

BEFORE THE  
OFFICE OF ADMINISTRATIVE HEARINGS  
STATE OF CALIFORNIA

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CASE NO. 2020100618

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PARENT ON BEHALF OF STUDENT,

v.

ORCUTT UNION SCHOOL DISTRICT.

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DECISION

April 22, 2021

On October 19, 2020, the Office of Administrative Hearings, called OAH, received a due process hearing request from Parent on behalf of Student, naming Orcutt Union School District. OAH granted Student's motion to amend his complaint on January 5, 2021. Administrative Law Judge Cararea Lucier heard this matter by videoconference on March 2, 3, 4, 9, 10 and 11, 2021.

Daniel Shaw and Melissa Cummins represented Parent and Student, with assistance from paralegal Eric Wooten. Parent attended all hearing days on Student's

behalf. Meagan Kinsey represented Orcutt Union School District. Kathleen Long, Director of Special Education, attended all hearing days on Orcutt's behalf.

The matter was continued to April 8, 2021, for written closing briefs. The record was closed and the matter submitted on April 8, 2021.

## ISSUES

1. Did Orcutt Union School District deny Student a free appropriate public education, referred to as FAPE, during the 2019-2020 school year, including extended school year, by:
  - a. Failing to implement Student's individualized education program, referred to as IEP;
  - b. Failing to conduct an adequate triennial assessment;
  - c. Failing to offer adequate distance learning supports;
  - d. Failing to assess Student in all areas of suspected disability; and
  - e. Predetermining Student's supports and services?
2. Did Orcutt deny Student a FAPE, during the 2020-2021 school year, through January 5, 2021, by:
  - a. Failing to implement Student's IEP;
  - b. Failing to assess Student in all areas of suspected disability;
  - c. Predetermining Student's supports and services;
  - d. Failing to respond to parental request for an independent education evaluation;
  - e. Failing to offer adequate distance learning supports; and
  - f. Failing to make a clear offer of FAPE?

Student withdrew issues relating to the timeliness of Orcutt's triennial assessment of Student during the 2019-2020 and 2020-2021 school years and whether Orcutt conducted an adequate triennial assessment of Student during the 2020-2021 school year.

## JURISDICTION

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

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

The IDEA affords parents and local educational agencies the procedural protection of an impartial due process hearing with respect to any matter relating to the identification, assessment, or educational placement of the child, or the provision of a free appropriate public education to the child. (20 U.S.C. § 1415(b)(6) & (f); 34 C.F.R. § 300.511 (2006); Ed. Code, §§ 56501, 56502, 56505; Cal. Code Regs., tit. 5, § 3082.) The party requesting the hearing is limited to the issues alleged in the complaint, unless the other party consents, and has the burden of proof by a preponderance of the evidence.

(20 U.S.C. § 1415(f)(3)(B); Ed. Code, § 56502, subd. (i); *Schaffer v. Weast* (2005) 546 U.S. 49, 57-58, 62 [126 S.Ct. 528, 163 L.Ed.2d 387]; and see 20 U.S.C. § 1415(i)(2)(C)(iii).) At hearing, Student moved to shift the burden of proof to Orcutt, but subsequently withdrew this motion in his closing brief. Student had the burden of proof in this matter. (*J.G. v. Department of Education* (9th Cir. 2019) 772 Fed.Appx. 567.) 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 a 14-year-old boy who resided within Orcutt Union School District with his mother, grandmother, and siblings at all times relevant to this matter. He qualified for special education and related services under the eligibility category of autism.

#### ISSUE 1(A): IMPLEMENTATION OF STUDENT'S IEP FOR THE 2019-2020 SCHOOL YEAR AND EXTENDED SCHOOL YEAR

Student contends that Orcutt failed to implement Student's IEP for the 2019-2020 school year and extended school year, referred to as ESY. Specifically, Student asserts that during the school closures relating to the Covid-19 pandemic, Orcutt provided only five to 30 minutes per day of specialized academic instruction instead of the 300 minutes per day in Student's operant IEPs. Student further alleges Orcutt failed to provide the speech therapy, behavior intervention services, and direct one-on-one aide as was required by Student's IEPs.

Orcutt contends that it implemented Student's IEPs at all relevant times, including through a distance learning format. Orcutt argues that it provided Student with access to enough online activities that Student could receive all the services minutes in his IEPs.

A FAPE means special education and related services that are available to an eligible child that meets state educational standards at no charge to the parent or guardian. (20 U.S.C. § 1401(9); 34 C.F.R. § 300.17 (2006).) Parents and school personnel develop an IEP for an eligible student based upon state law and the IDEA. (20 U.S.C. §§ 1401(14), 1414(d)(1); and see Ed. Code, §§ 56031, 56032, 56341, 56345, subd. (a) and 56363 subd. (a); 34 C.F.R. §300.501.)

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

A school district violates the IDEA if it materially fails to implement a child's IEP. (20 U.S.C. § 1401(9).) A material failure occurs when there is more than a minor discrepancy between the services provided to a disabled child and those required by the IEP. (*Van Duyn v. Baker School Dist.* (9th Cir. 2007) 502 F.3d 811, 815, 822.) However, "[T]he materiality standard does not require that the child suffer demonstrable educational harm in order to prevail." (*Ibid.*) The *Van Duyn* court emphasized that IEP's are clearly binding under the IDEA, and the proper course for a school that wishes to make material changes to an IEP is to reconvene the IEP team pursuant to the statute, and "not to decide on its own no longer to implement part or all of the IEP." (*Parents v. Rim of the World Unified School District*, OAH Case No. 2013120111, March 10, 2013, citing *Van Duyn*.)

Local educational agencies must continue to implement a student's IEP, including specialized academic instruction, during distance learning. (*California Department of Education Special Education Guidance for Covid-19*, September 30, 2020.)

Student's operative annual IEPs were dated April 5, 2019, which covered the period at issue from August 14, 2019, through May 10, 2020, and April 9, 2020, which covered the period from May 11, 2020, through January 5, 2021.

From August 14, 2019, through March 13, 2020, Orcutt implemented Student's operative IEP with fidelity. In Student's IEP of April 5, 2019, Orcutt offered Student a placement at Orcutt Junior High School, with 300 minutes per day of specialized academic instruction, referred to as SAI. The IEP specified that Student would receive six periods of 50-minute classes in a special day class for students with moderate to severe disabilities, which paralleled the class structure for general education students at Orcutt Junior High School. Orcutt also offered Student 120 minutes per month of direct speech and language services, and 60 minutes per month of consultation between an occupational therapist and Student's teacher.

To address Student's significant behavioral challenges, Orcutt offered Student a one-on-one instructional assistant for the duration of his school day. Orcutt also offered Student 720 minutes per month of behavior support by a Board Certified Behavior Analyst, referred to as a BCBA, and a detailed Behavior Intervention Plan, referred to as BIP. Student's BIP mandated that Student have two adults to supervise him at all times due to his eloping, aggression to others, self-injurious behaviors, and out of seat behavior.

Student attended a full traditional school day, from 9:00 a.m. to 3:07 p.m. In first period, Student worked on group language-based activities, including the daily

calendar, current events, and social skills. In second period, Student worked on math goals. At 10:45 a.m., Student participated in a nutrition break with general education and special education peers. Student had physical education for third period, and science or social skills instruction for fourth period. Student's one-on-one aide would then walk him to a field under a tree, where he ate his lunch. Periods five and six were devoted to community-based tasks, such as recycling, working on the community garden with general education peers, or visiting the Dollar Store or a grocery store.

Prior to school closures, Gabriel Espinoza, Student's teacher for the 2019-2020 school year, implemented Student's behavior plan with fidelity. Student could never be left unsupervised because this was dangerous to Student and those around him. Student required a structured environment with clear directives using the Premack principle, and "if/then" statements. Espinoza learned early in the 2019-2020 school year that he could not follow Student's lead, as this led to aggressive behaviors, such as biting.

Student was curious and impulsive. He would "run amok," bolting from his classroom daily into other classrooms in the junior high school, where he turned on water faucets, and took books. If he heard an airplane flying over the school, he would run outside. He pulled fire alarms, flipped switches, and pushed buttons.

Prior to school closure on March 16, 2020, Student's BIP was effective. The school staff learned to position their bodies to prevent Student from leaving the classroom. Orcutt staff developed a highly effective token economy system for Student. Each day he would earn a dinosaur for good behavior, or a sad face. At the end of the week, he would receive a prize from the Dollar Store if he earned enough dinosaurs. Student was so motivated by this system that asking him, "Are we going to earn a

dinosaur today?" would stop or freeze his behaviors. Nevertheless, Student still required two adults to supervise him, including one adult within five feet of him at all times. The evidence demonstrated that Orcutt did not deny Student a FAPE from August 14, 2019, through the date of school closure on March 16, 2020, by failing to implement his IEP dated April 5, 2019.

From March 16, 2020, to April 17, 2020, when Orcutt schools were closed to all students, Orcutt was not required to implement Student's IEP. In March of 2020, the United States Department of Education issued informal guidance suggesting that if a local educational agency closed to all students, it was not required to provide services to students with disabilities at that time. (*USDOE Questions and Answers on Providing Services to Children with Disabilities During a Covid-19 Outbreak*, March 2020.) Because Orcutt schools were closed to all students, it was not required to implement Student's IEP From March 16, 2020, to April 17, 2020.

On March 31, 2020, Orcutt informed parents that schools would remain closed until further notice, and that it would do a soft launch of distance learning on April 20, 2020, with full implementation on April 27, 2020. Orcutt followed with a letter in early April 2020 explaining the expectations for distance learning, with subsequent information provided through social media posts on the Parent Square platform. Orcutt asked parents to help students access work and keep them on a schedule. School was not optional, and Orcutt encouraged parents to keep students occupied and engaged. Students were expected to maintain current skills but would not be exposed to new learning.

Orcutt directed staff to choose the most successful classroom activities and mimic them on Zoom. Espinoza chose several activities from Student's first period class,



calendar and current events, for his Zoom lessons to Student and his classmates. Speech therapist Charlene Baczkiewicz uploaded fun activities to Google Classroom for Student. Baczkiewicz expected parents and siblings to assist students with speech activities to encourage communication but did not assign any of the activities or expect to receive work back.

On April 9, 2020, Orcutt convened an IEP team meeting for Student via Zoom to discuss triennial assessments and distance learning, which continued on April 23, and 29, 2020. Collectively these meetings are referred to as Student's April 9, 2020 IEP. Orcutt offered Student 300 minutes per day of SAI, 120 minutes per month of speech and language services, 60 minutes per month of consultation between an occupational therapist and Student's teacher, a one-one-one instructional assistant for the duration of his school day, 720 minutes per month of behavior support by a BCBA, and a detailed BIP. Parent consented to this offer on May 11, 2020.

At the April 9, 2020, IEP team meeting, Kathleen Long, Director of Special Education, verbally provided an alternative offer of special education and related services, to which Parent did not consent. Long read a letter to Parent entitled "Amendment of Services and Supports During the Covid19 Pandemic." The letter states "the operable IEP is hereby amended as outlined below." Orcutt offered to provide Student with 150 minutes per week of specialized academic instruction, 30 minutes per month of occupational therapy, 30 minutes per month of speech therapy consultation, and 15 minutes per week of direct, online speech therapy. Orcutt also offered Student online support from an instructional aide for 75 minutes per week, consultation from the school psychologist and behavior specialist 30 minutes per week each, and 20 minutes per week of communication with Parent. Both parties referred to this letter as Student's distance learning plan. Parent did not consent to the reduction of services offered in

the distance learning plan. The April 9, 2020 distance learning plan was not attached to, or incorporated within, the April 9, 2020, IEP.

On April 20, 2020, Orcutt launched its distance learning program. From then until the last day of the 2019-2020 school year, June 5, 2020, Orcutt materially failed to implement Student's operative IEPs dated April 5, 2019, and April 9, 2020. Espinoza attempted to provide Student with online specialized academic instruction, but by the second day he felt that it was hopeless. Espinoza observed Student punch his mother numerous times during a lesson and wished he could go through the camera to intervene but could only offer verbal encouragement. Behavior specialist William Headrick acknowledged at hearing that the online instruction caused Student to have severe maladaptive behaviors, including self-injurious behaviors and physical aggression to others.

Due to his disabilities, Student could not meaningfully access online instruction during the spring of 2020. Espinoza's instruction diminished from 15-30 minutes per day to five minutes per day at the end of the 2019-2020 school year. Headrick admitted that he did not provide any direct services to Student during this time period, and that Orcutt did not implement most components of Student's Behavior Intervention Plan. Student was not provided with a direct instructional assistant for the duration of his school day. Baczkiewicz provided only one direct speech therapy session during the spring of 2020, which she conceded was unsuccessful. Student had trouble sitting and focusing on the screen. He left and did not return.

Orcutt argues that Student had access to independent educational activities online that could amount to 300 minutes per day of specialized academic instruction. Specialized academic instruction is an instructional service, individualized based on a

student's needs, and provided by a credentialed special education teacher. (California Department of Education Special Education Guidance for Covid-19, September 30, 2020; Cal. Code Regs., tit. 5, § 3053, subd. (c); See Ed. Code, § 56001, subd. (n) and (o).) Parent was not a credentialed teacher, behavior specialist, speech pathologist, school psychologist, or occupational therapist. She was not qualified to provide the special education and related services in Student's IEP. Thus, Orcutt did not satisfy its legal obligation to implement Student's IEP. Espinoza did not assign daily tasks from the online platform, nor did he supervise or review Student's work. Student could not independently log on to the distance learning platforms. He required adult assistance and supervision at all times.

Furthermore, Student's attention span lasted approximately from ten seconds to four and one-half minutes. Espinoza's testimony that he expected Parent to engage Student in online activities throughout the day to reach the 300 minutes meant she would have to choose at least 67 activities each day to prompt Student through, while simultaneously managing his behavior. Orcutt refused to consider in-person supports from non-public agencies, referred to as NPAs, or private providers. Orcutt's expectations for distance learning for Student for the 2019-2020 school year did not comply with state and federal laws governing the education of students with a disability during the Covid-19 school closures as Orcutt expected Student's family to provide the intensive, specialized instruction and services that it had provided previously to Student due to his significant deficits.

During ESY 2020, Orcutt materially failed to implement Student's operative IEP dated April 9, 2020. In his IEP of April 9, 2020, Orcutt offered Student the following services for ESY 2020: 150 minutes per day of specialized academic instruction, 60 minutes per week of speech therapy, and 360 minutes per month of behavior

intervention services. On June 11, 2020, Orcutt sent Parent a letter describing Student's distance learning plan for ESY, which was entirely virtual, and included substantially fewer minutes of instruction than the April 9, 2020 IEP.

Parent informed Orcutt that Student would participate in ESY for the summer of 2020 but requested in-person support. In response, Orcutt sent Parent several packets of worksheets, but did not provide any other supports. Student did not participate in virtual ESY for the summer of 2020. At that point in time, Student was hurting himself and his mother on a daily basis.

In conclusion, for Issue 1(a), Student proved by the preponderance of the evidence that Orcutt denied Student a FAPE when it failed to materially implement Student's IEPs from April 20, 2020, through ESY 2020.

## ISSUE 2(A): IMPLEMENTATION OF STUDENT'S IEP DURING THE 2020-2021 SCHOOL YEAR, THROUGH JANUARY 5, 2021

Student contends that Orcutt failed to implement Student's IEP dated April 9, 2020, during the fall of 2020, as Orcutt transitioned Student back to campus. Student alleges that Orcutt only provided Student with one to two hours of specialized academic instruction, four times per week, rather than the 300 minutes per day, five days per week, required by Student's IEP dated April 9, 2020. Student further alleges Orcutt failed to provide the speech therapy, behavior intervention services, and direct one-on-one aide required by Student's IEP dated April 9, 2020.

Orcutt contends that it provided Student with access to enough online activities that Student could receive all the services minutes in his IEP, in addition to the supports and services on campus.

As discussed in Issue 1(a) above, a school district violates the IDEA if it materially fails to implement a child's IEP. (20 U.S.C. § 1401(9).) A material failure occurs when there is more than a minor discrepancy between the services provided to a disabled child and those required by the IEP. (*Van Duyn, supra*, 502 F.3d 811, 815, 822.)

Student's IEP dated April 9, 2020, was operant for the beginning of the 2020-2021 school year. As such, Student remained entitled to 300 minutes per day of SAI, 120 minutes per month of speech and language services, 60 minutes per month of consultation between an occupational therapist and Student's teacher, a one-one-one instructional assistant for the duration of his school day, 720 minutes per month of behavior support by a BCBA, and a detailed BIP.

From August 12, 2020, to January 5, 2021, Orcutt materially failed to implement Student's April 9, 2020 IEP. During the summer of 2020, Orcutt anticipated that it would begin the 2020-2021 school year in a distance learning format. On July 21, 2020, Orcutt sent parents a letter explaining that it would begin providing services in a distance learning format and that it anticipated it would move between blended learning and distance learning until a Covid-19 vaccine was available to all students and staff. At hearing, Long emphasized that safety was the school district's main concern.

However, on August 7, 2020, Orcutt administrators convened an internal meeting and determined that they could bring students back to campuses for targeted supports, based upon Santa Barbara Health Officer Order 2020-12.5, and conversations between the Special Education Local Plan Area, referred to as SELPA, Director and the public health officer. Long decided that Student would be the first Orcutt student permitted back on campus for in-person instruction.

From August 12, 2020, through August 25, 2020, Orcutt did not provide Student with any educational services, either in-person or online. Espinoza did not provide Student with any Zoom sessions because he did not want to set him up for failure for the 2020-2021 school year.

From August 26, 2020, through August 28, 2020, Student received 60 minutes per day of specialized academic instruction in person, on the campus of Orcutt Junior High School, for a total of three hours for the week. Orcutt also provided Student with his one-on-one aide and implemented his BIP when he was on campus.

From September 1, 2020, through October 2, 2020, Student received 90 minutes of SAI per day, four days per week, for a total of six hours each week of in-person instruction on campus. Orcutt also provided Student with his one-on-one aide and implemented his BIP when he was on campus.

From October 6, 2020, through December 18, 2020, Student received 120 minutes of SAI per day, four days per week, for a total of eight hours each week of in-person instruction on campus. Orcutt also provided Student with his one-on-one aide and implemented his BIP while on campus. On October 26, 2020, Orcutt began providing Student with 120 minutes per month of direct speech therapy.

Student did not receive any educational services from December 19, 2020, through January 5, 2021, because Orcutt was closed for the winter break.

The services Student received in person, on campus, were the totality of his educational services for the time period at issue. Student did not receive any online services from August 12, 2020, through January 5, 2021.

The services Orcutt provided Student from August 12, 2020, through January 5, 2021, fell substantially short of the services offered in Student's April 9, 2020 IEP. Student proved by the preponderance of the evidence that Orcutt denied Student a FAPE when it failed to materially implement Student's IEP from August 12, 2020, through January 5, 2021.

## ISSUES 1(B) AND 1(D): ASSESSMENT OF STUDENT DURING THE 2019-2020 SCHOOL YEAR AND ESY

Student contends that Orcutt's triennial evaluation of Student during the 2019-2020 school year was incomplete. Student asserts that Orcutt only completed the speech and language assessment, and several rating scales. Student further contends that Orcutt did not assess Student in all areas of suspected disability.

Orcutt contends that its triennial evaluation of Student was necessarily interrupted by school closures relating to Covid-19, but that it resumed assessing Student in the fall of 2020.

A reassessment must occur not more frequently than once a year, unless the parent and the district agree otherwise, and must occur at least once every three years, unless the parent and the district agree, in writing, that a reassessment is unnecessary. (20 U.S.C. § 1414(a)(2)(B); 34 C.F.R. § 300.303(b) (2006); Ed. Code, § 56381, subd. (a)(2).) A reassessment performed every three years is commonly referred to as a triennial assessment.

A district must ensure that an evaluation is sufficiently comprehensive to identify all of the student's needs for special education and related services, whether or not commonly linked to the identified disability category. (20 U.S.C. §1414(b)(3); 34 C.F.R.

§ 300.304(b)(1)(ii) &(c)(6) (2006); *Letter to Baus* (2015 OSEP) 65 IDELR 81.) A district is on notice of a suspected disability and required to assess in that area if a student has displayed symptoms of that disability. (*Timothy O. v. Paso Robles Unified School Dist.* (9th Cir. 2016) 822 F.3d 1105, 1119, cert. den. (Apr. 17, 2017, No. 16-672) 137 S.Ct. 1578 [2017 WL 1366731] (*Timothy O.*.)

In *Timothy O.*, the Ninth Circuit held, "the IDEA and its accompanying regulations contain an extensive set of procedural requirements that are designed to ensure that this initial evaluation (as well as any subsequent reevaluations) achieves a complete result that can be reliably used to create an appropriate and individualized educational plan tailored to the needs of the child." (*Timothy O.*, supra., 822 F.3d 1105, 1110.)

A school district's assessments must use sound and reliable methods to yield accurate data to inform the IEP team. (See *Timothy O.*, supra., 822 F.3d 1105, 1123-1124.) The Supreme Court noted that "[a]n IEP is not a form document. It is constructed only after careful consideration of the child's present levels of achievement, disability, and potential for growth." (*Endrew F.*, supra, 137 S. Ct. at 999.) The failure to obtain critical assessment information about a student "render[s] the accomplishment of the IDEA's goals - and the achievement of a FAPE - impossible." (*N.B. v. Hellgate Elementary School Dist.* (9th Cir. 2008) 541 F.3d 1202, 1210 [quoting *Amanda J. v. Clark County School Dist.* (9th Cir. 2001) 267 F.3d 877, 894].) "School districts cannot circumvent [their assessment] responsibility by way of informal observations." (*Id.* at p. 1119; see *S. P. by and through Palacios v. East Whittier City School District* (9th Cir. 2018) 735 Fed.Appx. 320 [an auditory skills assessment that consisted solely of observation and record review was insufficient to satisfy district's evaluation obligation].)



Reassessments require parental consent, or, in the absence of parental consent, an order following a due process hearing. (20 U.S.C. § 1414(c)(3); Ed. Code, § 56381, subd. (f)(1).) To obtain parental consent the school district must provide proper notice to the student and his or her parent. (20 U.S.C. §§ 1414(b)(1); 1415(b)(3), (c)(1); 34 C.F.R. § 300.304(a) (2006); Ed. Code, § 56321, subd. (a).) The district must give the parent at least 15 days to review, sign, and return the proposed assessment plan. (Ed. Code, § 56321, subd. (a).) The assessment must be completed and an IEP team meeting held within 60 days of receiving consent, exclusive of school vacations in excess of five school days and other specified days. (20 U.S.C. § 1414(a)(1)(C); 34 C.F.R. § 300.301(c) (2006); Ed. Code, §§ 56043, subd. (f)(1), 56302.1, subd. (a), & 56344, subd. (a).)

A district's failure to conduct appropriate assessments or to assess in all areas of suspected disability may constitute procedural violation that may result in a substantive denial of FAPE. (*Park v. Anaheim Union High School Dist.* (9th Cir. 2006) 464 F.3d 1025, 1032-1033; *Timothy O., supra*, 822 F.3d 1105, 1118.)

The U.S. Department of Education has not waived legal requirements relating to triennial assessments during school closures for Covid-19 and distance learning. (California Department of Education Special Education Guidance for Covid-19, September 30, 2020.)

California enacted emergency legislation in Statutes 2020, chapter 3, section 8, effective March 17, 2020, that suspended timelines regarding the commencement of assessment process in developing an assessment plan in Education Code, section 56043, subdivision (a), and section 56321, subdivision (a), while a student's school was closed. This exception lasted only through July 1, 2020, pursuant to Statutes 2020, chapter 110, section 56. However, while California provided school districts with protection regarding

the start of the assessment process as to developing and presenting parents with an assessment plan, California law made no changes to Education Code, section 56043, subdivision (c), which governs the timeline for school districts to complete the assessment after parents consent to assessment plan and to present the assessment findings at an IEP team meeting.

Orcutt's triennial re-assessment of Student was interrupted by the Covid-19 school closures. Orcutt provided Parent with an assessment plan and procedural safeguards on February 12, 2020. Parent signed her consent to the assessments, which Orcutt received on February 19, 2020. The assessment team began some portions of the triennial assessments prior to the school closures on March 16, 2020, and resumed the remainder in the fall of 2020.

Charlene Baczkiewicz assessed Student in the area of speech and language prior to the school closures on March 16, 2020. She included her results in an assessment report dated April 9, 2020, and discussed her findings and recommendations in the IEP team meetings of April 9 and 23, 2020. Baczkiewicz gave Student two standardized assessments, in the areas of receptive vocabulary and expressive vocabulary. On both tests Student scored below the first percentile, with an age equivalent of approximately five years old. She administered a test of articulation but did not include the scores in the assessment report. Baczkiewicz took monthly data on Student's language during the 2019-2020 school year and included the results of her informal language sample in the assessment report. Student spoke in 2-7 word utterances such as "I want it print please," "I want to cut the airplane please" and "64 million years ago the Jurassic time period." She did not assess Student in the areas of pragmatics, social skills, syntax, or semantics, although she believed these were areas of suspected disability for Student.

As part of the triennial assessments Orcutt assessed Student's social emotional needs using a rating scale completed by both Parent and Espinoza. In the area of adaptive skills, Parent completed a rating scale but Espinoza did not complete the teacher form prior to the school closures.

During the 2019-2020 school year, Orcutt did not assess Student in the areas of academics, cognitive functioning, adaptive skills, gross motor, or behavior. Student had significant needs in each of these areas, which required assessment as part of his triennial review. Orcutt intended to assess Student in these areas during the 2019-2020 year but stopped assessing due to school closures in the spring of 2020.

Orcutt did not assess Student in the areas of autism, or assistive technology and the use of alternative augmentative communication devices, referred to as AAC, as part of his triennial review.

Orcutt argued that it could not complete Student's triennial assessments due to school closures related to Covid-19. The California Association of School Psychologists recommended against assessing students during school closures. However, Long acknowledged that federal and state law did not grant any waivers of the re-assessment process due to Covid-19 related school closures. While Orcutt's position is understandable, an ALJ may not create a waiver of the laws regarding assessments when the U.S. Department of Education, California Department of Education, and the Governor declined to do so.

Orcutt failed in its responsibility to conduct a comprehensive assessment of Student's eligibility for special education as part of the triennial assessment process. At the time of the assessment, Student qualified for special education under the category of autism. Previously Student also qualified under the category of intellectual disability.

In conducting its triennial re-assessment, Orcutt did not assess Student in the areas of autism or cognitive abilities.

Orcutt also failed to test Student in all areas of suspected disability. Student presented deficits in the areas of cognitive, academic, communication, autistic-like behaviors, social-emotional functioning, gross and fine motor, adaptive skills, and social skills. During the 2019-2020 school year Orcutt failed to assess Student in the areas of academics, cognitive functioning, adaptive skills, gross motor, or behavior. Orcutt also failed to assess Student in several areas of suspected disability related to communication, including pragmatics, social skills, syntax, semantics, and AAC efficiency. Without this information, the April 9, 2020 IEP team could not make informed decisions regarding the full extent of Student's need for special education and related services, or supports and accommodations.

Orcutt's triennial assessment during the 2019-2020 school year was not comprehensive and failed to achieve "a complete result that can be reliably used to create an appropriate and individualized educational plan tailored to the needs of the child." (*Timothy O., supra*, 822 F.3d 1105, 1110.) Additionally, Orcutt failed to assess Student in all areas of suspected disability. These procedural errors significantly impeded Student's right to a FAPE, thereby substantively denying him a FAPE.

## ISSUE 2(B): ASSESSMENT OF STUDENT DURING THE 2020-2021 SCHOOL YEAR, THROUGH JANUARY 5, 2021

Student contends that during the 2020-2021 school year Orcutt failed to assess Student in the areas of autism, auditory processing, pragmatic language, AAC efficiency,

and assistive technology. Student also asserts that Orcutt failed to conduct a functional behavioral assessment of Student, which Student required.

Orcutt contends that it assessed Student in all areas of suspected disability. Orcutt alleges that its assessments encompassed autism and pragmatic language. Orcutt argues that Student did not require an AAC assessment or a functional behavior assessment.

In the fall of 2020, when Student returned to campus for some in-person instruction, Orcutt resumed Student's triennial assessments. Espinoza assessed Student in the area of academics. School Psychologist Darrell Black assessed Student in the area of cognitive abilities. Headrick assessed Student in the area of behavior using the Verbal Behavior Milestones Assessment and Placement Program, referred to as VB-MAPP. This assessment showed Student made progress in the area of behavior from his last assessment on the VB-MAPP in April of 2019. Espinoza also updated Student's social emotional abilities, with updated rating scales. The assessment team also completed assessments of Student in the areas of adaptive skills and gross motor. The scores were compiled in an assessment report dated October 5, 2020, and presented at IEP team meetings on October 26, 2020 and October 29, 2020.

Dr. Randal Ball testified as to his expert opinion of Orcutt's assessments. Ball presented as a calm, competent, and careful witness. As such, his opinions were given substantial weight. Ball opined that Orcutt failed to assess Student in the areas of autism, auditory processing, pragmatic language, AAC efficiency, and assistive technology. Ball strongly recommend that Orcutt conduct a behavior assessment of Student in his home environment to develop a behavior plan that could be used at

home to support distance learning. Ball also identified some errors in the scoring or reporting of Student's scores on the social emotional rating scales.

Orcutt's assessments failed to appropriately assess Student in the areas of autism, social skills, syntax, semantics, auditory processing, pragmatic language, AAC efficiency, and assistive technology. Orcutt also failed to assess Student's behavior in the home environment to support Student's hybrid distance learning during school closures.

Student met his burden of proof that Orcutt failed to assess Student in all areas of suspected disability. This procedural error significantly impeded Student's right to a FAPE, thereby substantively denying him a FAPE.

#### ISSUES 1(E) AND 2(C): PREDETERMINATION

Student contends that Orcutt predetermined Student's supports and services, specifically after school closures in the spring of 2020, and through the 2020-2021 school year. Student argues that Orcutt did not consider Parent's request for additional supports during distance learning. Student also alleges that decisions regarding Student's time on campus when he returned to school after the closures were made without parent input and outside of the IEP team process. Student alleges that Student's distance learning plans were developed without parent input and offered as "take it or leave it" propositions.

Orcutt contends that it did not predetermine Student's supports and services. Orcutt asserts that Parent meaningfully participated in all IEPs during this time period. Orcutt contends that it provided Student with a transition to on-campus instruction in a manner that was safe for students and staff. Orcutt asserts it continued to provide the distance learning supports that were feasible and safe in light of the Covid-19 pandemic.

Orcutt asserts that Student has been making progress during the 2020-2021 school year and did not regress or suffer any learning loss during this period.

The IDEA requires school districts to ensure that the parents of disabled children are members of any group that makes decisions about their child's educational placement. (34 CFR § 300.327; 34 § CFR 300.501 subd. (c)(1) (2006).)

School districts may not unilaterally predetermine a child's special education and related services prior to an IEP team meeting. (*Deal v. Hamilton County Bd. of Educ.* (6th Cir. 2004) 392 F.3d 840, 858., cert. denied, 546 U.S. 936 (U.S. 2005).) School administrators and staff must enter the IEP team meeting with an open mind and must meaningfully consider the parents' input. (*H.B., et al. v. Las Virgenes Unified School Dist.* (9th Cir. 2007) 239 Fed. Appx. 342, 344; see also, *Ms. S. ex rel G. v. Vashon Island Sch. Dist.* (9th Cir. 2003) 337 F.3d 1115, 1131.)

A district may not arrive at an IEP team meeting with a "take it or leave it" offer. (*JG v. Douglas County School Dist.* (9th Cir. 2008), 552 F.3d 786, 801, fn. 10.) However, school officials do not predetermine an IEP simply by meeting to discuss a child's programming in advance of an IEP team meeting. (*N.L. v. Knox County Schs.* (6th Cir. 2003) 315 F.3d 688 at p. 693, fn. 3.)

A school district's predetermination of an IEP seriously infringes on parental participation in the IEP process, which constitutes a procedural denial of FAPE. (*Deal, supra*, 392 F.3d 840, 858.)

At the beginning of the 2019-2020 school year, Orcutt convened two IEP team meetings for Student on August 12 and 23, 2019. Student did not meet his burden of

proof that Orcutt predetermined his supports and services at the August 2019 IEP team meetings.

In April of 2020, Orcutt convened three additional IEP team meetings for Student on April 9, 23 and 29, 2020. The purpose of the April 2020 meetings was to review assessments and discuss Student's distance learning plan.

As mentioned above, at the April 9, 2020 IEP team meeting, Long presented a letter to Parent entitled "Amendment of Services and Supports During the Covid19 Pandemic." The letter states "the operable IEP is hereby amended as outlined below." Orcutt offered to provide Student with 150 minutes per week of specialized academic instruction, 30 minutes per month of occupational therapy, 30 minutes per month of speech therapy consultation, 15 minutes per week of direct, online speech therapy, 75 minutes per week of online support from an instructional aide, 30 minutes per week consultation from the school psychologist and behavior specialist, and 20 minutes per week of communication with Parent.

Prior to the April 9, 2020 IEP team meeting, during Orcutt's spring break, Long, Baczkiewicz, Espinoza, and Headrick decided upon Student's special education and related services for the spring of 2020 during school closures. Parent did not participate. Student's distance learning plan was not individualized, but rather was identical to the offers for other similar students in the school district. Long issued a directive to staff that students would receive 15 minutes per week of speech therapy on Zoom and 30 minutes per month of consultation, regardless of the services in their IEP. Long determined that Student would receive 150 minutes per week of specialized academic instruction because it seemed feasible and safe. She also determined



Student's minutes of direct services in the areas of behavior intervention services and aide support.

With respect to ESY, on June 11, 2020, Orcutt sent Parent a letter with Student's distance learning plan for ESY 2020. Long, Headrick, and Baczkiewicz developed the distance learning plan, which was a universal offer for all students in Orcutt. Student's distance learning plan for ESY 2020 was not based upon his individualized needs. The offer was developed outside of the IEP team process and without parent input or participation.

From the beginning of the 2020-2021 school through August 23, 2020, Orcutt continued to offer Student distance learning supports through the "Amendment of Services and Supports During the Covid19 Pandemic" read to Parent at the April 9, 2020 IEP team meeting. As discussed above, Orcutt predetermined this offer of placement and services in advance of the April 9, 2020, IEP team meeting without parent participation.

On August 24, 2020, Orcutt convened an IEP team meeting to discuss transitioning Student back to campus for in-person instruction. At the hearing, witnesses for Orcutt gave contradictory testimony regarding the decision-making process for Student's transition back to school. Long testified that the decision with respect to Student's time on campus was made by Espinoza and Headrick, based upon Student's behaviors. Espinoza initially testified that the decision was a collaborative effort by the Orcutt members of the IEP team. He subsequently changed his testimony to explain that the decision guiding Student's instructional minutes on campus was beyond his control and that he was following orders from Long. Headrick was the most credible witness on this topic. Headrick testified that Student's transition was not based

upon Student's behaviors, but rather by concerns over the Covid-19 pandemic. Headrick preferred a quick transition for Student to be back on campus full time but was overruled by Long.

On the witness stand, Long gave an impassioned explanation of her decision-making process to slowly ease students back to campus. Her responsibility to keep staff and students safe weighed on her. Long memorized county public orders and felt that bringing students back to campus was risky. Long was aware that Orcutt could not control community exposure and of the possibility of students bringing Covid-19 into classrooms. People were dying, and bringing students back to school could have "life altering, life ending" consequences. Long made the decision to prioritize safety. She believes this was the right decision.

Espinoza and Headrick both conceded that Parent was not involved in the decision as to how much time Student would spend on campus as he transitioned back. At the August 24, 2020, IEP team meeting Parent voiced her concerns over the transition and requested that Student attend campus on consecutive days so that he could better understand his schedule. The IEP team agreed. However, with this minor exception, Student's placement and services were determined in advance of the IEP team meeting by Orcutt without parent participation.

On September 28, 2020, Orcutt sent Parent a letter stating what Student's distance learning placement and services would be for the 2020-2021 school year. Orcutt offered Student 450 minutes per week of specialized academic instruction via video conferencing, as well as speech therapy and adapted physical education, delivered virtually. Orcutt offered to implement the services in Student's IEP "to the greatest extent practicable" through distance learning or a combination of in-person instruction

and distance learning. This offer was not individualized but was a blanket offer for all similarly disabled students, developed by Long and Espinoza. Long conceded that this offer to Student was developed outside of the IEP team process.

Parent's perception that Orcutt's offer of special education and related services during the school closures was a "take it or leave it" proposition was confirmed by testimony of Orcutt witnesses at the hearing. This procedural error denied Parent the ability to meaningfully participate in the IEP team process. The evidence overwhelmingly supported Student's argument that Orcutt denied Student a FAPE when it predetermined Student's supports and services during the 2019-2020 school year, from April 9, 2020 through the end of ESY 2020, and for the 2020-2021 school year, from August 12, 2020 through January 5, 2021. Accordingly, Student met his burden of proof on this issue.

#### ISSUE 1(C) AND 2(E): DISTANCE LEARNING SUPPORTS

Student contends that Parent informed Orcutt on numerous occasions that distance learning was not working for Student and requested in-person supports. Student argues that Orcutt could have provided in-person support from private providers or non-public agencies. Student further alleges that the lack of distance learning supports caused Student to regress.

Orcutt contends that it provided the distance learning supports that were feasible and safe in light of the Covid-19 pandemic. Orcutt argues that school staff worked harder than ever during this period. Orcutt asserts that Student did not regress or suffer any learning loss during this period.

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. (*Rowley, supra*, 458 U.S. 176, 201-204; *Endrew F., supra*, 137 S.Ct. 988, 1000.)

On March 13, 2020, Governor Newsom issued Executive Order N-26-20, requiring the California Department of Education and Health and Human Services Agency to jointly develop guidance ensuring that during the Covid-19 pandemic students with disabilities receive a FAPE consistent with their IEP and meeting other procedural safeguards under the IDEA and California law. On March 20, 2020, the California Department of Education, referred to as CDE, issued the mandated guidance, which it updated on April 9, 2020, and September 30, 2020.

In its March 20, 2020, guidance CDE reiterated that the federal government did not waive the federal requirements under the IDEA. If local educational agencies could provide the special education services in a student's IEP via distance learning, CDE encouraged them to do so. However, CDE provided that local educational agencies could also consider in-home service delivery, or meeting students on school sites or other locations to deliver services. The CDE guidance explained that even when school sites were closed, local educational agencies could provide classroom-based instruction to small groups of students with disabilities with extensive needs, or to maintain the mental and physical health and safety of students.

On April 9, 2020, CDE updated its March guidance. CDE clarified that local educational agencies were not precluded from providing in-person or in-home services in exceptional situations, to maintain the mental and physical health and safety of

students and to support distance learning. Some individuals serving students with disabilities were designated essential workers, including occupational therapists, speech pathologists, behavioral health workers, workers who support vulnerable populations to ensure their health and well-being, and workers supporting K-12 schools for the purposes of distance learning. State and federal orders and guidance all supported the concept that local educational agencies could and should consider in-person supports for students in exceptional circumstances.

Orcutt failed to provide Student with adequate distance learning supports from April 20, 2020, through January 5, 2021. This failure resulted in a denial of FAPE. The law does not explicitly state that disabled students are entitled to an adequate distance learning plan. Rather, at all relevant times, Student was entitled to a substantive FAPE. (*Rowley, supra*, 458 U.S. 176, 201-204; *Endrew F., supra*, 137 S.Ct. 988, 1000.) During distance learning, a local educational agency denies a child a substantive FAPE if it fails to provide special education and related services that allow the child to access specialized instruction and related services individually designed to provide educational benefit and reasonably calculated to enable a child to make progress. (*Ibid*)

Student's significant behavioral, attentional, and communication disabilities prevented him from receiving meaningful educational benefit from an online format during the time period at issue. The witnesses at the hearing were unanimous Student would have difficulty with distance learning. Espinoza did not have the right behavioral strategies to keep Student engaged on Zoom. Student did not respond well to new things, and Espinoza knew that distance learning would cause Student anxiety. He opined that two months was not enough time for Student to adjust to a new learning environment.

Headrick was similarly not surprised that Student had difficulties with online learning. Student had significant challenges generalizing behavior and would not be able to carry over the skills he learned in his special day classroom to his distance learning program at home. Headrick felt a home applied behavior analysis program could have helped Student with his behaviors in the home environment.

Online instruction exacerbated Student's behavior and attention problems. He understood that the teacher was not in the same room and that he could walk away. During online sessions Student punched his mother, banged on tables, made high pitched noises, slammed his hands on the desk, banged on his computer, eloped, and damaged computers and furniture. Headrick observed that Student did not work on academics in the Zoom sessions. Student leaned on his mother, walked away from the session, and paced. Headrick opined that Zoom sessions caused Student to have self-injurious and aggressive behaviors.

Parent shared her concerns about distance learning with Orcutt. Parent told Espinoza of Student's difficulties with online learning, as well as with completing the packets of worksheets. In Espinoza's view, providing packets of worksheets was the best they could do, even though it didn't work for Student. Parent relied on compensatory education funds from a previous settlement agreement to hire speech pathologist Kellie Henkel to provide some additional in-home therapy for Student between March 2020 and July 2020.

Parent reported that when prompted to engage in online distance learning Student kicked, hit, pinched, and bit her. He threw objects and kicked doors. Student hit and bit the computer screen, and himself. He attempted to crush electronics and pulled keys off his computer keyboard.

Parent attempted many strategies to keep Student at the computer for his online sessions. At times she restrained him, held his chair, put her legs over his, or positioned him between a wall and herself. These strategies all resulted in Student assaulting her.

For the 2020-2021 school year, Orcutt began transitioning Student back to campus, but did not provide Student with distance learning in his home. Orcutt failed to provide Student with any distance learning supports from August 12, 2020, through August 26, 2020, with the possible exception of a packet of worksheets Espinoza believes he may have dropped off at Student's home.

Orcutt convened an IEP team meeting on August 24, 2020, to discuss Student's return to in-person instruction on campus. Then, once Student began attending on campus instruction on August 26, 2020, Student's team did not consider implementing distance learning in Student's home. Espinoza and Baczkiewicz felt that distance learning had not been successful during the 2019-2020 school year and did not attempt any online instruction. Headrick believed that Parent had declined distance learning, although this was incorrect.

On September 28, 2020, Orcutt sent Parent a letter with his distance learning plan for the 2020-2021 school year. The letter explained that Student would receive his IEP services through either distance learning or a combination of in-person and distance learning. Orcutt convened IEP team meetings for Student on August 24, October 5, October 26, November 3, 2020 and November 16, 2020. However, the IEP team did not consider adding distance learning supports at any of the meetings.

Long decided that Orcutt special education students would not receive any in-person supports during distance learning at home. She was aware of CDE guidance allowing for in-person instruction from March 2020. However, given the emergency

health situation due to Covid-19 and the many uncertainties, Long made policy decisions that emphasized the safety of Orcutt staff. Long was concerned that Orcutt could not guarantee that families would use masks or socially distance. She believed her decision to err on the side of caution was in line with guidance from Santa Barbara County health officials and was supported by school nurses and district administrators. At hearing, Long stood by her decision.

Throughout the school closures due to Covid-19 Orcutt was required to provide Student with a FAPE. Although Orcutt's decision to pivot to a district-wide distance learning model was supported by state and federal law, it nonetheless was required to consider alternate supports, including in-person supports, in exceptional situations. Student qualified as one of the exceptional circumstances in which Orcutt was required to provide alternate supports to online instruction.

Orcutt's failure to provide adequate supports for distance learning caused a substantive denial of FAPE because Student could not access the services in his IEP without appropriate supports. During this time period Student regressed in the areas of academic stamina, as well as certain adaptive skills such as toileting. Student met his burden of proof that Orcutt denied Student a FAPE when it failed to provide Student with distance learning supports for the 2019-2020 school year and ESY, and the 2020-2021 school year, through January 5, 2021.

## ISSUE 2(D): PARENT'S REQUEST FOR INDEPENDENT EDUCATIONAL EVALUATIONS

Student contends that Orcutt failed to respond to Parent's request for IEEs for over six months.



Orcutt contends that it did not realize Parent requested IEEs until it received the amended complaint in this matter on January 5, 2021. Orcutt asserts it timely offered to provide IEEs after this point.

A parent has the right to obtain an independent educational evaluation if the parent disagrees with a district's assessment. (34 C.F.R. § 300.502 (2006); Ed. Code, § 56329, subd. (b).) If a parent requests an independent educational evaluation at public expense, the education agency must, without unnecessary delay, file a due process hearing request to demonstrate that its assessment is appropriate, or ensure that an independent educational evaluation is provided at public expense. (34 C.F.R., § 300.502(b)(2) (2006); see also Ed. Code, § 56329, subds. (b) &(c).) Neither the Code of Federal Regulations nor the Education Code specify how a parent is to communicate to the district parent's disagreement with the district's assessment.

The term "unnecessary delay" as used in 34 C.F.R. § 300.502(b)(2) is not defined in the regulations. It permits a reasonably flexible, though normally brief, period of time that could accommodate good faith discussions and negotiations between the parties over the need for, and arrangements for, an independent evaluation. (*Letter to Anonymous*, 56 IDELR 175 (OSEP 2010).) Some delay in the provision of an independent evaluation is reasonable if the school district and the parents are engaging in active communications, negotiations or other attempts to resolve the matter. (*J.P. v. Ripon Unified Sch. Dist.* (E.D. Cal. April 15, 2009) 2009 WL 1034993.) The determination of "unnecessary delay" is a fact-specific inquiry. (*See Pajaro Valley Unified Sch. Dist. v. J.S.* (N.D. Cal. Dec. 15, 2006, C06-0380 PVT) 2006 WL 3734289 (a delay of almost three months between parent's request for an independent evaluation and district's due process filing was unreasonable where district offered no explanation or justification for its delay).

On August 14, 2020, Parent sent Long a letter requesting Independent Educational Evaluations, referred to as IEEs, in the areas of psycho-educational and speech. Parent disagreed with Orcutt's assessments because she believed they were incomplete. On January 5, 2021, Parent filed an amended complaint in this matter raising the issue. Long reviewed her emails and discovered she had received Parent's request on August 14, 2020. On February 18, 2021, following a dispute resolution session between the parties, Orcutt sent Parent a letter offering to fund IEEs in the areas of psycho-educational and speech.

Orcutt unreasonably delayed its response to Parent's request for IEEs by waiting six months to respond. This procedural error denied Student a FAPE because it delayed assessment of him, and denied Parent the ability to exercise her rights under the IDEA. Student met his burden of proof that Orcutt denied Student a FAPE when it failed to timely respond to Parent's request for independent educational evaluations during the 2020-2021 school year, through January 5, 2021.

## ISSUE 2(F): ORCUTT'S OFFER OF FAPE

Student contends that Orcutt failed to make a clear offer of FAPE to Student for the 2020-2021 school year. During the hearing, Student asserted that Parent could not understand the portion of the IEP labeled "IEP Emergency Conditions Provision." Student also contends that the various distance learning plans were not clear to Parent. Because Student pled this issue only with respect to the 2020-2021 school year, only the time period from August 12, 2020, through January 5, 2021 is relevant to this issue.

Orcutt contends that it made a clear offer of FAPE in Student's IEPs for the 2020-2021 school year. Orcutt asserts that Parent had the opportunity to ask clarifying

questions about Student's IEPs. Orcutt asserts that the section on Student's IEP labeled "IEP Emergency Conditions Provision" complies with amendments to California state law under Senate Bill 98.

In *Union v. Smith* (9th Cir. 1994) 15 F.3d 1519, 1526, cert. denied (1994) 513 U.S. 965), the Ninth Circuit determined the importance of a specific written, offer of FAPE stating the requirement was not merely technical, and should be enforced rigorously. (*Union, supra*, 15 F.3d 1519, 1526.)

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 Sch. Dist.* (9th Cir. 2017) 858 F.3d 1189, 1197.) Insufficiently specific drafting renders the IEP a useless blueprint for enforcement. (*Id.* at p. 1199.)

The decision as to the frequency and duration of a related service is an IEP team decision that must be included in the school district's specific written offer of FAPE. (20 U.S.C. § 1414(d)(1)(A)(VII); see also 34 C.F.R. § 300.320(a)(7) (2006); Ed. Code, § 56345, subd. (a)(7).)

On June 29, 2020, Governor Newsom signed Senate Bill 98, which amended California Education Code section 56345 to add a requirement that IEPs must include a description of the means by which the IEP would be provided under emergency conditions. (Stats. 2020, ch. 24, § 66.) The description of the means by which the IEP would be provided under emergency conditions pursuant to Education Code, section 56345, subdivision (a)(9) is an element of the overall offer of FAPE. (*California Department of Education Special Education Guidance for Covid-19*, September 30, 2020.) Parents must be involved in the development of the emergency plan, and local educational agencies must obtain parental consent to implement the plan. (*Ibid.*)

Orcutt convened an IEP team meeting for Student on August 24, 2020. Orcutt included a new section to Student's IEP labeled "IEP Emergency Conditions Provision" which attempted to provide a description of the means by which the IEP would be provided under emergency conditions, referred to in this Decision as emergency plan. However, Student's emergency plan was confusing, filled with jargon and almost incomprehensible. The emergency plan did not clearly state the special education placement and services Student would receive in an emergency. The form states that a distance learning plan would be provided separately to Parent. Student's proposed distance learning plan was not included within or attached to Student's operant IEP for the 2020-2021 school year, which was Student's IEP of April 9, 2020.

Orcutt did not specify Student's placement and services under emergency conditions in the August 24, 2020, IEP because the district did not know what those would be. Long testified that at the time of the August 24, 2020, IEP team meeting there was no plan because they did not have the details figured out. Headrick also participated in the August 24, 2020, IEP team meeting. He did not understand the emergency plan. At hearing Headrick testified that the plan was not specific, and that he could not tell from the document how much specialized academic instruction, speech services, behavior supports, or accommodations Orcutt offered Student.

Orcutt subsequently convened IEP team meetings for Student on October 5, October 26, November 3, 2020 and November 16, 2020, but did not revise the emergency plan or attach Student's distance learning plan.

The emergency plan is an element of the overall FAPE offer, and as such must provide a specific, written offer of the special education placement and services a child will receive under emergency conditions when schools are closed for more than ten

days. (Ed. Code, § 56345, subd. (a)(9); California Department of Education Special Education Guidance for Covid-19, September 30, 2020; *Union v. Smith*, supra, 15 F.3d. 1519, 1526.) Without a clear and accurate written offer of placement, Parent could not understand “what placements were offered, and what additional educational assistance was offered to supplement a placement, if any.” (See *Union v. Smith*, supra, 15 F.3d. 1519, 1526.) The offer of the emergency plan was not sufficiently clear such that Parent could provide informed consent. (See Ed. Code, § 56021.1.) This procedural error prevented Parent from meaningfully participating in Student’s IEP process. Student met his burden of proof that Orcutt failed to make a clear offer of FAPE during the 2019-2020 school year, from August 24, 2020, through January 5, 2021. In conclusion, Orcutt failed to make a make a clear offer of FAPE during the 2020-2021 school year, through January 5, 2021, due to the impermissible vagueness of Student’s emergency plan under Education Code section 56345(a)(9).

## CONCLUSIONS AND PREVAILING PARTY

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

Issue 1(a): Orcutt Union School District denied Student a FAPE during the 2019-2020 school year and ESY by failing to implement Student’s IEP from April 20, 2020, through the end of ESY 2020. Student and Orcutt each partially prevailed on Issue 1(a).

Issue 1(b): Orcutt Union School District denied Student a FAPE during the 2019-2020 school year and ESY by failing to conduct an adequate triennial assessment. Student prevailed on Issue 1(b).

Issue 1(c): Orcutt Union School District denied Student a FAPE during the 2019-2020 school year and ESY by failing to offer adequate distance learning supports. Student prevailed on Issue 1(c).

Issue 1(d): Orcutt Union School District denied Student a FAPE during the 2019-2020 school year and ESY by failing to assess Student in all areas of suspected disability. Student prevailed on Issue 1(d).

Issue 1(e): Orcutt Union School District denied Student a FAPE during the 2019-2020 school year and ESY by predetermining Student's supports and services from April 9, 2020, through the end of ESY 2020. Student and Orcutt each partially prevailed on Issue 1(e).

Issue 2(a): Orcutt Union School District denied Student a FAPE during the 2020-2021 school year, through January 5, 2021, by failing to implement Student's IEP. Student prevailed on Issue 2(a).

Issue 2(b): Orcutt Union School District denied Student a FAPE during the 2020-2021 school year, through January 5, 2021, by failing to assess Student in all areas of suspected disability. Student prevailed on Issue 2(b).

Issue 2(c): Orcutt Union School District denied Student a FAPE during the 2020-2021 school year, through January 5, 2021, by predetermining Student's supports and services. Student prevailed on Issue 2(c).

Issue 2(d): Orcutt Union School District denied Student a FAPE during the 2020-2021 school year, through January 5, 2021, by failing to timely respond to parental request for IEEs. Student prevailed on Issue 2(d).

Issue 2(e): Orcutt Union School District denied Student a FAPE during the 2020-2021 school year, through January 5, 2021, by failing to offer adequate distance learning supports. Student prevailed on Issue 2(e).

Issue 2(f): Orcutt Union School District denied Student a FAPE during the 2020-2021 school year, through January 5, 2021, by failing to make a clear offer of FAPE. Student prevailed on Issue 2(f).

## REMEDY

Under federal and state law, courts have broad equitable powers to remedy the failure of a school district to provide FAPE to a disabled child. (20 U.S.C. § 1415(i)(1)(C)(iii); Ed. Code, § 56505, subd. (g); see *School Committee of the Town of Burlington, Massachusetts v. Dept. of Education* (1985) 471 U.S. 359, 369 [105 S.Ct. 1996, 85 L.Ed.2d 385] (*Burlington*).) This broad equitable authority extends to an Administrative Law Judge who hears and decides a special education administrative due process matter. (*Forest Grove School Dist. v. T.A.* (2009) 557 U.S. 230, 244, fn. 11 [129 S.Ct. 2484, 174 L.Ed.2d 168].)

In remedying a FAPE denial, the student is entitled to relief that is appropriate in light of the purposes of the IDEA. (20 U.S.C. § 1415(i)(2)(C)(iii); 34 C.F.R. § 300.516(c)(3) (2006).) The purpose of the IDEA is to provide students with disabilities a free appropriate public education which emphasizes special education and related services to meet their unique needs. (*Burlington, supra*, 471 U.S. 359, 374.) Appropriate relief

means relief designed to ensure that the student is appropriately educated within the meaning of the IDEA. (*Student W. v. Puyallup School Dist.* (9th Cir. 1994) 31 F.3d 1489, 1497 (*Puyallup*)). The award must be fact-specific and be reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place. (*Reid ex rel. Reid v. District of Columbia* (D.C. Cir. 2005) 401 F.3d 516, 524.)

An independent educational evaluation at public expense may be awarded as an equitable remedy, if necessary to grant appropriate relief to a party. (*Los Angeles Unified School Dist. v. D.L.* (C.D. Cal. 2008) 548 F.Supp.2d 815, 822-23.)

A school district also may be ordered to provide compensatory education or additional services to a student who has been denied a FAPE. (*Park, supra*, 464 F.3d at p. 1033.) Compensatory education is a prospective award of educational services designed to catch-up the student to where he should have been absent the denial of a FAPE. (*Brennan v. Regional School Dist. No. 1* (D.Conn. 2008) 531 F.Supp.2d 245, 265; *Orange Unified School Dist. v. C.K.* (C.D.Cal. June 4, 2012, No. SACV 11-1253 JVS(MLGx)) 2012 WL 2478389, \*12.) An award of compensatory education need not provide a day-for-day compensation. (*Puyallup, supra*, 31 F.3d 1489, 1496-1497.) The conduct of both parties must be reviewed and considered to determine whether equitable relief is appropriate. (*Id.* at p. 1496.)

Student is entitled to compensatory education for Orcutt's failure to implement Student's IEP from April 20, 2020, through January 5, 2021, and predetermination of Student's IEPs from April 9, 2020, through January 5, 2021. Student presented two expert witnesses on the topic of compensatory education. Kellie Henkel opined that Student should receive compensatory education equal to twice the amount of services



that he missed. However, Henkel was not a careful witness. When testifying, Henkel answered impulsively, often using exaggerated and hyperbolic language. For example, she testified that virtual instruction was “abusive” to Student, and that “absolutely, 100% he could never do” online instruction. Henkel also offered numerous opinions on matters outside of her expertise as a speech and language pathologist. As such, Henkel was not a highly credible witness and her testimony was given limited weight.

Dr. Ball opined that Student should receive compensatory education equal to the amount of services he missed. Dr. Ball was a highly credible witness, who answered in calm, precise terms. For the 2019-2020 school year, Orcutt failed to provide Student 161.5 hours of SAI, 3.5 hours of speech services, and 21 hours of behavioral services. For ESY 2020, Orcutt failed to provide Student 50 hours of SAI, 4 hours of speech services, and 6 hours of behavioral services. For the 2020-2021 school year, through January 5, 2021, Orcutt failed to provide Student 337 hours of SAI, 5.5 hours of speech services, and 54 hours of behavioral services. In total, Orcutt failed to provide Student with 642.5 hours of special education and related services during the time period at issue.

Several factors warrant consideration with respect to the award of compensatory education hours. Compensatory education is meant to catch-up the student to where the student should have been absent the denial of a FAPE. The evidence demonstrated Student only suffered minor regression, and once Student returned to campus on August 26, 2020, he made educational progress. Additionally, the conduct of both parties must be reviewed and considered to determine equitable relief. Some Orcutt staff, especially Espinoza, made dedicated, good faith attempts to provide Student with an appropriate education during the school closures related to the Covid-19 pandemic. School staff were trying their best in the face of difficult circumstances beyond their

control. Due to Student's limited regression and equitable factors, the total number of hours of educational services awarded will amount to two-thirds of the hours of educational services missed. Accordingly, Student is awarded 428 hours of compensatory education to be used in any educationally-related area of Parent's choice, by a certified non-public agency of Parent's choice.

Orcutt denied Student a FAPE by failing to conduct an adequate triennial assessment, failing to assess Student in all areas of suspected disability, and failing to timely respond to Parent's request for IEEs. Dr. Ball provided persuasive testimony as to the areas in which Student required assessment. He also opined that Student required a functional behavior assessment in his home environment to support distance learning. Orcutt does not have a firm plan for when Student will return to campus full-time, and anticipates providing some online instruction to Student through the 2020-2021 school year. Student is awarded independent educational evaluations in the areas of psycho-educational, speech, and AAC. Student is also awarded a functional behavior assessment in the home environment during distance learning, by a private provider of Parent's choice.

Orcutt denied Student a FAPE by failing to provide adequate distance learning supports. The evidence overwhelming demonstrated that Student required in-person support while distance learning in the home environment. Orcutt also failed to make a specific written offer of FAPE in Student's operant IEP for the 2020-2021 school year, which was Student's IEP of April 9, 2020, with respect to the emergency plan. As a remedy, Orcutt is ordered to convene an IEP team meeting within 30 days of this Decision to amend Student's operant IEP, which is Student's IEP of April 9, 2020, with a specific written offer of FAPE with respect to emergency conditions under Education Code section 56345, subdivision (a)(9), which shall include in-person supports in the

home environment for the entire duration of Student's school day when he is expected to be distance learning.

## ORDER

1. Within 30 days of being notified of Parent's selection, Orcutt shall contract with a certified non-public agency of Parent's choice to provide 428 hours of compensatory education to be used in any educationally-related area of Parent's choice. Parent may choose more than one certified non-public agency to provide the compensatory education. Any compensatory education services not used by December 31, 2023, shall be forfeited by Student.
2. Parent shall select independent educational evaluation providers, within Orcutt's SELPA criteria, to conduct assessments in the areas of psycho-educational functioning, speech, AAC, and a functional behavior assessment within Student's home learning environment, which shall also include time for the independent assessor to present their assessment results at an IEP team meeting. Within 30 days of being notified by Parent of the selected independent assessors, Orcutt shall contract with the independent assessors.
3. Within 30 days of this Decision, Orcutt shall convene an IEP team meeting for Student to amend Student's operant IEP, which is Student's IEP of April 9, 2020, with a specific written offer of FAPE with respect to emergency conditions under Education Code section 56345, subdivision (a)(9), which shall include in-person supports in the home environment for the entire duration of Student's school day when he is expected to be distance learning.
4. All other requests for relief are denied.

## RIGHT TO APPEAL THIS DECISION

This is a final administrative decision, and all parties are bound by it. Pursuant to Education Code section 56505, subdivision (k), any party may appeal this Decision to a court of competent jurisdiction within 90 days of receipt.

Cararea Lucier  
Administrative Law Judge  
Office of Administrative Hearings