prove that San Diego's March 2020 pragmatic language assessment was untimely or inappropriately conducted. San Diego met its burden of proving that its pragmatic language assessment, memorialized in a March 6, 2020 report, was legally compliant.

## SAN DIEGO'S MENTAL HEALTH ASSESSMENT

Student contends that San Diego's mental health assessment was insufficient because the assessor did not consider private counseling or occupational therapy records, and did not inquire into the reason for Student's excessive tardies, which might have signaled a school avoidance problem.

At the beginning of the 2019-2020 school year, while Student was still attending Gage, and pursuant to a prior agreement between Parent and San Diego, San Diego prepared an assessment plan to assess Student in several areas of suspected disability, including functional behavior, mental health, occupational therapy and the need for a one-to-one aide, called a supplemental support assessment. Parent reported that Parents had separated and Student was displaying extreme emotional behaviors at home, and with Student's history of trauma, school staff suspected that Student's behaviors had a mental health component. The assessment plan was in English, and explained that the mental health assessment was intended to determine whether Student required mental health services and support. It indicated that the assessment would be performed by a mental health clinician. Parent consented to the assessment plan on September 17, 2019.

Melody Filamor, a licensed marriage and family therapist in San Diego's Mental Health Resource Center, and who was also working on her mild/moderate educational specialist credential, was properly qualified and had the necessary experience to

conduct a mental health assessment. She was familiar with Student's learning, behavioral, and emotional difficulties, and had experience assessing children with those disabilities. Filamor had Master's degrees in Special Education and Counseling Arts, with over 3,000 hours of clinical intern experience prior to earning her license in 2019. She had over 12 years of experience as a mental health worker in the school setting, had been a behavior aide and a mild/moderate special education teacher prior to becoming a marriage and family therapist trainee, and had worked for San Diego as a mental health case worker since 2013. Filamor provided therapeutic services to San Diego students. As part of her job duties, Filamor provided mental health counseling, conducted mental health assessments, attended IEP team meetings and wrote mental health goals for the students on her caseload. Filamor testified in a calm and professional manner, demonstrated good recall, and gave thorough responses to all questions. Her testimony was informative and persuasive.

San Diego complied with all procedural requirements in conducting its mental health assessment in September and October 2019. Parent had requested the mental health assessment as part of a settlement agreement in a previous due process matter, and both by agreement and through its assessment plan, San Diego properly obtained parental consent prior to conducting the mental health assessment.

Filamor used a variety of assessment tools and methods, including review of Dr. Jimenez's psychoeducational evaluation results. Dr. Jimenez had summarized Parent's report of family trauma, and recommended that Student be assessed for both school-based mental health services and therapeutic behavior supports at home, referred to collectively as wrap-around services. Parent told Filamor that wrap-around services from another agency were about to begin, and that Student had previously received trauma therapy. Filamor requested records from the trauma therapist, but the

therapist did not respond. Filamor did not attempt to obtain records from Student's equine therapy or occupational therapy providers. Filamor also consulted with René Mendoza, a Gage school psychologist concurrently conducting both functional behavior and supplemental support assessments of Student. Mendoza supported Gage's special education classrooms, and worked on behavior interventions with Student in Fall 2019. The assessment tools and methods chosen by Filamor were designed to provide information about Student's social and emotional functioning and the need for modification of his social emotional goals or addition of mental health supports, and were appropriate in light of Student's disabilities.

The mental health assessment instruments and methods used were not racially, sexually, or culturally biased, were given in English, and were valid for the purpose for which they were used. The results were valid, and provided adequate information regarding Student's social emotional functioning and need for mental health supports at school and at home to access his education.

Filamor interviewed Student and Parent, consulted with Student's teachers and the staff who worked with Student at Gage, and observed Student in the general education classroom, at recess and at lunch. Filamor observed Student in the classroom moving around and having to be redirected to his work, which was consistent with Dr. Jimenez's diagnosis of attention deficit hyperactivity disorder, or ADHD. Standing in line and at recess, Student engaged in horseplay with his peers, gently pushing others and having to be reminded to keep his hands to himself. Filamor interviewed Student during a snack break, where he willingly and appropriately joined Filamor and shared his thoughts about school. He was insightful regarding peer interactions, and acknowledged that he sometimes had problems with peers. He stated that he liked reading but it was hard for him, that he thought his aide in the general education

classroom was helpful, and that teacher Rogers in the special education classroom where he went for English language arts was the best. Student expressed a desire to have harmony in his family and to have an easier time at school, which Filamor believed made him an ideal candidate for wrap-around services at school and at home.

Parent reported that Student did not know how to make friends, was touchy, and could be impulsive with other children. Parent stated that Student had low self-esteem, poor coping skills, and reacted to overstimulation by going into flight-or-fight mode. Rogers and general education teacher Sinkovich responded to a checklist of child symptoms of ADHD, social anxiety and other behaviors common to emotional and behavioral disorders. Sinkovich reported that although Student's behaviors had improved, he still tended to seek out negative attention from peers, for instance pushing in line and throwing erasers, and displayed anxiety during non-preferred tasks. Her rating score indicated concerns with social emotional functioning, and that Student's behaviors impacted his functioning in the academic setting. Rogers responded that Student was disruptive, deliberately annoyed others, was defiant and argumentative, and similarly rated Student's social emotional functioning as impacting access to education. Mendoza reported observing Student seeking negative attention that interfered with forming friendships and was disruptive. Mendoza was concerned that Student was needlessly engaging in power struggles and work avoidance, although Student had also begun learning school rules and respecting them.

Filamor prepared a report of her assessment results, dated October 30, 2019, which concluded that Student struggled with appropriate interactions with peers and adults, self-regulation, non-compliance, and staying focused and on-task, which affected his ability to effectively participate in the educational environment. She hypothesized that Student's behaviors were due in part to a preoccupation with his own thoughts and

worries. She concluded that Student was willing to participate in, and would benefit from, mental health services to implement change. Filamor recommended that Student learn and practice coping strategies to manage his emotions and reactions to others and situations, and learn to recognize social cues to foster more appropriate and positive interactions. She also recommended that Student's IEP team consider mental health related services in school, for Parent, and in the community, combined with behavior intervention services to address behavioral symptoms. The report stated that the current annual social emotional goals regarding personal boundaries, attempting assignments and self-regulation, were appropriate and would be supported by mental health services.

The report noted Student's cooperation with the assessment, and that no behaviors interfered with the assessment results. It included the relationship of Student's behavior to his academic and social functioning, and educationally relevant health, development and medical findings. The assessment noted no concerns with environmental, cultural, or economic disadvantage, and concluded that Student did not have a low incidence disability.

On or before the November 1, 2019 IEP team meeting, Parent was provided with the mental health assessment report. Filamor presented the report at the November 15, 2019 IEP team meeting, a continuation of the November 1, 2019 team meeting, at which the IEP team discussed its results, recommendations and Student's social emotional goals. Parent fully participated in the discussion.

Student presented no evidence to contradict the results of San Diego's mental health assessment, or to persuasively criticize the assessment instruments or methods utilized. Student offered no evidence of his trauma therapy, equine therapy or

occupational therapy treatment goals, progress, or recommendations to show that important information on Student's social emotional functioning or mental health status was not considered by the November 15, 2019 IEP team. Parent was present at the meeting and had an opportunity to provide additional information to the team. Dr. Jimenez included a social emotional component in her psychoeducational assessment at the same time Filamor was conducting her mental health assessment, and similarly did not review information from Student's trauma, equine or occupational therapy providers.

There was no credible evidence that Student's tardies were due to school avoidance or any other mental health issue. The record contained many contemporaneous emails from Parent on how much Student enjoyed Roger's special education class, which was often the first class of Student's school day. Parent wrote to school staff on an almost daily basis about her concerns regarding Student's behaviors and energy levels, and sometimes regarding safety concerns, but made no mention of Student being anxious about, or resistant to, going to school.

Mother testified at hearing that Student was tardy due to school avoidance, but that testimony was not credible for multiple reasons. She did not tell school staff that Student was refusing to go to school in her almost daily messages in Fall 2019. She did not tell Dr. Jimenez, Filamor or Mendoza that Student engaged in school refusal during assessment interviews. In an audio recording from the November 1, 2019 IEP team meeting, when questioned about tardies, Parent responded that Student was late because she had to leave early for work, and wasn't there to get him ready in the morning.

Mother's credibility in general was adversely affected in several ways. Mother freely admitted to deleting information from email exhibits offered. Written communications to Springall demonstrated that Mother was advocating for both Dr. Jimenez and Springall to tailor their documentation to support Student's due process hearing request. Mother also appears to have deliberately removed reports of extreme and violent behavior from Student's proffered exhibit of Springall's daily behavior sheets. Parent testified that she received behavior sheets from Springall every day, and if any were missing, it was probably due to holidays or absences. However, the documents produced by Springall in response to San Diego's subpoena duces tecum showed that Parent had systematically removed behavior sheets with notes of Student's increasingly extreme behaviors at Springall. Mother's affirmative actions to manipulate evidence and influence witnesses, and her testimony contrary to her contemporaneous statements and correspondence, adversely affected her credibility. For these reasons, it was unsurprising that there was no corroborating evidence of school avoidance, and the mental health assessment was not deficient for Filamor's failure to investigate the reasons for Student's excessive tardies.

Student failed to prove that San Diego's October 2019 mental health assessment was inappropriately conducted. San Diego met its burden of proving that its mental health assessment memorialized in an October 30, 2019 report, was legally compliant.

#### ISSUE 1b: DID SAN DIEGO MAKE A CLEAR OFFER OF SERVICES FOR ACADEMICS, BEHAVIOR, AND MENTAL HEALTH?

Student contends that the November 1, 2019 and March 6, 2020 IEP offers were unclear because they designated specialized academic instruction as a combination of direct and collaborative services. Student also contends the IEPs failed to explain the



frequency, duration or method of delivery of the behavior intervention services offered. Regarding mental health, Student argues that the IEPs were confusing because they offered different delivery models, that services could be provided in different settings, that services included collaboration with a variety of IEP team members, and that the services would be provided during and outside of the school day. San Diego contends that the offers were clear, and that the IEP teams discussed the offered mental health services at length in the November 15, 2019 and March 6, 2020 IEP team meetings.

A formal, specific offer from a school district alerts the parents of the need to consider seriously whether the proposed placement is appropriate under the IDEA. A clear offer also helps parents determine whether to reject or accept the placement with supplemental services, and allows the district to be more prepared to introduce relevant evidence at hearing regarding the appropriateness of placement. (*Union School District v. Smith* (9th Cir. 1994) 15 F.3d 1519, 1526.) The requirement of a formal, written offer creates a clear record that may eliminate troublesome factual disputes many years later about what was offered. (*Id.* at p. 1525.)

An IEP provides notice to both parties as to what services will be provided to the student during the period covered by the IEP. (*M.C. v. Antelope Valley Union High School District* (9th Cir. 2017) 858 F.3d 1189, 1197.) Parents must be able to participate in both the formulation and the enforcement of the IEP, and insufficiently specific drafting renders the IEP useless as a blueprint for enforcement. (*Id.*, at p. 1199; see also *R.E.B. v. Hawaii Dept. of Education* (9th Cir., Sept. 13, 2017) 2017 WL 4018395 at \*2-3 [finding denial of FAPE where language in IEP was too vague to enable student to use the IEP as a blueprint for enforcement].)

The failure to specify the delivery model of the services is a procedural violation of the IDEA, because it does not commit to a means for providing the services, such as individual or small group services. (*Tamalpais Union High School District v. D.W.* (N.D.Cal 2017) 271 F.Supp.3d. 1152, 1160-1161 (*Tamalpais*.) Such a violation would result in a denial of FAPE if it impeded the child's right to a FAPE or parents' opportunity to participate in the IEP decision making process, or deprived the child of educational benefit. (20 U.S.C. § 1415(f)(1)(E)(ii); Ed. Code, § 56505, subd. (f)(2), see *W.G., et al. v. Board of Trustees of Target Range School Dist., etc.* (9th Cir. 1992) 960 F.2d 1479, 1483.)

An IEP is a written document detailing, in relevant part, the student's current levels of academic and functional performance, a statement of measurable academic and functional goals, a description of the manner in which goals will be measured, a statement of the special education and related services that are to be provided to the student and the date they are to begin, the anticipated frequency, location and duration of services and modifications, an explanation of the extent to which the child will not participate with nondisabled children in a regular class or other activities, and a statement of any accommodations that are necessary to measure the academic achievement and functional performance of the child on State and district-wide assessments. (20 U.S.C. § 1414(d); Ed. Code, § 56345, subd. (a).)

## OFFER OF ACADEMIC SERVICES

The November 1, 2019 IEP, completed on November 15, 2019, offered specialized academic instruction through the due date of Student's annual IEP on April 4, 2020, or a period of five months. Specialized academic instruction was offered for 12 hours per week in a regular, or general education, classroom. An additional 5 hours per week were offered in a separate, or special education, classroom. The IEP contained service

information in specific columns for the start date, end date, duration, frequency and setting for services.

The March 6, 2020 IEP offered the same specialized academic instruction. Although it also listed services as ending on April 4, 2020, when Student's annual IEP review was due, it listed the start date of all related services as April 26, 2019, rather than March 6, 2020. As discussed below, this was an immaterial and harmless error.

The delivery method for services were specified in another section of the IEPs entitled Special Factors, Special Education Service Delivery, where details of delivery were described. For specialized academic instruction, the November 1, 2019 IEP indicated that support was being delivered in the general education classroom to support Student in English language arts and behavior, and stated that:

Special Ed provider to assist as needed by providing small group and/or one-to-one instruction. Ed specialist will collaborate with general education teacher to insure that [Student] is able to access grade level standards in the general education classroom.

The November 1, 2019 IEP also stated that, for specialized academic instruction in the separate, or special education, classroom the services support English language arts:

Services will be a combination of direct, collaborative and consultation with the IEP team. Small group and one-to-one instruction will be provided. Materials will be provided at [Student's] instructional level.

The March 6, 2020 IEP similarly specified the specialized academic instruction as delivered in the general education and special education classrooms, with a combination of direct student services and collaboration with the IEP team working with

Student. It specified that the areas of instruction would be reading, math, writing and behavior, and that small group instruction would include no more than five students.

By all reports, Student was a bright child, who had strong memory and math skills, and could understand and fully participate in the general education curriculum with the exception of reading, writing and math word problems. Student was acutely aware of his inability to read at the same level as his peers, and the IEP team was informed on November 1, 2019, that Dr. Jimenez diagnosed Student with dyslexia. Here, unlike *Tamalpais* where the IEP was checked with boxes for a service to be both individual and group without detail, Student's IEPs explained that the services in the general education classroom would be provided individually or in a small group, as needed to ensure Student's access to the general education curriculum, providing in-class support for reading, writing, math word problems and behavior. Such services required an educational specialist to ensure Student's academic understanding of material presented in the general education classroom, and provide behavioral redirection and prompting for focus and attention to task. It is clear from the IEP that Student would have a special education provider in the general education classroom for 12 hours per week to enable Student to understand instruction and participate in classroom assignments. Services would be individual unless provided in a small group, which is appropriate for small group second grade projects like learning centers. The 12 hours offered were not for one-to-one specialized academic instruction in a separate classroom, and the fact that the IEP acknowledges that the services would be provided according to Student's needs in the general education environment, and would vary from day to day, did not make the offer unclear or incapable of enforcement.

Rogers, who was Student's caseworker, testified that she coordinated with Sinkovich on a regular basis to schedule specialized academic support in Student's

general education classroom when new material was presented. Student was moved into her special education classroom for additional English language arts instruction.

The five specialized academic instruction hours offered in a special education classroom were specified to be delivered individually or in small groups as needed. Special education classrooms are taught by credentialed special education teachers, who are well-qualified to determine when a student requires one-to-one assistance, or can participate in small group learning. The fact that an IEP gives the special education teacher discretion in her classroom does not make the IEP offer unclear.

The November 1, 2019 and March 6, 2020 IEPs were worded with sufficient specificity, so there was no procedural violation. There was also no denial of FAPE because any alleged lack of specificity did not impede Student's right to a FAPE, significantly impede Parents' opportunity to participate in the IEP decision making process, or deny Student educational benefit. San Diego did not offer services that might be inadvertently withheld if the IEPs were implemented at another school district, such as segregated one-to-one instruction, a particular staff qualification, or a specific reading curriculum. It offered Student specialized academic instruction in the general education classroom to ensure him access to grade level curriculum, with additional specialized instruction in his area of need, English language arts, taught in a special education classroom. An educational specialist in the general education classroom, supplemented by Student's attendance in a special education classroom for core curriculum, with collaboration as indicated, would support Student in making progress on his goals and provide Student with the academic support envisioned by the IEP team. Accordingly, Student was not deprived of educational benefit or denied a FAPE for lack of additional specificity in the IEPs.

One or both Parents attended the November 1, 2019, November 15, 2019 and March 6, 2020 IEPs and fully participated in the discussions of when, how and how often specialized academic instruction would be offered. Parent's desire to know who was working with her son, what their qualifications were, and what reading programs they were utilizing, did not require this information to be included in the IEPs. The IDEA required the IEPs to specify the date, type, frequency, duration and delivery method of services, which they did. The lack of additional information requested by Parent did not significantly interfere with Parents' opportunity to participate in designing a program reasonably calculated to allow Student to make academic progress in light of his circumstances.

The start date error in the March 6, 2020 IEP was minor. Related services offered were obligated to be provided only upon parental consent to the IEP, and the IEP correctly reflected that the services were scheduled to end on April 4, 2020. The IEP covered a period of less than one month, through Student's next annual IEP review, while Student was unilaterally enrolled at Springall. Accordingly, this procedural error was inconsequential.

San Diego's offer of specialized academic services was clear and complied with the IDEA.

## OFFER OF MENTAL HEALTH AND BEHAVIOR SERVICES

The mental health services, which included mental health behavior intervention, were also adequately explained in the November 1, 2019 and March 6, 2020 IEP documents. In the November 1, 2019 IEP, the services were offered from

November 15, 2019 through April 4, 2020, a period of less than five months, including Winter and Spring breaks. The March 6, 2020 IEP offered the same services through April 4, 2020, with the minor start date error discussed above. Both IEPs offered 12 hours per year, or over one hour per month over a school year, of mental health related services in a separate classroom on campus. They also offered mental health services in the general education classroom for five hours per year. In addition, the IEPs offered 40 hours per year, or approximately an hour per week, of mental health services dedicated to behavior intervention. The offers specified the necessary dates, frequency and duration.

The IEPs specified in the delivery method section that the services would be provided at the school site at various times, during the school day or outside of the school day, which gave the mental health providers flexibility to provide services before or after school to address Student's mental health and behavioral needs, which were complex and varied across settings. A school district is entitled to determine the method it chooses to implement services, and Student's IEP teams chose a service delivery model that would address Student's mental health needs across settings to build the adult network and the emotional and behavioral foundation Student needed to meet academic challenges and build friendships at school. For instance, if Student was indeed having anxiety about attending school, the mental health and behavior intervention providers could work with Student and Parent in the morning, or the provider could meet with Parent in the evening, to design and implement strategies to address that anxiety.

This flexibility was described in the offer of 12 hours of mental health services per year as follows:

MHRS [mental health related services] service modality may include individual, group and/or family therapy (family with student present). Services may be provided within the school, home or community setting.

Student had a history of trauma, family disruption, and frequent moves to different communities and schools. The mental health goals drafted for the IEPs included Student being able to identify frustration and stressors in different environments, to utilize coping strategies and emotional vocabulary instead of aggression, and to ask a friend to play and take turns during academic and social situations. A delivery method that would allow mental health professionals to work with Student individually and in groups, and in different settings, was necessary for Student to make progress on his mental health goals. Student could not practice strategies in real time and in a variety of situations unless the mental health providers could work with Student under those circumstances. This flexibility was necessary to address Student's particular needs and did not make the offer unclear.

The five hours of mental health services offered in the general education classroom, were described as:

Services may include consultation and collaboration with parents, school personnel, community bas[ed] providers and other natural supports.

The IEPs described services in which the mental health provider could consult with the adults who worked with Student, including Parent, to keep them abreast of the strategies Student was learning and enable them to provide mental health support



when Student was not receiving direct services. The flexible delivery method chosen to enable providers to collaborate with Student's extended adult support group in different places and different times did not make the offer unclear. The November 1, 2019 and March 6, 2020 IEPs were designed to build a mental health support system for Student inside and outside the classroom using a collaborative model, and there was nothing confusing about the description of these services.

Lastly, the IEPs described the delivery model of the 40 hours of mental health behavior intervention services as:

Service modality may include behavior intervention inside the classroom, behavior intervention outside the classroom, crisis intervention, and/or skill building groups.

This description allowed the mental health behaviorist to go into the classroom to work with Student on focus, coping strategies and the other skills included in Student's mental health goals. It permitted the mental health behaviorist to work with Student on the playground and in skill building groups such as adult-directed social clubs. Again, the delivery model chosen for the mental health behaviorist to work with Student in real time under real conditions across settings did not make the offer confusing or unclear.

Parent's desire to know the specifics of Student's daily activities so she could "frontload" Student's day, or to know the mental health behaviorist's level of training, did not make such information a required component of the IEPs.

The statutory requirements for the contents of an IEP are exclusive. Nothing in those requirements is to be construed to require that additional information be included

in an IEP beyond what the statutes explicitly require. (20 U.S.C. § 1414(d)(1)(A)(ii)(I).) Parents are not entitled to choose teachers or other instructional personnel. Although districts may choose to let the child's multidisciplinary team make such decisions, the IDEA permits districts to treat these matters as administrative decisions, which are made by school personnel. (*Letter to Wessels* (OSEP 1990) 16 IDELR 735.)

Student cites no authority requiring San Diego to provide Parent with a specific schedule of Student's daily activities, or to inform Parent of the qualifications of the mental health behaviorist who would be providing services to Student, let alone to include that information in the IEP document.

The IDEA does not require a child's schedule, or the qualifications of proposed personnel, to be included in the IEP. The lack of such information in the IEPs did not make the offers unclear.

In addition, a number of unpublished Ninth Circuit decisions interpreting the IDEA and its regulations have held that that if assigned personnel are qualified to perform designated services, the choice of qualified personnel to provide services is within the district's administrative discretion. (See *Blanchard v. Morton School Dist.* (9th Cir. 2010) 385 Fed.Appx 640, 640 [nonpub. opn.], affirming *Blanchard v. Morton School Dist.* (W.D. Wash 2009) 2009 WL 481306; *Gellerman v. Calaveras Unified School Dist.* (9th Cir. 2002) 43 Fed.Appx 28, 31 [nonpub. opn.]; *Zasslow v. Menlo Park City School Dist.* (9th Cir. 2003) 60 Fed.Appx. 27, 28 [nonpub. opn.]

The evidence established that the mental health specialist assigned to work with Student, but who could not because Parent removed Student from school shortly after the Thanksgiving holiday, was well qualified to provide mental health services. The specialist had many years of experience working with students who had experienced

trauma, and Rogers, Sinkovich, Filamor and Mendoza testified consistently and persuasively that they thought the particular mental health specialist assigned to Student was an excellent match for Student's needs. They had seen her work effectively with other students to meet their mental health goals and have a positive impact on those students, and expected the same for Student.

Student did not prove that the offers of specialized academic instruction and mental health related services, including mental health behavior intervention, contained in the November 1, 2019 or March 6, 2020 IEPs were unclear. San Diego prevailed on Issue 1b.

#### ISSUE 1c AND 1d: DID SAN DIEGO OFFER AN APPROPRIATE BEHAVIOR INTERVENTION PLAN, AND DID SAN DIEGO OFFER APPROPRIATE SUPPORTS AND SERVICES IN ACADEMICS, BEHAVIOR, AND MENTAL HEALTH?

Student contends that the academic supports offered were insufficient, as he was not making academic progress. He contends that the mental health services offered were insufficient because they did not include Parent counseling. Student appears to contend that a full-time one-to-one aide and additional behavior staff were necessary to implement his behavior intervention plan, rather than that the behavior intervention plan itself was insufficient or inappropriate. San Diego contends that the services offered were adequate to meet Student's needs.

#### ACADEMIC SERVICES

Student argues that he made no academic progress at Gage, because when he was unilaterally placed at Springall he was still at his reading level from April 2019. He

contends that this lack of progress was not addressed by the specialized academic instruction offers in the November 1, 2019 and March 6, 2020 IEPs.

As mentioned, the November 1, 2019 and March 6, 2020 IEPs offered Student five hours per week of specialized academic instruction in a special education classroom, and 12 hours per week of specialized academic instruction in the general education classroom. This was an increase from 3.5 hours per week in the special education classroom, and from 11.25 hours per week in the general education classroom, offered in Student's April 26, 2019 IEP, drafted by a different IEP team at a different school.

Student had not met his reading goals by November 15, 2019, but the goals were annual goals expected to be met in April 2020. At the time of the November 1, 2019 IEP team review, Student had only been at Gage for approximately two months. Student was frequently tardy and missed time in Rogers's classroom, where he received 3.5 hours per week of specialized academic instruction in English language arts under the April 20, 2019 IEP. Student's behaviors were interfering with his access to the curriculum, particularly as he adjusted to a new school. Student's lack of progress at that time was not unexpected under the circumstances.

In second grade, Student was still unable to identify some vowel sounds, and although he had a good working memory, his ability to sound out words and reading frequency were well below grade level. Student's IEP team was also informed on November 1, 2019, that Dr. Jimenez had diagnosed Student with dyslexia. Student's writing skills were similarly below grade level, although he was quite capable of orally participating in class lessons. At the November 15, 2019 continuation meeting, the IEP team increased Student's specialized academic instruction in the special education classroom by approximately 70 percent, to five hours per week, or an hour each day, to

address Student's learning disability. This was consistent with Dr. Jimenez's recommendation for specialized academic instruction in the core subjects of reading and writing, included in the October 17, 2019 psychoeducational assessment report she presented to the IEP team on November 1, 2019.

Parent removed Student from school soon after the return from the Thanksgiving holiday, before the increased hours of specialized academic instruction, mental health services and behavior supports could be implemented. Sinkovich, Rogers and Mendoza opined consistently and persuasively that by November 15, 2019, Student's undesirable behaviors had decreased, and he was learning school rules and classroom expectations. This showed that he was poised to make academic gains, and the academic supports offered in the IEPs were reasonably calculated to ensure that Student made progress appropriate in light of his circumstances.

Student did not want to leave Gage and go to Springall. He liked Rogers very much, as well as his assigned paraeducator, and considered Rogers's room a comforting retreat when upset or dysregulated. Student took pride in moving his name up a chart in Rogers's room for good behavior. After removal from Gage, Student did not begin attending Springall until January 2020 and missed academic instruction for over one month. Student was also placed in a classroom for students with moderate to severe disabilities and worked on kindergarten level academic material during an observation by Rogers in February 2020. Student's teacher at Springall, Katherine Miller, testified that Student displayed serious maladaptive behaviors after he was placed in her moderate to severe classroom, which escalated in February 2020. Under these circumstances, evidence of Student's lack of reading progress, particularly based on testing done at Springall in February 2020, was unpersuasive to establish that the academic services and supports offered Student were not adequate.

## MENTAL HEALTH AND BEHAVIOR SERVICES

Student argues that additional behavior supports were needed. At the November 1, 2019 IEP team meeting, Dr. Jimenez recommended that Student receive a one-to-one aide for behavior support. At hearing, an independent functional behavior assessor, Rachel Teschler, opined that Student needed additional staff to implement Student's behavior intervention plan. These recommendations were contrary to recommendations of Mendoza, who performed a functional behavior analysis and a supplemental support assessment of Student in October 2019, which assessments are not at issue.

When a child's behavior impedes the child's learning or that of others, the IEP team must consider strategies, including positive behavioral interventions and supports to address that behavior. (20 U.S.C. § 1414(d)(3)(B)(i); 34 C.F.R. § 300.324(a)(2)(i) & (b)(2017); Ed. Code, § 56341.1, subd. (b)(1).) The Legislature intended that children with serious behavioral challenges receive timely and appropriate assessments and positive supports and interventions. (Ed. Code, § 56520, subd. (b)(1).) An IEP that does not appropriately address behaviors that impede a child's learning denies a student a FAPE. (*Neosho R-V School Dist. v. Clark* (8th Cir. 2003) 315 F.3d 1022, 1028-1029; *County of San Diego v. California Special Educ. Hearing Office* (9th Cir. 1996) 93 F.3d 1458, 1467-68.)

No mental health professional testified to contradict Filamor's opinion that the mental health services offered were appropriate for Student to make progress in light of his circumstances. The IEP team heard and discussed Filamor's mental health assessment, and offered the mental health services recommended. Student argues that the mental health services were insufficient because they did not provide Parent

counseling to help Parent manage Student's behaviors at home, but the November 15, 2019 and March 6, 2020 IEPs expressly provided for a portion of the individualized mental health services to include family therapy with Student present as needed, and for the consultation and collaboration services to include Parent.

Dr. Jimenez's psychoeducational assessment report dated October 17, 2019 did not recommend parent counseling, only that an assessment be completed for wrap-around services, which San Diego performed. Dr. Jimenez did not disagree with the level of mental health services discussed and offered at the November 15, 2019 IEP team meeting. Dr. Jimenez's May 20, 2020 assessment report, which was prepared for hearing and never presented to Student's IEP team, recommended only that Student continue accessing mental health services in and out of school, without reference to Parents. Behaviorist Teschler did not recommend parent counseling in her October 11, 2019 functional behavior analysis, or at the November 1, 2019 IEP team meeting where her assessment was presented and discussed. Teschler did not opine at hearing that parent counseling was a necessary part of Student's behavior intervention plan support.

Parent was not a mental health specialist, behaviorist or educator, and her opinion that Student's IEPs required regular parent counseling was not persuasive. Her many letters to San Diego staff requesting help to manage Student at home similarly did not show that regular parent counseling was necessary for Student to access the curriculum and succeed at school. San Diego was only required to offer Student a FAPE, and Parent's preference for counseling services to help her address Student's behaviors at home, even if it would result in greater educational benefit, did not require San Diego to include the preferred services in the IEP. [*Rowley, supra*, 458 U.S. at p. 198; *Endrew F., supra*, 580 U.S. \_\_ [137 S.Ct. 988].)

School psychologist Mendoza collaborated with Sinkovich and Rogers concerning special education students in their classes, and had worked specifically with Student on behavior intervention. Student was involved in a number of behavior incidents at the beginning of the school year, and Mendoza was familiar with Student's April 26, 2019 behavior intervention plan, and had counseled Rogers and Sinkovich on its implementation.

Mendoza had a Bachelors' degree in School Psychology, and Master's degrees in Education and Counseling Psychology. He was a licensed marriage family therapist, with numerous other counseling-related credentials. He had been a credentialed school psychologist for almost 10 years when he worked with Student, and had worked with at-risk youth and their families for almost 20 years. He had completed at least 800 psychoeducational assessments and functional behavior analyses over his career. Mendoza answered all questions readily and completely. His recall was good, and it was clear that he was familiar with, and cared about, Student. His testimony was insightful, and he gave specific examples and referenced assessment results to support his opinions. Mendoza was a credible and persuasive witness. Due to his familiarity with Student and Student's behaviors, from both his regular interactions with Student and his assessment of the function of Student's behavior and need for supplemental behavior support, Mendoza's opinions carried more weight than the opinions of Dr. Jimenez and Teschler.

Mendoza's explanation of the purposes for, components of, and implementation of behavior intervention plans was more detailed and informative than that of Teschler, who became a board certified behavior analyst in 2017. Mendoza's criticisms of Teschler's functional behavior assessment were logical and persuasive. Multiple deficiencies in Teschler's assessment were also identified by Student's advocate in the



audio recording of the November 1, 2019 IEP team meeting. Teschler was unfamiliar with the behavior of a typical second grade student. For example, her report called for all of Student's behaviors to be extinguished to zero occurrences per school day, but Gage staff persuasively explained that not engaging in behaviors such as noncompliance or being off-task would be unachievable by many typical second graders. Teschler opined at hearing that she believed Gage staff wasn't implementing Student's behavior intervention plan with fidelity, but she did not contemporaneously mention this to Gage staff during her observation or when she presented her report at the November 1, 2019 IEP team meeting. Teschler's statements often needed clarification or qualification on cross-examination, which adversely affected her credibility and persuasiveness. Some of her opinions were based on unreliable Parent report. For these reasons, Teschler's opinions regarding Student's behavioral needs, and the program and supports to address those needs, were not persuasive.

Mendoza reviewed his assessment results in detail at the November 15, 2019 IEP team meeting and at hearing, and persuasively explained that the behavior implementation plan was being implemented correctly and that Student was showing marked improvement in behavior and attitude at school. Student did not need the level of support provided by a one-to-one aide, as observations and reports from staff working with Student demonstrated that Student was generally understanding and following directions and class lessons with the level of redirection and prompting provided by the April 26, 2019 IEP. The increased academic, mental health, and behavior support offered in the November 1, 2019 and March 6, 2020 IEPs was reasonably calculated to ensure that Student would make academic, social emotional, and behavioral progress appropriate in light of his circumstances.

The behavior intervention plan appropriately addressed behaviors that impeded Student's learning, and the November 1, 2019 and March 6, 2020 IEPs offered appropriate supports for Student's behavior plan. As discussed at Issue 1f, below, the behavior plan identified Student's problem behaviors and appropriate functionally equivalent replacement behaviors, and described strategies to teach and reinforce positive behavior outcomes. Teschler's own functional behavior assessment, although excessively faulted by Student's advocate and persuasively criticized by Mendoza, came to conclusions and made many recommendations consistent with the existing behavior support plan, which was retained by the November 2019 and March 2020 IEP teams. Teschler opined that Student's behaviors served the function of task avoidance, as did the existing behavior support plan. Her recommendations for behavior supports, such as frequent praise, visual schedules and point charts, were already components of the behavior intervention plan and IEPs.

Teschler opined at hearing that Student needed a full-day one-to-one aide, based primarily on minor incident reports reviewed in preparation for hearing and Parent's inaccurate statements that Student's behaviors at Gage were getting worse. However, her functional behavior assessment and Filamor's mental health assessment recommended only an increase in student to staff ratio for portions of the school day. This was added to Student's IEP by the November 15, 2019 IEP team in the form of increased specialized academic instruction hours and weekly mental health behavior intervention services. Notably, Gage school staff testified persuasively and in detail about improvements in Student's behavior obtained through consistent implementation of the behavior support plan, demonstrating the appropriateness and effectiveness of that plan, even before the increase in behavioral supports.

Student failed to prove that San Diego denied him a FAPE during the 2019-2020 school year by offering an inappropriate behavior support plan or by offering inappropriate academic, mental health or behavioral supports.

#### ISSUE 1e: DID SAN DIEGO OFFER AN APPROPRIATE PLACEMENT?

Student contends that he required a nonpublic school placement to address his reading deficits and behaviors. San Diego contends that it offered Student an appropriate placement in the least restrictive environment.

For a school district's offer of special education services to a disabled pupil to constitute a FAPE under the IDEA, the school district's offer of educational services and placement must be designed to meet the student's unique needs, comport with the student's IEP, and be reasonably calculated to provide the pupil with some educational benefit in the least restrictive environment. (*Endrew F., supra*, 580 U.S. \_\_ [137 S.Ct. 988]; *Gregory K. v. Longview School Dist.* (9th Cir. 1987) 811 F.2d 1307, 1314 (*Gregory K.*); 20 U. S.C. § 1401(9).)

A school district has the right to select the program offered, as long as the program is able to meet the student's needs, and the district is ultimately responsible for ensuring that FAPE is offered. (*Letter to Richards*, 55 IDELR 107 (U.S. Dept. of Educ., Office of Special Educ. Programs 2010).) A school district is not required to place a student in a program preferred by a parent, even if that program will result in greater educational benefit to the student. (*Rowley, supra*, 458 U.S. at p. 198; *Endrew F., supra*, 580 U.S. \_\_ [137 S.Ct. 988].) The IEP need not conform to a parent's wishes to be sufficient or appropriate. (*Shaw v. Dist. of Columbia* (D.D.C. 2002) 238 F.Supp.2d 127,

139 [The IDEA does not provide for an “education . . . designed according to the parent’s desires”], citing *Rowley, supra*, 458 U.S. at p. 207.)

## LEAST RESTRICTIVE ENVIRONMENT

To provide the least restrictive environment, school districts must ensure, to the maximum extent appropriate, that children with disabilities are educated with non-disabled peers, and that special classes or separate schooling occurs only if the nature or severity of the child’s disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily. (20 U.S.C. § 1412(a)(5)(A); Ed. Code, § 56031; 34 C.F.R. 300.114 (a).) To determine whether a special education student could be satisfactorily educated in a regular education environment, the Ninth Circuit Court of Appeals has balanced the following factors:

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

(*Sacramento City Unified School Dist. v. Rachel H.* (9th Cir. 1994) 14 F.3d 1398, 1404 (*Rachel H.*) [adopting factors identified in *Daniel R.R. v. State Board of Ed.* (5th Cir. 1989) 874 F.2d 1036, 1048-1050 (*Daniel R.R.*)]; see also *Clyde K. v. Puyallup School Dist. No. 3* (9th Cir. 1994) 35 F.3d 1396, 1401-1402.)

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

Mainstreaming is a term used to describe opportunities for disabled students to engage in activities with nondisabled students. (*M.L. v. Federal Way School District* (9th Cir. 2005) 394 F.3d 634, 640, fn. 7.)

Because Student does not contend that he can be satisfactorily educated solely in the regulation education applying the *Rachel H.* factors, the least restrictive environment analysis for this case requires a determination of whether Student was to be mainstreamed to the maximum extent appropriate under *Daniel R.R.* or required a nonpublic school placement.

San Diego's FAPE offers of November 1, 2019 and March 6, 2020 enabled Student to remain in the general education classroom for 82 percent of his school day. Specialized academic instruction in the general education classroom enabled Student to access grade-level curriculum and integrated research-based reading lessons into instruction throughout the day. Mental health behavior intervention supported Student in using self-regulation techniques and coping strategies in real time, during lessons and interactions with his classmates, inside the classroom and on the playground.

As discussed below, the November 1, 2019 and March 6, 2020 IEPs reasonably removed Student from the general education environment for 18 percent of his school day for individualized and small group services. Student needed individualized and small group academic instruction in reading and writing. Some of his mental health services needed to be delivered individually to address trauma and teach coping and social skills prior to generalization. Student needed individualized occupational therapy to learn self-regulation techniques and lessons on personal boundaries.

Student's educational benefit from regular education classes was adversely impacted by his inability to independently read, his distractibility, and his emotional

dysregulation. These disability-related deficits interfered with his ability to participate in learning activities that required whole group instruction. Student had a good grasp of math concepts and other grade-level subjects, but needed individualized academic instruction and instructional materials at his reading and writing level, and in math as the curriculum incorporated word problems. He similarly needed individualized instruction in learning to cope with stressors and regulate his emotional status.

Contrary to Parent's testimony, Rogers, Filamor, and Mendoza testified persuasively that Student had friends in general education, and was learning to initiate and maintain new friendships. Student tended to roughhouse with his classmates, and did not always keep an appropriate social distance, but was learning to respect personal boundaries and having less conflicts with his peers. General education provided Student with typically developing peer role models for social interactions and behavior. Student had average cognition, and was appropriately placed with typical peers except when individualized or small group instruction was required.

Sinkovich testified that Student's behaviors were manageable, and that Student had sufficient supports in her general education classroom. She noted that Student had good and bad days, but so did many of her second grade students. In consultation with Mendoza and Rogers, Sinkovich was able to provide accommodations to assist Student in accessing the curriculum. For instance, if Student did not want to join the class on the rug, he could stay in his seat as long as he was attentive. Sinkovich observed that Student's maladaptive behaviors decreased as the school year progressed.

Student received educational benefit from being placed primarily in general education, but required a portion of his school day outside of general education with special education services. Student had dyslexia and below grade-level reading and

writing skills. These deficits required specialized academic instruction by a credentialed special education teacher, provided at his instructional level. Such instruction could not be delivered during grade level general education reading and writing instruction, or by a general education teacher, and because of his reading and writing deficits, mainstreaming was not appropriate during English language arts.

Dr. Jimenez recommended in her October 17, 2019 psychoeducational assessment report, presented at the November 1, 2019 IEP team meeting, that Student receive specialized academic instruction for core subjects in a small special education classroom. A paraeducator trained in research-based reading programs worked with Student in Sinkovich's classroom, but the November 1, 2019 present levels of performance established that Student needed an increase in individualized and small group instruction to meet his reading goals. The November 1, 2019 and March 6, 2020 offers of specialized academic instruction in a special education classroom, with a smaller student to teacher ratio than a general education classroom, were consistent with this recommendation.

General education was not appropriate during all of Student's mental health sessions. A portion of the mental health services would deal with trauma, and require working with Student individually to teach and ensure understanding of self-regulation techniques and coping strategies across settings. Similarly, the November 1, 2019 and March 6, 2020 IEPs offered individualized occupational therapy services to help Student with self-regulation skills. Mental health and occupational therapy services delivered individually, or in a small group, could not appropriately take place in the general education classroom. For related services, the therapy room or other small group setting was the least restrictive environment. The March 6, 2020 IEP offered Student vision therapy with on a clinic basis, which did not affect his time in general education.

Student did not establish that San Diego could not meet his needs on a public school campus. Mother preferred that Student be placed in the more restrictive setting of a nonpublic school, in a small classroom for the entire school day. However, the evidence established that Student could adequately and appropriately learn and socialize in the general education environment of a public school with the services and supports offered in the November 1, 2019 and March 6, 2020 IEPs.

Parent's concerns regarding Student's safety were speculative and not supported by the evidence. Other than a Parent report of Student having a headache after a purported altercation with a peer, there was no evidence that Student was injured or injured others during Fall 2019. The extreme behaviors exhibited by Student during the 2017-2018 and 2018-2019 school years, such as severe aggression, elopement and climbing fences, were not present in Fall 2019. Gage staff testified consistently and convincingly that Student's roughhousing with peers was decreasing, and he was learning to self-regulate and respect personal boundaries.

Two incidents in particular illustrate the difference in perspectives between Parent and Student's IEP team at Gage regarding incident reports. In one incident, a female peer was angry with Student for not sharing candy and pushed him, and Student said in response that he wanted to kill her. Gage staff referred Student and the girl to Gage's restorative justice program, where both students discussed the exchange, were counseled, and Student never again made such a threat. Parent viewed the incident as an end to what she called the honeymoon period at Gage and a precursor to increased maladaptive and dangerous behaviors. Student's IEP team was proud of Student for resolving the incident through the restorative justice process. In another incident, two students were annoying Student on the playground so Student sought an adult for assistance in asking the students to stop. Parent was upset that Student had been



bothered by other students, and worried that such engagement was a precursor to a fight, but Gage staff was proud of Student for implementing a learned coping strategy, which was to walk away from conflict and request adult assistance rather than engage in inappropriate behavior.

Further, several incident reports that Parent characterized as safety threats involved very minor behaviors, such as pushing in line, throwing erasers and crayons, and breaking another student's pencil. The testimony of Rogers, Sinkovich and Mendoza regarding Student's improved behavior was far more persuasive than Parent's speculation that Student's interactions were a trigger for imminent dangerous conduct. Parent's fear that Student would suffer another concussion was speculative and unsupported under the circumstances, considering that the physical aggression and dangerous behaviors such as climbing fences that Student had exhibited at his prior two schools were virtually nonexistent at Gage.

Parent's testimony that she unilaterally enrolled Student at Springall due to fears for Student's safety lacked credibility and were not persuasive. Student's behaviors had dramatically improved at Gage, as reflected in contemporaneous communications between Parent and Gage staff. Parent had already researched Springall and sent Student for attendance trials at Springall prior to informing Gage staff of her safety concerns. Student did not complain to Gage staff about headaches at any time, and Parent's reports of headaches just prior to enrolling him at Springall were not persuasive evidence of such headaches, or that Parent justifiably feared that Student would suffer another concussion if he remained at Gage. In light of Parent's expressed desire to retain Student at Springall despite Springall reports that Student was involved in attacks on his peers and staff, climbed over furniture, overturned desks, threw chairs and ran

out of the school and into the street, it strains logic that the minor incidents reported at Gage put Parent in fear of Student's safety.

At Springall, Student was placed in a classroom taught by a special education teacher credentialed only to teach students with moderate to severe disabilities. Although the classroom was small, with significant adult support, Student was placed with students with moderate to severe disabilities, who Wedner, Rogers and Mendoza observed had communication deficits and aggressive behaviors. Daily point sheets showed, and Springall teacher Miller testified, that Student's own behaviors increased from January to February 2020, and remained high in March 2020. Parent attempted to downplay Student's behaviors at Springall by removing point sheets with comments about severe behavior from those submitted into evidence, but the removed pages were produced by Springall in response to a subpoena duces tecum. Springall's documents included correspondence from Parent stating that behaviors she saw at home were worse than she had seen from Student in an entire year. Springall was implementing a school-wide behavior reward system, as opposed to focusing on Student's individualized behavior intervention plan.

Student's improved behaviors and regularly reported happiness in general education with special education supports at Gage was in stark contrast to his escalating behaviors at Springall when placed in an extremely restrictive environment. The testimony of Dr. Jimenez and Miller that Springall was an appropriate placement for Student was not persuasive. Dr. Jimenez based her opinion primarily on reports of minor incidents at Gage and Parent's safety concerns, as opposed to Student's educational needs. Miller was credentialed to teach only students with moderate to severe disabilities, and not familiar with the general education program at Gage, or Student's performance and progress at Gage. Although the November 1, 2019 IEP team

did not have the benefit of the information presented at hearing regarding Student's adverse reaction to a restrictive setting, such information, in hindsight, supports San Diego's offer to educate Student in a much less restrictive environment.

The March 6, 2020 IEP continued to offer Student the services in the November 1, 2019 IEP, with additional vision therapy services. There was no evidence of a significant change in Student's educational needs between the two IEPs, other than that Student's behaviors escalated at Springall, and that Student would benefit from the individualized behavior intervention plan and mental health behavior interventions offered in the March 6, 2020 IEP.

In summary, placement in general education with limited removal for specialized instruction and related services, and with supports in the general education classroom, was the least restrictive environment for Student. The November 1, 2019 and March 6, 2020 IEPs were drafted to ensure that Student was educated with non-disabled peers to the maximum extent appropriate. Accordingly, the November 1, 2019 and March 6, 2020 IEPs offered Student an appropriate placement in the least restrictive environment.

Student did not prove that San Diego denied Student a FAPE during the 2019-2020 school year by failing to offer appropriate placement.

#### ISSUE 1f: DID SAN DIEGO FAIL TO IMPLEMENT STUDENT'S BEHAVIOR INTERVENTION PLAN, BEHAVIOR SUPPORTS, AND ACCOMMODATIONS?

Student contends that San Diego denied him a FAPE by failing to implement certain behavior intervention strategies, failing to take daily behavior data, and failing to take daily data on the effectiveness of designated strategies. As written, this issue

challenges Student's removal from the classroom and discipline. San Diego contends that it fully implemented the behavior intervention plan, and that Student made significant progress on his behavior goals.

When a student alleges the denial of a FAPE based on the failure to implement an IEP, to prevail, the student must prove that any failure to implement the IEP was material, which means that the services provided fell significantly short of the services required by the child's IEP. (*Van Duyn v. Baker School Dist. 5J* (9th Cir. 2007) 502 F.3d 811, 822.) There is no statutory requirement of perfect adherence to the IEP, nor any reason rooted in the statutory text to view minor implementation failures as denials of a free appropriate public education. (*Id.* at p. 821.)

The behavior intervention plan included in the November 1, 2019 and March 6, 2020 IEPs was developed while Student was at a previous school. Although Gage did not see the extreme behaviors referenced in the behavior plan, such as running from staff, climbing fences and hitting, kicking and knocking down peers, the IEP teams retained all parts of the plan based upon Parent's insistence that Student would start to exhibit those behaviors after what she termed the honeymoon period of the new school year was over.

Student did engage in inappropriate behaviors at Gage at the beginning of the school year. During behaviorist Teschler's September 2019 observation Student hit another student in the bathroom who started crying. However, Rogers, Sinkovich and Mendoza testified persuasively that Student's behaviors were manageable and improved as the school year progressed. Parent's testimony that Student was frequently sent home in Fall 2019 due to behavior was vague as to when or how many times, and was not corroborated by the incident reports of generally minor misbehavior admitted

into evidence. Student failed to present persuasive evidence that he was disciplined or removed from the classroom in a material deviation from his behavior intervention plan.

Other than the extreme behaviors not seen, the behavior intervention plan identified three types of behaviors observed at Gage that prevented Student or his peers from learning:

- Defiance, or saying no, not following directions, tearing up or scribbling on work, or throwing work away
- Leaving the group or work area, such as hiding under tables and chairs, being out of his seat and wandering the classroom, and
- Withdrawing from a task, for example, refusing to start or finish work, not responding to teacher instruction, not participating, or not engaging with assigned work

The previous school reported on the plan that these behaviors occurred with varied frequency, with varied intensity, and lasted from less than one minute to an hour or more. The behavior of immediate concern to Gage teachers was Student's refusal to attempt to begin work on an assignment, even when he had shown he was capable of the work.

The behavior intervention plan identified predictors of behavior, changes in environment to remove the need for problem behaviors, and strategies to reduce problem behaviors. It identified functionally equivalent replacement behaviors, such as requesting a movement break, requesting assistance with a task, or asking for a shortened assignment rather than eloping to escape a task or avoid task completion. Reinforcement for positive behavior included using a star or point chart and frequent praise, using a timer, visual and verbal prompts, and acknowledging the absence of

problem behaviors when Student used appropriate strategies. Reactive strategies included using a calm and neutral voice when redirecting, using simple directions, redirecting and prompting as needed, reminding Student to make good choices, and praising positive behavior.

The outcomes identified in the behavior intervention plan were for Student to ask for help or a break when he was stressed or overwhelmed, instead of defiance, leaving the task, withdrawing, eloping, climbing a fence or becoming physically aggressive. The plan provided for progress on behavior to be reported to Parents every 12 weeks, in a progress report written by the case manager for Parent, the general education teacher, and staff working with Student. Data on implementation was to be taken on the behaviors, use of interventions, and use of replacement behaviors, on a daily basis by staff working with Student.

Teschler was critical of San Diego for not using accommodations identified in the IEP to support the behavior intervention plan, including visual supports, sensory tools, reinforcement, breaks, structured choice and a high degree of praise. However, the evidence demonstrated that these strategies were regularly employed, including, for example, the point sheet, Rogers' classroom behavior board, and Student's sensory box. Rogers and Mendoza testified persuasively regarding compliant strategies regularly used in the classroom and on the playground, and their testimony was more persuasive than that of Teschler. Teschler's observation in September was for approximately one hour. In this observation, she was not focused on Student's behavior goals or his behavior intervention plan, and she did not speak with Student's paraeducator, teachers or Mendoza to ask if or how the behavior plan was being implemented during her observation. Teschler's opinions at hearing were based primarily on Parent report. Her

opinion that Gage staff was not implementing the behavior intervention plan with fidelity was not well-informed or persuasive.

Early in the school year, Rogers worked with Student to develop a point sheet to track Student's progress on his behavior outcomes, using language that Student would understand and had a role in writing. The categories they developed were being respectful towards others, keeping hands and feet to himself, and following directions. During each period of the school day, Student could earn two points for a great job, and one point for working on a goal, which was defined as being warned once and then making better choices. Zero points would indicate that Student had continued to make bad choices after he was warned. Student was responsible for taking the point sheet with him from class to class, and the staff working with him would enter the points he had earned during that period on the point sheet. Student earned rewards for earning ones and twos. The point sheet also had a comment section on the back, and was sent home daily to Parent. Absences, school holidays, tardies, and Student misplacing the point sheet could result in missing or blank point sheets or sections.

Parent testified at hearing that many point sheets were missing, which she concluded demonstrated that San Diego was not rigorous in taking data. In his closing brief, Student argued that San Diego did not value the point sheets as actual data collection, or they would not have sent them home to Parent where they could be removed or lost. In fact, Parent removed point sheets from the exhibit of Springall point sheets to manipulate the resulting data and hide the extreme nature of Student's escalating behaviors at Springall. Parent also never returned Gage's point sheets to Gage after she withdrew Student. As described elsewhere in this Decision, Parent repeatedly attempted to alter evidence to manipulate the result at hearing. For these reasons, Parent's summary of missing Gage point sheets was not credible or persuasive,

and Rogers's testimony that point sheets were completed and sent home every day was given greater weight. Accordingly, Student did not prove that San Diego staff failed to take daily behavior data.

Teschler was critical of the Gage point sheets for not precisely tracking the behaviors as identified in the behavior intervention plan. However, Rogers persuasively explained that the point sheets were written with Student to make the tracking more immediate and meaningful to him. That is, the behavior intervention plan's identified behaviors of defiance, leaving a group or work area, withdrawing from a task, and not touching others became being respectful to others, keeping hands and feet to himself, and following directions. The point sheets were written in terminology that a second grader could understand, to make expectations for points and rewards clear and to motivate him. This modification did not make the data collection any less accurate or informative, and was not a material failure to track identified behaviors.

Teschler opined that blank sections of the Gage point sheets, and the lack of separate sections regarding the strategies used moment to moment, constituted failure to implement the monitoring requirements of the behavior intervention plan. However, Mendoza testified more persuasively that the behavior intervention plan required a report every 12 weeks, and that the information memorialized on the point sheets combined with the observations of the teachers and staff working with Student would adequately track Student's behavior trends and the effectiveness of the strategies implemented.

Student questioned multiple witnesses about when, how and by whom written data on the interventions used with Student was recorded, and there was much confusion caused by the questions' implication that certain written data was required by



the behavior intervention plan. However, as explained persuasively by Mendoza, the behavior intervention plan provided for monitoring of behavior and the success of interventions by teacher observation as well. Rogers had been a general education teacher for 14 years, and a credentialed special education teacher for six years. Sinkovich had been a general education teacher, mostly for second grade, for 30 years. Mendoza had been a school psychologist for 10 years. Specialized school staff also worked with Student inside and outside of the classroom. These education professionals had the education, training and experience to observe and provide a sound description of the success or lack of success of different strategies used with Student for purposes of a 12-week progress report.

To the extent daily observation by experienced teachers and staff would not provide a progress report as detailed as daily written data, the IDEA does not require perfect adherence to an IEP, or provide that minor implementation variations constitute a denial of FAPE. Student's IEP team at Gage was adequately and effectively implementing and monitoring Student's behavior intervention plan, albeit not at the level of detail preferred by Parent or Teschler. The Gage team's methods of implementing and monitoring Student's behavior intervention plan did not materially deviate from that plan, and did not constitute a denial of FAPE.

It is notable that Student had no criticism of the Springall point sheets, which were part of a behavior system applied school-wide and not individualized to Student. Springall also used a three-level point system of green, yellow and red stars to denote good, bad or in-between behavior to earn points for rewards. It did not include information on strategies implemented. Its categories included following directions, staying on task, staying in assigned area, using appropriate language, showing respect for others, and a catch-all category entitled personal goal. Springall's point sheet also

included areas for comment. Mother asked Miller and her staff to write more good comments on the point sheets to assist Student in prevailing at the due process hearing. Whether these comments would have been written without Parent's request is unclear, but Springall staff also wrote comments about extreme maladaptive behaviors by Student that Parent removed from the Springall point sheet exhibit offered into evidence by Student. The Springall point sheets acceptable to Parent did not provide any more information than the Gage point sheets, and were not part of a plan individualized to Student.

Parent testified that she wanted more daily information on Student's behaviors in Fall 2019 than Gage's point sheets provided. However, the behavior intervention plan only required a progress report to Parent every 12 weeks. Student did not prove that San Diego failed to implement the behavior implementation plan by not reporting to Parent daily, or by reporting on behavior less than every period of every school day.

Throughout the hearing and in the audio evidence, the witnesses for Gage were compelling and convincing in their descriptions of Student's conduct, and in their opinions of the strategies that worked well with him. Rogers, Sinkovich and Mendoza were clearly fond of Student, and proud of Student's success in utilizing learned strategies to replace inappropriate behaviors. Parent herself wrote to Rogers multiple times that Student took pride in doing well in her classroom, loved Rogers and the paraeducators, and enjoyed going to school to see Rogers. During the November 15, 2019 IEP team meeting, Parent frequently agreed with both Rogers's and Mendoza's statements on what strategies worked or did not work with Student. Mendoza testified compellingly about working with staff to demonstrate how to best

implement Student's behavior intervention plan. Teschler corroborated Mendoza's testimony about demonstrating a behavior intervention strategy for a paraeducator, as she saw him do so during her classroom observation. Rogers, Wedner and Mendoza seemed genuinely saddened when relating their observations of Student at Springall, placed in a classroom with students he could not communicate with, doing work well below his abilities, and acting out with behaviors that had been reduced or extinguished at Gage. As a whole, this testimony demonstrated a team that was familiar with Student's behavior intervention plan, implemented the plan with fidelity, utilized the strategies that worked best with Student, and saw great improvements in Student's behavior.

Student did not prove that San Diego materially deviated in the implementation of Student's behavior intervention plan, by disciplining him and removing him from the classroom, or otherwise. Student did not prove that San Diego denied him a FAPE in the 2019-2020 school year by failing to implement the behavior intervention plan.

## 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.

### STUDENT'S ISSUES

Issue 1a: San Diego did not deny Student a FAPE during the 2019-2020 school year by failing to timely and appropriately assess Student in speech and mental health. San Diego prevailed on Issue 1a.

Issue 1b: San Diego did not deny Student a FAPE during the 2019-2020 school year by failing to make a clear offer of services in academics, behavior, and mental health. San Diego prevailed on Issue 1b.

Issue 1c: San Diego did not deny Student a FAPE during the 2019-2020 school year by failing to offer an appropriate behavior intervention plan. San Diego prevailed on Issue 1c.

Issue 1d: San Diego did not deny Student a FAPE during the 2019-2020 school year by failing to offer appropriate supports and services in academics, behavior, and mental health. San Diego prevailed on Issue 1d.

Issue 1e: San Diego did not deny Student a FAPE during the 2019-2020 school year by failing to offer an appropriate placement. San Diego prevailed on Issue 1e.

Issue 1f: San Diego did not deny Student a FAPE during the 2019-2020 school year by failing to implement Student's behavior intervention plan, behavior supports, and accommodations, including by disciplining and removing Student from the classroom. San Diego prevailed on Issue 1f.

## SAN DIEGO'S ISSUES

Issue 2: San Diego's mental health and related services assessment, memorialized in an October 30, 2019 report, was legally compliant. San Diego prevailed on Issue 2.

Issue 3: San Diego's pragmatic language assessment, memorialized in a March 6, 2020 report, was legally compliant. San Diego prevailed on Issue 3.

## 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/*

Alexa Hohensee

Administrative Law Judge

Office of Administrative Hearings