

BEFORE THE  
OFFICE OF ADMINISTRATIVE HEARINGS  
STATE OF CALIFORNIA

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CASE NO. 2022070237  
CASE NO. 2022060890

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IN THE CONSOLIDATED MATTERS INVOLVING

PARENT ON BEHALF OF STUDENT, AND  
MODESTO CITY SCHOOLS.

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## DECISION

October 17, 2022

On June 29, 2022, the Office of Administrative Hearings, called OAH, received a due process hearing request from Modesto City Schools, naming Student. On July 8, 2022, OAH received a due process hearing request from Parent on behalf of Student, naming Modesto City Schools District. The correct name for the school district is Modesto City Schools, which will be called Modesto in this decision. Student's case and Modesto's case were consolidated for hearing by Order dated July 15, 2022.

Administrative Law Judge Alexa Hohensee heard these consolidated cases by videoconference on August 30 and 31, and September 1, 2, 6, 7 and 8, 2022. Student

initially requested that the hearing be open to the public, but on September 2, 2022, requested that the hearing be closed to the public. Based on circumstances stated on the record, the hearing was ordered closed, retroactive to August 30, 2022.

Sheila Bayne, Lynda Williams, and Robert Burgermeister, attorneys at law, represented Student. Parent attended all hearing days on Student's behalf. Marcy Gutierrez and Tilman Heyer, attorneys at law, represented Modesto. Christi Allen, Senior Director of Modesto's Special Education Local Plan Area and Special Education for Modesto, attended all hearing days on Modesto's behalf.

At the parties' request the matter was continued to September 30, 2022, for written closing briefs. The record was closed, and the matter was submitted on September 30, 2022.

## ISSUES

In Student's closing brief, Student withdrew the reference to adapted physical education from Issues 7 and 8 as stated in the Order Following Prehearing Conference for Hearing by Videoconference, dated August 22, 2022. Student's Issues 7 and 8 have been rephrased accordingly. A FAPE means a free appropriate public education. An IEP means an individualized education program.

## STUDENT'S ISSUES

1. Did Modesto deny Student a FAPE by providing distance learning instead of in-person services from July 8, 2020 through the end of the 2019-2020 school year, and the 2020-2021 school year?

2. Did Modesto deny Student a FAPE by providing distance learning without necessary accommodations from July 8, 2020 through the end of the 2019-2020 school year, and the 2020-2021 school year?
3. Did Modesto deny Student a FAPE by failing to assess Student to determine if distance learning was appropriate for Student from July 8, 2020 through the end of the 2019-2020 school year, and the 2020-2021 school year?
4. Did Modesto deny Student a FAPE in the February 17, 2021 IEP by failing to include adequate goals for Student to receive educational benefit, particularly academic, social emotional, social skills, work habits, and vocation?
5. Did Modesto deny Student a FAPE by failing to address regression suffered by Student as a result of distance learning from July 8, 2020 through the end of the 2019-2020 school year, and the 2020-2021 school year?
6. Did Modesto deny Student a FAPE by failing to offer Student extended school year in Summer 2021?
7. Did Modesto deny Student a FAPE by failing to offer sufficient related services in Student's February 17, 2021 IEP, specifically in occupational therapy and speech and language?
8. Did Modesto deny Student a FAPE by failing to offer sufficient related services in Student's February 2, 2022 IEP, specifically in counseling and speech and language?
9. Did Modesto deny Student a FAPE by not finding him eligible for special education under the category of autism, from July 8, 2020 through the filing of Student's complaint?

10. Did Modesto deny Student a FAPE by failing to offer in-home applied behavior analysis therapy and clinic meetings for the 2021-2022 school year?
11. Did Modesto deny Student a FAPE by denying Parent's requests after the February 9, 2022 and May 26, 2022 IEP team meetings for:
  - a. placement in a residential treatment program in a State facility of Parent's choice,
  - b. an explanation of alleged violations of the Health Insurance Portability and Accountability Act,
  - c. completed documentation regarding a discipline report and for failing to report threats to other students,
  - d. a threat assessment of Student and a safety plan,
  - e. an independent psychoeducational evaluation, and
  - f. development of a plan to transition Student from one location to another location for extended school year?

## MODESTO'S ISSUE

12. May Modesto assess Student pursuant to the June 9, 2022 assessment plan, and will that assessment constitute an independent educational evaluation?

## 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 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] (*Schaffer*); and 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 Modesto had the burden of proof on Modesto's issue. The factual statements in this Decision constitute the written findings of fact required by the IDEA and state law. (20 U.S.C. § 1415(h)(4); Ed. Code, § 56505, subd. (e)(5).)

Student was 14 years old and in ninth grade at the time of the hearing. Student resided within Modesto's geographic boundaries at all relevant times. Student was

diagnosed with autism spectrum disorder, attention deficit hyperactivity disorder also called ADHD, mood dysregulation disorder, generalized anxiety disorder and depressive episodes. Student was eligible for special education under the categories of other health impairment and specific learning disability.

ISSUE 1: DID MODESTO DENY STUDENT A FAPE BY PROVIDING DISTANCE LEARNING INSTEAD OF IN-PERSON SERVICES FROM JULY 8, 2020 THROUGH THE END OF THE 2019-2020 SCHOOL YEAR, AND THE 2020-2021 SCHOOL YEAR?

Student contends that after he was assigned to distance learning in March 2020, Modesto did not provide the services required in Student's IEP. Modesto contends it provided all IEP services in a distance learning format.

A FAPE means special education and related services that are available to an eligible child that meets state educational standards at no charge to the parent or guardian. (20 U.S.C. § 1401(9); 34 C.F.R. § 300.17.) Parents and school personnel develop an IEP for an eligible student based upon state law and the IDEA. (20 U.S.C. §§ 1401(14), 1414(d)(1); and see Ed. Code, §§ 56031, 56032, 56341, 56345, subd. (a) and 56363 subd. (a); 34 C.F.R. §§ 300.320, 300.321, and 300.501.)

In general, a child eligible for special education must be provided access to specialized instruction and related services which are individually designed to provide educational benefit through an IEP reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances. (*Board of Education of the Hendrick Hudson Central School Dist. v. Rowley* (1982) 458 U.S. 176, 201-204; *Endrew F. v. Douglas County School Dist. RE-1* (2017) 580 U.S. 386 [137 S.Ct. 988, 1000].)

## STATUTE OF LIMITATIONS BARS CLAIMS FOR 2019-2020 SCHOOL YEAR

Student's case was filed on July 8, 2022. The two-year statute of limitations for claims under the IDEA and State special education bars claims before July 8, 2020, which encompasses the entire 2019-2020 school year.

Since 2004, the IDEA has had a two-year statute of limitations period. (20 U.S.C. §§ 1415(b)(6)(B) and 1415(f)(3)(C).) The IDEA permits states to adopt their own statute of limitations, and California has done so. In California, a request for a due process hearing must be filed within two years from the date the person requesting due process knew or had reason to know of the facts underlying the basis for the request. (Ed. Code section 56505, subd. (l).)

California law provides that a special education claim accrues when a parent learns of the injury that is a basis for the action, that is, when the parent knows that the education provided is inadequate, not when the claim actually occurred. (*M.M. & E.M. v. Lafayette School Dist.* (N.D. Cal., Feb. 7, 2012 Nos. CV 09– 4624, 10–04223 SI) 2012 WL 398773, \*\* 17 – 19 (*M.M.*), *affd.* in part and *revd.* in part on other grounds by *M.M. v. Lafayette School Dist., et al* (9th Cir. 2014) 767 F.3d 842, 859.) The knowledge of facts requirement does not demand that the person bringing a claim know the specific legal theory or even the specific facts of the relevant claim. Rather, that person must have known or reasonably should have known the facts underlying the supposed learning disability and their IDEA rights. (*Miller v. San Mateo-Foster City Unified School Dist.* (N.D. Cal. 2004) 318 F.Supp.2d 851, 861 (*Miller*), citing *Jolly v. Eli Lilly & Co.* (1988) 44 Cal.3d 1103, 1111); *Ashlee R. ex rel. Russell v. Oakland Unified School Dist. Financing Corp.* (N.D. Cal., Aug. 23, 2004, No. C 03-5802 MEJ) 2004 WL 1878214, \*5 (*Ashlee*.)

Congress intended to obtain timely and appropriate education for children with special needs. Congress did not intend to authorize the filing of special education claims many years after the alleged wrongdoing occurred. (*Alexopoulos v. San Francisco Unified School Dist.* (9th Cir. 1987) 817 F.2d 551, 556.) In special education disputes, California has interpreted the statute of limitation to begin to run when parents know the education is inadequate, not when parents knew that inadequacy was a legal claim. (*Miller, supra*, 318 F.Supp.2d at p. 861; *Ashlee, supra*, 2004 WL 1878214, at \*5.)

Title 20 United States Code section 1415(f)(3)(D) and Education Code section 56505, subdivision (l), establish exceptions to the statute of limitations in cases in which the parent was prevented from filing a request for due process due to specific misrepresentations by the local educational agency that it had resolved the problem forming the basis of the complaint, or the local educational agency's withholding of information from the parent that was required under particular special education law to be provided to the parent.

Here, Student did not allege, and the facts did not establish, that any exception to the statute of limitations applied. Parent assisted Student with his schoolwork daily at home after California ordered schools closed in March 2020 in response to the COVID-19 pandemic and Modesto switched to online virtual classes, called distance learning. Parent was contemporaneously aware of Student's academic struggles, and of the nature and extent of the distance learning program provided by Modesto in the 2019-2020 school year. Although Modesto's 2019-2020 regular school calendar was not admitted into evidence, district witnesses testified that the 2019-2020 school year ended in May 2020. Any claim regarding the inadequacies in Student's distance learning program during the 2019-2020 school year would had to have been filed by May 2022.



Accordingly, Student's claims filed on July 8, 2022, regarding the adequacy of the 2019-2020 distance learning program, or actions Modesto should have taken about Student's access to distance learning for that school year, are barred by the two-year statute of limitations.

## 2020-2021 SCHOOL YEAR

Modesto began the 2020-2021 school year with all students on distance learning. Classes took place live online for 80 minutes each, for six-hours per day. Three periods took place on Mondays and Thursdays, and two on Tuesdays and Fridays. On Wednesdays, all five class periods were each 25 minutes long.

The IEP in effect for Student at the beginning of the 2020-2021 school year was not moved into evidence. The first IEP in evidence was dated February 17, 2021. Accordingly, the analysis of Issue 1 will begin with the question of whether Modesto provided Student with the services offered in the February 17, 2021 IEP, from February 17, 2021 through the remainder of the 2020-2021 school year.

At hearing, Parent testified that generally she, not Student, attended online classes during the 2020-2021 school year, a situation Student contends was enabled by the lack of in-person schooling. In the home, Parent assisted Student and Student's sibling in preschool, and Grandmother assisted Student's elementary school sibling. If Student became frustrated, Parent gave him a break. Parent described Student as frustrated all of the time and logged out of class more often than he was logged into class. Parent testified that when Student was off camera, she would be the person participating in class through the written online chat feature.

Parent's testimony conflicted with contemporaneous reports by Student's teachers in Fall 2020 that Student was on camera and enthusiastic, conscientious, and very engaged in class. Student's teachers described Student as needing help with peer conflict, sometimes dominating class discussions, interrupting, not handling criticism well, needing breaks, and needing frequent assistance, indicating that Student was often on camera interacting with peers and teachers.

Blake Mynear, Student's resource specialist during the 2020-2021 and 2021-2022 school years, testified credibly with excellent recall of Student. Mynear, a credentialed special education teacher with 10 years of teaching experience, provided Student with specialized academic instruction for two periods a day during distance learning in the 2020-2021 school year. Mynear attended Student's seventh grade math and English language arts classes and provided a separate online link to assist Student during those classes. These were called push-in services. During in-class assignments, Student could get one-to-one assistance from Mynear or Mynear's paraprofessional.

Student attended all general education classes except for one period of specialized academic instruction with Mynear for additional assistance with math and English language arts. Mynear worked with Student for a total of 160 minutes per day, four days per week during distance learning. Mynear was also Student's case manager and consulted with Student's general education teachers to modify Student's curriculum. His opinions on Student's educational needs, and the educational program components that would meet those needs, were persuasive and given considerable weight.

Student appeared frequently on camera and was almost always eager to participate. Student asked questions, entered into discussions, and joked with other

students. If Student turned off his camera, Student continued to participate appropriately in the online written chat feature. Myneer opined that Student turning off the camera to take a break when frustrated demonstrated good use of a learned coping strategy for appropriately dealing with that frustration. Student, sensitive to other students disagreeing with or criticizing his statements, went off camera as an appropriate way to step back from the situation rather than arguing, yelling, or engaging in other inappropriate behavior. Parent often contacted Myneer through the school's online parent/teacher message system to clarify class information or to ask about Student's progress, but he never saw her on camera helping Student.

Christopher Dempsey, Student's seventh grade general education English language arts teacher in 2020-2021, testified credibly at hearing with good recall of Student's participation in online classes. Student appeared on camera more than most students, seemed to work fine on his own, and turned in more work than others and faster. When on camera, Student answered questions promptly, asked relevant questions, and asked for clarification or help when needed. Dempsey permitted his students to repeat online assignments and assessments up to three times and could see how many times an assignment was done. Student often did assignments multiple times and placed in the top 25 percent of the class. Student sometimes acted silly, and once turned his camera to show the class that his puppy and kitten were cuddling together. Student wanted affirmation and enjoyed positive attention. Dempsey never saw Parent on camera with Student, and in light of Student's active participation and readiness to ask for help when needed, had no reason to suspect that anyone else completed Student's work.

Parent did not tell anyone at Modesto that she completed Student's academic work. In light of consistently favorable teacher comments concerning Student's

understanding and participation in online classes, the fact that no other witness saw Parent helping Student on screen, and Parent's failure to assert until the due process hearing that she did Student's work, Parent's testimony that she did Student's classwork and wrote on the chat feature when Student went off camera was not credible. Although Parent certainly helped Student, as most parents did during distance learning, Parent did not pretend to be Student when he went off camera and did not complete class assignments on Student's behalf.

In November 2020, with Parent's consent, Modesto started a multidisciplinary assessment of Student in preparation for a three-year review of Student's educational program. In addition to testing Student's cognitive abilities, academic achievement, and social emotional and behavioral functioning, the assessors sought to determine which, if any, special education eligibility categories applied to Student. Student had been diagnosed with autism in November 2018, after his last triennial assessment.

In general, Student was cheerful and cooperative during distance learning. Student had friends in his classes, and generally got along with other students despite being somewhat socially awkward, usually by talking too much or giving too much personal information. Student was often distracted in class, particularly when he wanted to share or participate out of turn, but was easily redirected by his teachers. Student liked to tell stories and often greatly exaggerated. Student had a reputation for telling unbelievable stories, sometimes characterized as lying. For example, Student told people that his two-year old sibling was his child, and that he caught giant fish when he went fishing at the local lake. Student was well liked by his peers and school staff.

The multidisciplinary assessment showed that Student had low average cognitive ability. He had good verbal comprehension skills but had weak information processing

skills that impacted his ability to learn, problem solve and do higher order reasoning, sometimes called executive functioning. Student's information processing speed was in the very low range, and Student needed time to understand class materials and to articulate questions and responses. His auditory processing and listening skills, likely impacted by his ADHD, were low to very low. Student also had weak visual motor integration skills that made copying tasks difficult.

Academically, Student scored low average in some math problem solving skills, and low for oral expression, listening comprehension, written expression, and basic reading skills. He tested very low for reading comprehension, reading fluency and math calculation skills, not unexpected in light of his very low processing skills. Student had earned A's in sixth grade on a curriculum modified by a credentialed special education teacher. When the triennial assessment was completed in Fall 2020, Student did well with a modified seventh grade curriculum, although he tested below grade level on standard timed tests.

Socially and emotionally, Student was friendly, talkative, and highly motivated by reinforcers and positive attention. However, Student was often off-topic and struggled to remain quiet in the classroom. Student's behavior, as rated by Parent, included problems with hyperactivity, anger control, and higher order thinking or problem solving. His teachers reported fewer concerns, although they noted that Student had low frustration tolerance and anger management control issues when he perceived criticism, which he handled well by taking breaks. Student's struggles with inattention, hyperactivity, and solving social problems were consistent with his dual diagnoses of ADHD and autism. Student was diagnosed with general anxiety, and could be moody and emotional. Student told one assessor that he was anxious about school, and particularly about testing.

## FEBRUARY 17, 2021 IEP TEAM MEETING

Modesto convened a virtual IEP team meeting for Student's three-year review on February 17, 2021. The meeting was attended by Parent, Student, Dempsey, Mynear, and district staff who were excused by Parent after giving their reports. Toni Patterson, the school psychologist who had completed Student's triennial testing and observed Student online, presented the results of the multidisciplinary assessment, except for the academic achievement portion, which was conducted and presented by Mynear.

English language arts teacher Dempsey told the IEP team that Student was earning an A+, good at getting his work done, and turning in all assignments. Student needed the accommodations in Student's IEP, such as audio support for reading, re-taking assessments or redoing assignments, but actively participated in class and interacted well with the other students.

Patterson described her observation in Dempsey's online class. Student logged in early and engaged in a back and forth conversation with Dempsey about their respective days. Student appropriately turned off his microphone during instruction and turned it on to answer or ask questions. Student made comments appropriate to the lesson in the chat feature, and occasionally turned off his camera. Student was highly distracted when he wanted to share with the class but was easily redirected by Dempsey. During her entire assessment, Patterson did three in-person sessions of testing with Student and observed Student in his classes for an additional hour and a half.

At hearing, Patterson answered all questions thoroughly and in an informative manner. She was a highly qualified and credentialed school psychologist, with multiple

professional certifications and 14 years of experience assessing students for special education in all eligibility categories, including autism. Despite Student attending school online during the assessment, Patterson was able to administer all the tests she typically would and established a good rapport with Student. She observed Student for a total of over four hours, and received good feedback from Student's teachers and Parents on the attention, social emotional, and behavior ratings scales. Patterson was a very persuasive witness, and her testimony was given substantial weight.

Academically, Student was doing well and getting good grades. It was not atypical for students with specific learning disabilities to score below standard on standardized and timed tests, and some of Student's standardized assessment scores in math and English language arts were lower than in a 2018 assessment. Patterson opined that Student's scores in 2021 were impacted by his test anxiety and rushing through the answers, and she gave more weight to Student's performance in class and on assignments. Patterson noted that Student had deficits in math and English language arts that interfered with his access to the curriculum, and that Student needed accommodations to account for his slow processing speeds. Mother reported that Student had difficulty writing multiple paragraphs and trouble taking notes, and Patterson recommended to the IEP team that Student receive notes from teachers or have assistance with note taking.

Socially, Student had friends at school, and particularly enjoyed playing basketball and other sports with his peers during physical education and recess, as Student was very athletic. Student was empathetic to others who might feel left out of activities, and he made efforts to include them. Student was socially awkward, but generally interacted appropriately with his peers in class and on the playground.

Emotionally, Parent told the team that Student had meltdowns if he ate sugar and it increased problem behaviors. Student's teachers reported that Student had a low frustration tolerance, which he managed with learned coping skills. For example, if Student became frustrated during distance learning, he could turn off the camera and participate in the chat feature. During in-person classes Student could put his head down for a while or ask for a break. Student displayed good self-management skills by stepping back when frustrated instead of acting inappropriately.

Student often engaged in inattentive and hyperactive behavior. Student's teachers helped regulate his behaviors through points and rewards, which were highly motivating for him. Student demonstrated awareness of what made him frustrated or anxious, and generally used appropriate coping strategies and advocated for himself rather than engaging in inappropriate behavior. Based on observations and autism rating scales, Student had self-regulation challenges as well as some social communication deficits, consistent with his diagnosis of autism spectrum disorder.

The IEP team found that Student continued to be eligible for special education under the category of other health impairment, due to his diagnoses resulting in hyperactivity, attention problems, anxiety, and self-regulation deficits. It also found him eligible as having a specific learning disability, due to the discrepancy between his math ability and calculation skills resulting from his processing and visual motor deficits. The team did not dispute Student's diagnosis of autism spectrum disorder but did not find Student eligible under the category of autism because Student's autism characteristics, such as occasional social awkwardness and need to regulate behaviors did not adversely impact Student's educational performance.



The IEP team reviewed Student's present levels of performance. Student had good grades and met his annual goals for reading comprehension, decoding and word recognition, editing his writing, and multiplication and fractions. Student made progress on but did not meet his goals for paragraph writing and multiplying multi-digit numbers. The team identified continuing needs in math and writing, and adopted four annual goals in

- multiplication fluency,
- understanding positive and negative numbers,
- writing informative or explanatory paragraphs, and
- writing conclusions.

Patterson did not recommend goals in behavior or social emotional functioning, as accommodations would address Student's behavior, and Student already appropriately and effectively used coping skills.

Patterson discussed services for anxiety with the team. Patterson recommended that Student access the school's Student Assistance Specialist, a general education service available to all students. This specialist provided one-to-one help with problem solving, taught students how to cope with school situations, and enforced strategies like taking a break or going to an adult. Parent indicated that Student was seeing a private psychiatrist and therapist and she did not want Student to receive additional counseling services, but agreed Student could access the Student Assistance Specialist. Student commented that he found school sometimes boring but he felt safe there, and then left the meeting to return to class.

Based on Patterson's recommendations and team discussions, the IEP team adopted program accommodations, including

- shortened assignments,
- extended time to complete assignments or tests,
- modified curriculum,
- separate settings for tests,
- tests read aloud,
- frequent breaks,
- notes and outlines provided for general education classes,
- an accessible multiplication table,
- calculation devices,
- positive reinforcement for social and academic achievement,
- preferential seating, and
- the use of notes on tests.

The special education and services determined by the team and offered by the February 17, 2021 IEP included two periods, or 470 minutes per week, of specialized academic instruction in the form of push-in services for Student's general education math and English language arts classes, and one period, or 235 minutes, of a resource specialist class for help in English language arts. This meant that Student would be in the general education setting for most of his day, but outside of general education for one period per day of resource support. The February 17, 2021 IEP offered placement in the general education program at Student's home school junior high. Student was not offered 2021 extended school year. Parent consented to the IEP on February 17, 2021.

Modesto students returned to in-person classes on the junior high campus in March 2021. Until then, Mynear provided push-in services for distance learning by attending Student's math and English language arts classes and having a separate link that Student could access for Mynear or his paraprofessional during class time set aside for classwork. Student frequently chose not to access Mynear's separate link, but it was available to Student throughout distance learning.

In addition, for one period per day, Student attended Mynear's resource class for support with a low student-to-adult ratio. Mynear's resource class contained 12 to 15 students, compared to 25 to 30 students in a general education class. Mynear provided specialized academic instruction assisted by Mynear's paraprofessional. Student received support in English language arts, whether it be reading assignments or writing, and received one-to-one instruction as necessary.

After students were permitted to return to Modesto schools in-person, Student continued to attend school for another two weeks through distance learning, while Modesto processed Parent's request for a mask exemption because Student could not tolerate a mask. However, Student switched from wearing a face shield to wearing a mask like other students soon after his return to in-person junior high school.

Also like many students at the end of the 2020-2021 school year, Student took advantage of strict COVID-19 protocols that required Modesto schools to send students home if they reported COVID-19 symptoms, such as a cough, runny nose, or feeling unwell. Student reported symptoms several times and was sent home to attend school virtually during the mandatory quarantine periods. These restrictions eased as the school year progressed, and Student subsequently had excellent in-person attendance. Student also had good online attendance while at home with alleged COVID symptoms.

The evidence established that Student made appropriate progress in light of his circumstances during distance learning in the 2020-2021 school year. Student earned straight A's in all his classes in the Fall 2020 semester, and As and Bs with one C after Student's return to in-person learning for the Spring semester. Student was

- hard working,
- eager to learn,
- could work independently,
- completed extra activities, and
- was enthusiastic, conscientious and engaged in class.

By the time of the February 17, 2021 IEP team meeting, one month before the end of distance learning, Student had met or made significant progress on all of his goals.

Student did not meet his burden of proving by a preponderance of the evidence that Modesto denied Student a FAPE by providing distance learning instead of in-person services from July 8, 2020 through the end of the 2019-2020 school year, and the 2020-2021 school year.

**ISSUE 2: DID MODESTO DENY STUDENT A FAPE BY PROVIDING DISTANCE LEARNING WITHOUT NECESSARY ACCOMMODATIONS FROM JULY 8, 2020 THROUGH THE END OF THE 2019-2020 SCHOOL YEAR, AND THE 2020-2021 SCHOOL YEAR?**

Student contends that when distance learning occurred, Modesto made no attempt to replicate the placement that existed prior to distance learning. Student also contends that he did not have the accommodations necessary to receive educational

benefit. Modesto contends it did duplicate Student's in-person program to the extent possible under pandemic distance learning conditions, and that Student did make educational progress.

As discussed earlier in Issue 1, Student's claims arising in the 2019-2020 school year are time-barred. In addition, as Student did not move into evidence the IEP existing prior to the February 17, 2021 IEP. Student cannot prevail on Issue 2 as to any alleged failure to implement the instruction, services, or accommodations required prior to Parent's consent to the February 17, 2021 IEP.

Also as discussed in Issue 2, after school closures due to the COVID-19 pandemic, Modesto provided live virtual classes for the same number of class minutes per week as before closure, although on a block schedule. Modesto duplicated through distance learning all portions of Student's general education program, and the frequency and duration of the specialized academic instruction required by the February 17, 2021 IEP.

Although the accommodations called for in Student's then-effective IEP are unknown, the general education teacher present at the February 17, 2021 IEP reported that Student took advantage of the accommodations available, including audio support when reading, retaking assessments or re-doing assignments when needed, and was earning an A+ in English language arts. Student was on a modified curriculum due to processing delays and attention deficits but was making anticipated progress towards achieving his annual goals and participating effectively in grade-level classes. Clearly, the accommodations Modesto provided prior to February 17, 2021 were sufficient for Student to make educational progress appropriate in light of his circumstances.

During the period of distance learning from February 17, 2021 to the return to in-person learning in March 2021, Student received all of the accommodations in the

February 17, 2021 IEP. In consultation with Mynear, Student's teachers allowed Student shortened assignments, extended time to complete assignments or tests, and provided a modified curriculum. Student could take tests separately or at home, read aloud by Mynear or his paraprofessional, or by Parent. During distance learning Student could, and did, take frequent breaks. These breaks were a learned coping strategy for frustration, being overcome by an emotion such as anger at criticism, or the need for a movement break to control hyperactivity. Student had

- access to notes and outlines for his general education classes,
- access to a multiplication table and calculation devices, and
- was permitted to use notes during tests.

Student's teachers and Mynear used positive reinforcement for appropriate social skills and academic achievement. Preferential seating was the only unnecessary accommodation during distance learning, as Student could focus the screen on his teacher and turn up the volume, allowing him to see and hear instruction without distraction.

The evidence did not establish that there were any educational program components, including accommodations or any other service, that Student required to make educational progress but did not receive during distance learning from February 17, 2021 through his return to in-person classes in March 2021.

Student did not meet his burden of proving by a preponderance of the evidence that Modesto denied Student a FAPE by providing distance learning without necessary accommodations from July 8, 2020 through the end of the 2020-2021 school year.

ISSUE 3: DID MODESTO DENY STUDENT A FAPE BY FAILING TO ASSESS STUDENT TO DETERMINE IF DISTANCE LEARNING WAS APPROPRIATE FOR STUDENT FROM JULY 8, 2020 THROUGH THE END OF THE 2019-2020 SCHOOL YEAR, AND THE 2020-2021 SCHOOL YEAR?

Student contends that he was struggling in school before the change to distance learning, and because it was foreseeable that Student would struggle during distance learning, Modesto should have reassessed him to determine if he required additional accommodations during distance learning to make educational progress. Modesto contends that Student was making good progress in school, and further assessment was not required.

As discussed earlier in Issue 1, Student's claims arising in the 2019-2020 school year are time-barred. The IEP existing prior to the February 17, 2021 IEP was not in evidence, and Student cannot prevail on Issue 3 as to any alleged inadequacy of that IEP. The surviving portion of Issue 3 is whether Modesto should have assessed Student during distance learning in the 2020-2021 school year to determine if distance learning was appropriate.

After a student is assessed and found eligible for special education, the IDEA requires reevaluations to be conducted not more frequently than once a year unless the parent and school district agree otherwise, but at least once every three years unless the parent and school district agree that a reevaluation is not necessary. (20 U.S.C. § 1414(a)(2)(B); 34 C.F.R. § 300.303(b); Ed. Code, § 56381, subd. (a)(2).) California law refers to reassessments rather than reevaluations, but they mean the same thing. In California, a reassessment must be conducted if the school district determines that the

educational or related service needs, including improved academic achievement and functional performance, of the pupil warrant a reassessment, or if the pupil's parents or teacher requests a reassessment. (20 U.S.C. § 1414(a)(2)(A)(i); 34 C.F.R. § 300.303(a)(1); Ed. Code, § 56381, subd. (a)(1).)

Neither Parent nor any of Student's teachers requested a reassessment of Student during distance learning. As discussed in Issue 2, Student made educational progress during distance learning appropriate in light of his circumstances. Student was eager to learn, actively engaged in his classes, earned good grades, met four of his six goals, and made progress on the other two goals. Modesto did not, and had no reason to, determine that Student's academic or functional performance required reassessment during distance learning in the 2020-2021 school year.

Nonetheless, Modesto conducted reassessments during distance learning for a three-year review of Student's educational program. The IEP team that reviewed the multidisciplinary assessment at the February 17, 2021 IEP team meeting found that Student made appropriate educational progress during distance learning. The IEP team had no reason to further assess Student prior to the return of in-person instruction a month later in March 2021.

Student did not meet his burden of proving by a preponderance of the evidence that Modesto denied him a FAPE by failing to assess Student to determine if distance learning was appropriate for Student from July 8, 2020 through the end of the 2019-2020 school year, and the 2020-2021 school year.



ISSUE 4: DID MODESTO DENY STUDENT A FAPE IN THE FEBRUARY 17, 2021 IEP BY FAILING TO INCLUDE ADEQUATE GOALS FOR STUDENT TO RECEIVE EDUCATIONAL BENEFIT, PARTICULARLY ACADEMIC, SOCIAL EMOTIONAL, SOCIAL SKILLS, WORK HABITS, AND VOCATION?

Student contends that Modesto denied him a FAPE because the February 17, 2021 IEP did not contain sufficiently ambitious goals, and failed to address Student's

- areas of need in academics,
- social emotional functioning,
- social skills,
- work habits and
- vocation.

Modesto contends that the goals in the February 17, 2021 IEP addressed all of Student's areas of need and were sufficiently challenging.

An IEP describes a student's needs, including academic and functional goals related to those needs. (20 U.S.C. §§ 1401(14), 1414(d)(1)(A); Ed. Code, §§ 56032, 56345, subd. (a).) The goals must be measurable and designed to meet the student's needs so that the student can be involved in and make progress in the general education curriculum and meet each of the other educational needs. (20 U.S.C. § 1414(d)(1)(A)(i)(II); 34 C.F.R. § 300.320(a)(2)(i).) The IEP must also describe how progress towards the goals developed will be measured and reported. (20 U.S.C. § 1414(d)(1)(A)(i)(III); 34 C.F.R. § 300.320(a)(3).)

Goals are typically developed once a year at a student's annual IEP team meeting. Annual goals should describe what a student with a disability can reasonably be expected to accomplish within a 12-month period of the special education program. (Letter to Butler, 213 IDELR 118 (OSERS 1988); *Notice of Interpretation, Appendix A to 34 C.F.R., part 300, Question 4 (1999 regulations)*.) The IEP must show a direct relationship between the present levels of performance, the goals, and the specific educational services to be provided. (Cal. Code Regs., tit. 5, § 3040, subd. (b).)

An IEP team must review a student's IEP at least annually to review the pupil's progress, to determine whether the annual goals are being achieved, and revise the IEP as appropriate, considering among other matters, whether there is a lack of expected progress toward the annual goals. (34 C.F.R. § 300.324(b)(1)(ii)(a); Ed. Code, § 56341.1, subd. (d)(1).) The IEP team must also meet whenever the student demonstrates a lack of anticipated progress. (Ed. Code, § 56343, subd. (b).)

The February 17, 2021 IEP academic goals were designed to meet Student's needs so that Student could be involved and make progress in the general education curriculum. The February 17, 2021 IEP team reviewed the multidisciplinary assessment results and identified Student's needs in the areas of math and writing. Patterson testified persuasively that due to Student's cognitive processing delays and academic skills deficits as a result of his autism and ADHD, Student would have difficulty progressing in these two areas of academics. The IEP team appropriately wrote goals for Student to

- learn multiplication of multi-digit numbers to 75 percent accuracy,
- learn the use of positive and negative numbers to 70 percent accuracy,
- write a paragraph that introduced a topic, gave details, linked ideas, and

- then concluded with 75 percent accuracy, and
- to write a concluding statement with 70 percent accuracy.

The goals were measurable using work samples and provided for three progress reports during the following 12 months.

The February 17, 2021 IEP annual goals had a direct relationship between the present levels of performance and the specific educational services to be provided. Each goal stated Student's then-current baseline skill level and was expressly supported by specialized academic instruction through push-in services in Student's math and English language arts classes, and a period with the resource specialist to work on English language arts. The cognitive functioning and academic achievement portions of the multidisciplinary assessment indicated that Student had more strengths in math than written expression, and the allocation of more specialized academic instruction services to written expression support was reasonably calculated to provide Student with appropriate support in his area of most academic need. Myneer and Patterson opined persuasively that the academic goals could reasonably be expected to be accomplished within a 12-month period with the supports in the IEP.

Student contends that two of the goals in the February 17, 2021 IEP were unchanged from the prior IEP, and therefore were not sufficiently challenging. Indeed, progress reports attached to the February 17, 2021 IEP indicate that two of the goals were carried forward without change. However, Student's present level of performance on the carried-forward goal to write a paragraph with an introduction and details indicated that Student had learned to write the required paragraph, but the details were not concrete, and Student did not end with a conclusion. The goal addressed a continuing area of need, on which Student made progress in the prior year. The IEP

team further addressed Student's paragraph writing deficits by adding a new and explicit goal for writing a concluding statement. Student's written expression was very low, and the fact that he did not meet the goal in a previous year did not make it less ambitious, particularly as new expectations were added in a related goal for a strong paragraph conclusion.

Similarly, the February 17, 2021 multiplication goal was identical to the previous goal because Student, although able to multiply numbers, did not place the value correctly. Student made progress in part of the mathematical computation but was missing a vital step in accurate problem solving. The IEP team determined that Student remained challenged by this essential computation skill and reasonably calculated that Student needed to continue working in this area. The goals that were carried forward from the previous IEP were suitably ambitious.

The evidence did not establish that Student had additional academic needs unaddressed by annual goals. Student's treating therapist Weston Lange and treating psychiatrist Dr. Banu Brar expressly stated that they had no opinions on Student's academic needs. Student's expert and credentialed school psychologist Theresa Edwards was not questioned about the goals in the February 17, 2021 IEP, or Student's academic needs at that time.

The evidence did not establish that Student had social emotional needs in February 2021 unaddressed by goals. Teacher interviews for the multidisciplinary assessment indicated that Student had low frustration tolerance, but was managing that with learned coping skills, such as turning off his camera and taking a break or participating in the chat feature. Student managed his frustration well and had accommodations to support him in class, where frustration was most likely. Dempsey

relayed one incident when Student expressed an unpopular opinion and asked to leave class early after he became defensive when other students respectfully disagreed. Student returned to the class the next day composed and completed the classwork. Mynear opined that Student's disabilities included mood dysregulation, executive functioning deficits, and a misunderstanding of social interactions, and Student was using his coping skills exactly as he had been taught to appropriately manage resulting frustration and emotions.

Dr. Brar saw Student once between the beginning of the 2020-2021 school year and February 17, 2021. Her contemporaneous notes from September 28, 2020, indicate that Student appeared in good spirits, and although Parent reported that Student would have meltdowns if he ate sugar, Parent reported that without sugar if Student got frustrated it was brief and easily manageable. Student did not have social emotional functioning needs that required a goal in February 2021.

The evidence did not establish that Student had unaddressed social skill needs in February 2021 that required annual goals. Student had friends at school and got along well with his peers. The multidisciplinary assessment showed that Student was friendly and talkative, and that his biggest problem was speaking impulsively and oversharing. Student was socially immature, but most of his difficulties with peers involved handling conflict and criticism, real or perceived. Student handled both situations well by stepping back or getting an adult. Although Parent rated Student as demonstrating clinically significant social emotional problems in the home setting, the rating scales by Student's teachers indicated that Student social emotional functioning at school was at acceptable levels.

The evidence did not establish that Student had unaddressed work habit needs in February 2021. Other than Parent's testimony that Student did not want to complete his work at home, the evidence did not show that Student had bad work habits. To the contrary, as part of the multidisciplinary assessment Student's teachers reported that

- Student was eager to learn,
- hard-working,
- used his free time appropriately,
- began work independently,
- asked for help when appropriate,
- advocated for extra time when needed,
- logged in early,
- was a go-getter, and
- worked independently.

The February 17, 2021 IEP addressed the impact of Student's cognitive processing delays with accommodations that provided for extra time, audio and visual instruction, as well as push-in services to assist Student in class in real time. Student did not need a goal in work habits.

The evidence did not establish that Student had vocational needs in February 2021 that were unaddressed by his goals. Student was diagnosed on the autism spectrum but was a high-functioning thirteen-year-old and a capable seventh grader. He could navigate the campus, follow classroom routines, engage appropriately with peers on the playground, and effectively articulate his wants and needs to peers and adults. Student had no need to work on vocational skills and did not require a goal to address vocation.

Student did not meet his burden of proving by a preponderance of the evidence that Modesto denied him a FAPE by failing to include adequate goals for Student to receive educational benefit, particularly academic, social emotional, social skills, work habits, and vocation in the February 17, 2021 IEP.

**ISSUE 5: DID MODESTO DENY STUDENT A FAPE BY FAILING TO ADDRESS REGRESSION SUFFERED BY STUDENT AS A RESULT OF DISTANCE LEARNING FROM JULY 8, 2020 THROUGH THE END OF THE 2019-2020 SCHOOL YEAR, AND THE 2020-2021 SCHOOL YEAR?**

Student contends that Modesto denied him a FAPE by failing to assess him for academic regression during distance learning, or to address that regression. Modesto contends that Student did not display regression during distance learning.

As discussed earlier in Issue 1, Student's claims arising in the 2019-2020 school year are time-barred.

As discussed in Issue 3, Modesto assessed Student near the end of distance learning. Some of Student's academic scores in February 2021 were lower than Student's scores on the same test in 2018. In February 2018, Student had scored generally in the average range in most academic areas, with scores in the 80's and 90's. In February 2021, Student scored mostly in the low to very low range with scores in the 50's, 60's and 70's. There was a definite discrepancy between the scores from the two years, and the February 2021 scores were much lower.

However, assessor Patterson opined that the scores from the academic achievement test should not be interpreted in isolation. Student was earning good

grades and teachers were uniformly reporting that Student was doing well and keeping up with the general education coursework. Student had also met most of his goals and made good progress on the others. The consistent feedback from a variety of sources was that Student was doing well academically during distance learning.

Mynear, who administered the achievement test as part of the multidisciplinary assessment, interpreted the differences in scores on one test as not warranting concern. Despite the low scores, Student was making significant progress in academics. Mynear saw Student daily in online classes, and Student

- did the schoolwork,
- made progress on goals,
- participated in classes, and
- showed knowledge of the material in each class.

Academics was a known area where Student's processing delays and ADHD adversely impacted Student's access to the curriculum, and the IEP team addressed these impacts with appropriate accommodations and supports, including three periods of specialized academic instruction. Patterson observed that Student rushed through academic testing he did not like and made careless errors, and persuasively opined that Student's lower scores on academic achievement testing in February 2021 did not establish regression.

Student's expert school psychologist Edwards also cautioned that scores on a solitary test instrument could not be relied upon in a vacuum. She did not opine that Student's scores on the academic achievement test established regression. At hearing, no educator opined that the results of the academic assessment indicated that Student



had regressed in the academic curriculum. Student demonstrated good progress on his academic goals, and in his general education classes, and there was no regression during distance learning for the IEP team to address.

Student did not meet his burden of proving by a preponderance of the evidence that Modesto denied him a FAPE by failing to address regression as a result of distance learning from July 8, 2020 through the end of the 2019-2020 school year, and the 2020-2021 school year.

#### ISSUE 6: DID MODESTO DENY STUDENT A FAPE BY FAILING TO OFFER STUDENT EXTENDED SCHOOL YEAR IN SUMMER 2021?

Student contends that Modesto denied him a FAPE by failing to offer extended school year in Summer 2021 to address his regression in academics. Modesto contends that Student did not need extended school year services.

California special education regulations require that extended school year services be provided for each student with exceptional needs who requires special education and related services in excess of the regular academic year. (Cal. Code Regs., tit. 5, § 3043.) A student needs extended programming if interruption of their educational programming may cause regression, rendering it impossible or unlikely that they will attain the level of self-sufficiency and independence that would otherwise be expected in view of their disabling condition. (*Ibid.*)

The purpose of extended school year placement and services is to prevent regression and recoupment difficulties during the summer break. Therefore, a student's

placement and services for the extended school year may differ from placement and services during the regular school year. (*Letter to Myers*, U.S. Dept. of Ed., Office of Special Ed. Programs (Dec. 18, 1989).)

As discussed in Issue 5, Student did not experience academic regression during distance learning. There was no evidence beyond Parent's speculation that Student had experienced regression, or had difficulty with recoupment of learned academic skills, during short or extended school breaks.

In the past, Student had not suffered regression during summer breaks that rendered it impossible or difficult for Student to attain the level of self-sufficiency and independence that would otherwise have been expected due to his autism and ADHD. Rather, without extended school year during the summer break in 2020, after several months of distance learning, Student returned to school for the 2020-2021 school year and earned straight A's in the first semester.

Myneer opined persuasively that Student did not need summer school at the end of the 2020-2021 school year for the same reasons he did not demonstrate regression during distance learning for most of that school year. Student

- performed academic work,
- made progress on his goals,
- participated actively in his grade level classes, and
- demonstrated acquired knowledge in each class.

Student's IEP team reasonably anticipated that Student would recoup any knowledge lost over the 2021 summer break as quickly as he had after the prior summer break, without extended school year.

Student did not meet his burden of proving by a preponderance of the evidence that Modesto denied him a FAPE by failing to offer Student extended school year in Summer 2021.

**ISSUE 7: DID MODESTO DENY STUDENT A FAPE BY FAILING TO OFFER SUFFICIENT RELATED SERVICES IN STUDENT'S FEBRUARY 17, 2021 IEP, SPECIFICALLY IN OCCUPATIONAL THERAPY AND SPEECH AND LANGUAGE?**

Student contends that Modesto denied him a FAPE by failing to offer him services in the areas of occupational therapy and speech and language. Modesto contends that Student did not have educational needs requiring such services.

For a school district's offer of special education services to a disabled pupil to constitute a FAPE under the IDEA, the offer of educational services or 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. (*Gregory K. v. Longview School District* (9th Cir. 1987) 811 F.2d 1307, 1314; 20 U.S.C. § 1401(9).) 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. (*Ibid.*) The IEP need not conform to a parent's wishes to be sufficient or appropriate, as the IDEA does not provide for an education designed according to Parent's desires. (*Shaw v. Dist. of Columbia* (D.D.C. 2002) 238 F.Supp.2d 127, 139, citing *Rowley, supra*, 458 U.S. at p. 207.)

At the February 17, 2021 IEP team meeting, Parent expressed concern about Student's handwriting. Student's handwriting was large, without proper spacing, and sometimes illegible. Parent told the team that Student's medications caused his hands to tremor, which was also documented in Dr. Brar's treatment notes. Parent's particular concern was having Student write several paragraphs, and although she wanted him to work on his handwriting, she did not want him to work on it to the point of frustration.

The February 17, 2021 IEP team discussed Student's handwriting and determined that he did not need occupational therapy. By the age of 13, a student's way of holding a writing instrument is set, and occupational therapists do not recommend occupational therapy for handwriting at that age. Instead, the team adopted accommodations that would enable Student to access the curriculum without extended writing, such as

- reduced or shortened assignments and homework,
- additional time to complete assignments or tests, and
- teachers to provide written notes, outlines and instructions.

Although Parent preferred that Student have neater and more legible handwriting, the weight of the evidence did not establish that Student needed occupational therapy services to access his education.

As to Student's speech and language, he scored in the average range for verbal comprehension on the multidisciplinary assessment of general ability. Student appeared to understand other's thoughts and abstract meanings in figurative language, although he sometimes missed details of stories read to him, which was not unusual in

light of his autism and attention deficits. Student had many friends in school, and his reported conversational problems of being too talkative, oversharing, and exaggerating were minor and did not interfere with Student's access to the general education curriculum. Student was using coping strategies to appropriately respond to disagreements or conflict with peers. There was no reason to offer Student speech and language services in February 2021.

However, in light of Student's autism diagnosis, the February 17, 2021 IEP team recommended that Student be assessed in the area of pragmatic, or social, language after his return to a school setting, in case that was a contributing factor to Student's in-person social awkwardness. In fact, Student's interactions with his peers did not change after he returned to school for the remainder of the 2020-2021 school year, although an assessment in speech and language was agreed to be conducted for review of Student's annual IEP in February 2022. Dr. Brar's contemporaneous notes from May 17, 2021, near the end of the school year, indicated that Student reported that he was back in school, had many friends, and was very happy. The evidence did not establish that Student required speech and language services to access the general curriculum in February 2021.

Student did not meet his burden of proving by a preponderance of the evidence that Modesto denied him a FAPE by failing to offer sufficient related services in Student's February 17, 2021 IEP, specifically in occupational therapy and speech and language.

## ISSUE 8: DID MODESTO DENY STUDENT A FAPE BY FAILING TO OFFER SUFFICIENT RELATED SERVICES IN STUDENT'S FEBRUARY 2, 2022 IEP, SPECIFICALLY IN COUNSELING AND SPEECH AND LANGUAGE?

Student contends that Modesto denied Student a FAPE by failing to offer him counseling and speech and language services in the IEP of February 9, 2022. Modesto contends that Student did not need either service.

An IEP is evaluated in light of information available to the IEP team at the time it was developed; it is not judged in hindsight. (*Adams v. State of Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149 (*Adams*)). An IEP is a snapshot, not a retrospective. (*Id.* at p. 1149, citing *Fuhrmann v. East Hanover Bd. of Education* (3rd Cir. 1993) 993 F.2d 1031, 1041.) It must be evaluated in terms of what was objectively reasonable when the IEP was developed. (*Ibid.*)

School districts are charged with using general education interventions if those can effectively meet a student's needs. (See, e.g., Ed. Code § 56026, subd. (b) [student cannot be found eligible for special education instruction and services if modification of the regular school program will meet their needs].)

### 2021-2022 SCHOOL YEAR

During the 2021-2022 school year, Student struggled with family relationships, and by the end of the school year was not using his coping strategies effectively. Student was starting to shut down. Throughout most of the school year, student benefitted from speaking with the Student Assistance Specialist and a classroom behavior plan. Dr. Brar appeared to keep Student's outbursts at home under control

with increased medication. Parent and Student's estranged father were in Family Court fighting over visitation rights. Student was upset by his father's favoritism towards Student's half-brothers, and worried about the Court granting unsupervised visitation. Student's anxiety and frustration about his home situation, and lack of sleep, eventually began having a significant impact at school, but that did not occur until late April or May towards the end of the 2021-2022 school year.

During the first semester of the 2021-2022 school year, Student did well except for turning in his work. Student showed up for his classes, eager to learn, actively participated in classes, and demonstrated knowledge of the material, although his failure to turn in work lowered his grades. Student occasionally put his head down on his desk, as did many other eighth grade students. This was one of Student's appropriate strategies to regulate frustration.

Student began eighth grade on August 9, 2021. All Modesto schools were on in-person learning. Student met with the Student Assistance Specialist when he required adult assistance to discuss and solve peer conflicts. On August 16, 2021, Student told Dr. Brar, that school was going well although he preferred distance learning, and that he had good days and bad days. Dr. Brar noted no concerns with anxiety. Dr. Brar typically interviewed Student for approximately 20 minutes every one to three months to see how Student was doing on his medications. Most of Dr. Brar's information on Student came from Parent's report.

Dr. Brar testified at hearing with a professional demeanor and answered questions thoroughly and without hesitation. She began treating Student in 2016. She stressed that she was not a therapist and did not have an opinion on Student's

educational program, although she recommended at the end of the 2021-2022 school year, and at hearing, that Modesto fund a residential treatment placement based on Student's conduct at home and Parent's report of Student's conduct at school.

In late October or early November 2021, Student made a statement during Brandon Harrington's science class to two girls who shared a table with him. He said that he would bring an AK-47, a type of assault rifle, to school. The two girls reported the incident to the teacher, who reported it to Student's case manager and resource teacher Myneer. The girls did not appear upset by the statement, but rather, reported it as a routine obligation and acted as though Student simply made a typically weird or silly comment, not a threat. The two girls did not ask to be moved to another table and continued to socialize with Student in class. Harrington observed that Student often exaggerated, liked to be dramatic to get attention, and acted generally silly and immature. He did not think that Student made a serious threat.

Harrington reported the statement to Myneer, who spoke to Student that same day. Student denied making a threat or having any intention of shooting anyone. Myneer also called Parent to report and investigate the statement on that same day. Parent told Myneer that Student's statement was not a credible threat, and that Student did not have access to guns or ammunition that Parent kept in separate locked safes. Parent subsequently removed all guns from the home and informed Myneer she had done so. Myneer determined that Student did not have an intention to shoot anyone, a plan to shoot anyone, or the means to shoot anyone. Student never made such a statement again.



Student did not have a history of intentionally injuring others. Student had no history of injuring anyone at school. At home, Student once knocked a baby tooth out of a younger sibling's mouth by elbowing the sibling away when the sibling came up behind him. Parent reported to Dr. Brar during the 2020-2021 school year that although Student made threats at home and might wave or throw things around when angry, he generally acted inappropriately by

- stomping on the floor,
- slamming doors,
- noncompliance,
- bullying or hitting his younger brothers,
- crying, or
- telling stories.

At Student's appointment with Dr. Brar on November 8, 2021, Student downplayed the gun statement. He told her he was very stressed because his estranged adopted father was seeking unsupervised visits. Student had a very unhappy relationship with his father, who had a history of domestic violence. Student reported that he was doing poorly and failing math, but he did not understand that the poor math grade was because he did not turn in assignments for credit. Parent reported that Student was restless and sleeping only five hours each night. Parent also reported that she was looking for a therapeutic residential placement for Student in Utah. Dr. Brar advised Parent to ask for a one-to-one aide for Student at school to keep the other students safe, and increased Student's medications.

After the gun incident, Parent reported to Mynear that she was having a difficult time getting Student to school. Mynear observed that Student was not completing

work and instead focused on other things in his environment and shut down when given correction. Mynear and Patterson prepared a classroom behavior plan to address off-task behavior and attendance.

## NOVEMBER 18, 2021 CLASSROOM BEHAVIOR PLAN

The classroom behavior plan identified two of Student's behaviors as impeding learning. First, Student was off task and shutting down when corrected. Second, Student was not following Parent's directions to get ready and go to school each day.

The behavior plan designated alternative replacement behaviors, including staying on task and completing assignments, staying calm, and attending school. To achieve the alternative behaviors, the plan included strategies to be learned by Student. To stay on task, Student would check in with an adult in the morning to check his materials, review the behavior chart, and review points and rewards that he could earn. When Student had difficulty with focus due to anxiety or frustration, he would use calming techniques, which Mynear could teach Student individually or in a small group, such as taking deep breaths, relaxing muscles, admitting feelings, and going for a walk.

The plan called for Student to use a schedule of morning activities at home to get to school and earn rewards at home. Student would discuss with the Student Assistance Specialist or an adult like Mynear the consequences of not following the schedule and ways to self-monitor and motivate compliance. Mynear tracked behavior on the daily behavior chart and reported on it regularly.

The classroom behavior plan was added to the February 17, 2021 IEP in an addendum dated and signed by Parent on November 18, 2021.

Mynear was available to, and often did, speak with Student in the mornings when Student was reluctant to go to school. Student's attendance was good with this support.

Student was generally an active participant in his eighth grade classes. Science teacher Harrington credibly testified at hearing. He taught eighth grade science in 2021-2022, five days a week, and had good recall of Student. Student was one of the first students to Harrington's class each day and was on the silly side. He was attentive and enjoyed group activities. Student was self-directed, although Harrington sometimes had to encourage Student to do classwork. Mynear's paraprofessional from the resource room often worked with Student in Harrington's class. Student was actively engaged in class for the first semester. Student's class attendance was good and he responded well to redirection.

Student's eighth grade social studies teacher Rodney Addington also testified credibly at hearing. Addington was Student's social studies teacher five days a week. Student maintained attention approximately 75 percent of the time. Student interacted well with his peers and Addington did not observe any social struggles. Student could orally participate at the eighth grade level but had written expression skills well below grade level. Student was able to express opinions and ask questions related to the class content, although he had some trouble articulating issues. Addington opined that Student made progress in his class and by the end of 2021-2022 came close to meeting his paragraph writing goal of examining a topic and conveying ideas, and met the goal of providing a conclusion that followed from the narrated information. Student never displayed aggressive behaviors in his class. During the first semester, Student occasionally put his head down, as did many eighth grade students. Student asked for breaks when he needed them, approximately five times over the course of the year.

Addington used points to motivate Student, which were reported to Mynear, gave notes to Student, and implemented the other accommodations in Student's IEP and behavior plan. Addington never saw regression of any kind when Student returned from breaks.

By Student's December 8, 2021 visit to Dr. Brar, Parent reported that on changed medication Student was sleeping better, but had hand tremors. Parent reported no more outbursts at home, and that Student was seeing a school counselor and doing better at school. By January 13, 2022, Parent reported to Dr. Brar that with further medication changes, Student was no longer yelling much at home, did not engage in major physical aggression, and things were stable in the home. Student reported to Dr. Brar that schoolwork was sometimes overwhelming, but he was focused on school and passing all his classes except math. Dr. Brar concluded that there were no safety concerns.

In preparation for Student's annual IEP review in February 2022, Modesto conducted assessments of Student in the areas of speech and language and social emotional functioning. This would provide the IEP team with information on how Student was doing in in-person classes, as the multidisciplinary assessment had taken place during distance learning.

## SPEECH AND LANGUAGE ASSESSMENT

Speech language pathologist Angela Hodgson assessed Student's language and speech in November 2021 and January and February 2022. Parent had expressed a concern with Student's social language, called pragmatics. Hodgson was also looking at whether Student had any difficulty progressing and participating in school due to language deficits. Hodgson interviewed Mynear as the teacher who saw Student the

most throughout the day, and she observed Student interacting with peers during recess. Myneer reported that Student did a good job of interacting with peers. On the playground, Hodgson observed Student engaging in reciprocal turn taking while shooting hoops, orienting to his peers, and using and understanding nonverbal cues such as pointing to the hoop.

On standardized testing and in word samples, Student

- had good vocabulary,
- used tenses and irregular verbs correctly,
- spoke in complete sentences, and
- did not exhibit any concerns with receptive or expressive language.

Student displayed good turn-taking in conversation and responded appropriately to body language and gestures. In story comprehension, Student understood the big picture and did not focus on meaningless details. Student had no difficulty identifying and labeling emotions. He had good eye contact, no odd movements, and his conversations flowed nicely. His speech sample had long and detailed sentences appropriate for his age.

In her speech and language assessment report, Hodgson concluded that Student had the ability to communicate appropriately, as he understood others and was able to express himself. Student might put his head down or take a break when frustrated, but that was not a language issue. Student was capable of good verbal exchanges, did a great job of communicating, and had a strong pragmatic foundation. Student did not have pragmatic deficits that significantly impacted his use or understanding of verbal and nonverbal language, his social interactions, or his academics.

## SOCIAL EMOTIONAL ASSESSMENT

Patterson conducted a social emotional assessment in January and February 2022 as an addition to the multidisciplinary report. Parent did not tell Patterson, but Parent was particularly interested in having Student made eligible for special education under the categories of autism or emotional disturbance, as she understood that would make it easier for Student to be accepted in a residential treatment center. Parent was exhausted from the drama at home, and thought if Student was placed outside of the home the family dynamics would calm down. Parent told Patterson that Student struggled with anger, frustration, math and reading, and she wanted to see Student improve his grades and social interaction skills.

Student told Patterson he was happy but tired, and was reluctant to go to school when he was tired or not feeling well. Student had many friends at school and enjoyed speaking with the Student Assistance Specialist. Student was aware that he was not at grade level, but more nervous about getting in trouble.

Contrary to Parent's reports to Dr. Brar during the same period that things were stable and Student was not yelling, screaming or engaging in major physical aggression, Parent reported to Patterson that Student was showing increased aggression, violence and temper, including

- slamming doors,
- noncompliance,
- bullying,
- hitting his younger brother,

- crying, and
- telling stories.

Patterson collected teacher feedback. Mynear reported that Student was kind, cooperative and social, but told jokes at inappropriate times and sometimes needed help with peer relations. Student asked for help in class but needed help more often than requested. Student's task completion, work habits were concerns due to a lack of perseverance and being emotional.

Harrington reported that Student was cooperative and used his free time appropriately. Student needed frequent assistance and help with peer problems. Student also sought teacher attention, made off-topic comments, and overshared personal information. Addington reported that Student participated in class, and his behavior and attention had improved. Student was generally accepted by his peers. Student did not complete much work in class, and his written work was difficult to read and understand. The English language arts teacher reported that Student participated in class and with groups. Student also sometimes made inappropriate remarks and became upset after misperceiving peers' comments.

During Patterson's observation of Student in testing, he acted like an average eighth grader, engaging appropriately in verbal and non-verbal exchanges. Patterson observed Student in his science and history classes, where student again engaged in appropriate verbal and non-verbal communication and participated in class although he did not take notes. At lunch, Student joined other students playing basketball and appeared to know the rules of the game, oriented on other appropriately, and demonstrated a good understanding of non-verbal exchanges.

On various standardized tests, Student demonstrated that he had adequate ability to recognize and distinguish between facial expressions, and a basic ability to understand mental functions and another's point of view, but impulsivity and listening comprehension appeared to adversely impact his generalization of those skills.

Parent, Harrington and Myneer completed rating scales on Student's social, emotional, and behavioral functioning. A comparison of the responses showed that Student was struggling more significantly in the home than at school. His most significant behavior across settings was atypicality, in his case, misperceiving social situations, oversharing personal information, and social immaturity. Parent and one teacher's responses rated Student as clinically significant for depression. Some results were characterized as at-risk, which meant that there was not a current problem, but that Student should be monitored. Student was at risk and should be monitored for future problems with

- attention,
- adaptability,
- study skills,
- functional communication,
- anger control,
- executive functioning,
- negative emotions, and
- resiliency.

Results indicated Student had no autism-related behaviors at school, although one score suggested he might have difficulty with self-regulation.



Patterson did not find that Student met the criteria for special education eligibility of autism. Student's autism did not significantly affect his verbal and non-verbal communication, social interaction, or educational performance. He did not engage in repetitive activities or stereotypical movement, resist environmental changes, or respond unusually to sensory experiences. Patterson noted that Student struggled with appropriate communication but opined that it was more related to emotional or attention problems than autism-related behavior. In addition, the speech and language assessment did not find Student's pragmatic skills an area of deficit. Patterson concluded that Student's educational performance was adversely impacted by processing deficits, social-emotional struggles, and likely the impact of medication on the strength of Student's executive functioning, or higher reasoning, skills.

Patterson concluded that despite emotional dysregulation, Student did not meet the eligibility criteria for emotional disturbance. Student had friends and the capacity to build and maintain friendships. Although he struggled with appropriate social communication, it appeared to be due to social immaturity, impulsivity, and the need for attention. Anxiety was not reported or observed. Student did not exhibit catastrophic reactions to everyday occurrences or bizarre behavior at school. He had symptoms that might have been related to depression, such as anger, negative emotionality, and some frustration, but that did not interfere with his pleasure in enjoyable activities and was not pervasive.

## FEBRUARY 9, 2022 IEP TEAM MEETING

Modesto convened an IEP team meeting to review Student's educational program on February 9, 2022. It was attended by

- Parent,
- Student,
- Mynear,
- Addington,
- Patterson,
- Hodgson, and
- an administrator.

The team looked at Student's present levels of performance and how his lack of work completion adversely impacted his grades. Student earned grades in the first semester ranging from As and Bs to Ds and Fs. Student worked well in his classes when focused. He could understand math concepts and produce work when in a setting with a low student-to adult ratio but not at grade level. Addington told the team Student's behavior had improved, Student was attempting to do most of the assignments, and was engaged in the class. Student was motivated by the points he could earn on his behavior plan. Student was still silly and immature, and for example had brought virtual reality goggles to school to wear in class. Student shut down and put his head on the desk when his teacher took them away.

Student met his multiplication goal with a calculator, but still struggled without. Student made no progress on his math goal to use positive and negative numbers to represent quantities in real world context. Student met his paragraph writing goal, by

identifying a topic and conveying ideas and information through specific details. Student did not meet his conclusion goal and struggled to write conclusions that followed from the narrated experiences or events described in his essay, although he did do better describing a conclusion orally. The team carried forward the positive and negative numbers goal, and added a math goal for Student to understand letter variables in equations. The team continued the English language arts goal of writing a conclusion.

Patterson and Hodgson reviewed the results of the social emotional and speech and language assessments. Hodgson opined that Student had adequate language skills and social communication and did not recommend speech and language services. Patterson explained to the team why Student did not meet the criteria for autism or emotional disturbance, but also discussed with the team that Student needed to be monitored for atypicality, which was addressed in the behavior plan. The behavior plan in the November 18, 2021 addendum was included in the February 9, 2022 IEP by reference in the special factors section.

Modesto offered Student specialized academic instruction in a resource period for 235 minutes per week, or one period per week, and as push-in services for English language arts and math for another 235 minutes per week. Student remained placed in a general education program for 86 percent of the school day, with 14 percent outside of general education in the resource classroom. This was a reduction in specialized academic instruction services, but the Modesto IEP team felt that Student displayed strength in academics as well as deficits and was capable without the need for three periods of specialized academic instruction. The team also wanted Student to attend Modesto's ESP academic success program outside of regular school hours, which was available to all students and would provide additional academic support.

The team adopted the accommodations from the past year, and in light of Student's difficulty with writing, added speech-to-text with a graphic organizer. The team also added checks for understanding based on Mynear's report that Student was not asking for help as often as needed. Student's core curriculum continued to be modified so that part of his grade was based on his individual progress and effort.

The February 9, 2022 IEP did not offer extended school year because Student had not shown any signs of regression that could not be readily recouped after the break was over. Parent consented to the IEP on February 9, 2022.

The evidence did not establish that Student required counseling services at the time of the February 9, 2022 IEP. Student was doing well socially, and enjoyed seeing the Student Assistance Specialist for counseling for any problems arising from peer interaction. Student's November 18, 2021 behavior plan, which had been in effect for a short time given the Thanksgiving and Winter breaks, included strategies for staying on task, completing assignments, and staying calm, and his teachers were reporting improved behavior in the classroom without the necessity of counseling services.

Student's expert psychologist Edwards opined that Patterson's social emotional assessment had been appropriately conducted, although she would have preferred different and additional test instruments. Edwards disagreed with Patterson's conclusions on Student's eligibility under the category of emotionally disturbed, particularly taking into account Student's history of emotional issues at home. Edwards would have recommended that Student receive school counseling, particularly in light of Student's behavior at school as described by Parent.

Edwards opinions in general were less persuasive than those of Patterson. Edwards was a well-qualified and experienced school psychologist. However, Edwards's

knowledge and background on Student was obtained almost exclusively in a one-hour conversation with Parent and a 40-minute call with Student. She did not speak with Patterson, Student's teachers, or anyone at Modesto. She did not observe Student in the school setting. Her records review was limited to the February 2021 triennial assessment, the February 2022 speech and language and social emotional assessments, and the May 13, 2022 IEP. Edwards also had an ongoing consultation contract with a sub-unit of the law firm of Student's counsel, suggesting possible bias if Edwards wanted to maintain employment. (See Evid. Code, § 722, subd. (b).) Otherwise, Edwards testified with a professional demeanor, appeared to answer questions honestly, and indicated when she was unable to render an opinion. However, her persuasiveness was adversely impacted by the limited records she was given to review, and her heavy reliance on Parent's report for information on Student's school performance.

Patterson opined that access to counseling with the Student Assistance Specialist and implementation of the behavior plan were sufficient to meet Student's social emotional needs in February 2022. In conjunction with the testimony of Myneer, Harrington, and Addington that they saw improvements in Student's peer interactions and behavior while those supports were in place, Patterson's opinion of Student's social emotional needs was more persuasive and given more weight than that of Edwards. Access to the Student Assistance Specialist and implementation of the classroom behavior plan was reasonably calculated to address Student's social emotional needs.

Hodgson's assessment was thorough and identified all of Student's speech and language needs. She convincingly explained that Student's pragmatic skills were adequate for him to access the curriculum, and that Student did not need speech and language services. Student used and enjoyed access to the Student Assistance Specialist, who guided Student in resolving eighth grade peer conflicts, without the

need for speech services. No speech language pathologist was called to contradict the opinion of Hodgson that Student did not require speech and language services.

Student did not meet his burden of proving by a preponderance of the evidence that Modesto denied him a FAPE by failing to offer sufficient related services in Student's February 2, 2022 IEP, specifically in counseling, and speech and language.

#### ISSUE 9: DID MODESTO DENY STUDENT A FAPE BY NOT FINDING HIM ELIGIBLE FOR SPECIAL EDUCATION UNDER THE CATEGORY OF AUTISM, FROM JULY 8, 2020 THROUGH THE FILING OF STUDENT'S COMPLAINT?

Student contends that because he has a medical diagnosis of autism spectrum disorder, he should have been found eligible for special education under the category of autism. Modesto contends that Student does not meet the criteria of autism for eligibility purposes.

As long as a child remains eligible for special education and related services, the IDEA does not require that the child be placed in the most accurate disability category. Nothing in the IDEA requires that children be classified by their disability so long as each child who has a disability listed in the IDEA and who, by reason of that disability, needs special education and related services and is regarded as a child with a disability. (20 U.S.C. § 1412(a)(3)(B); Ed. Code § 56301(a).)

The United States Department of Education has advised that a child's entitlement is not to a specific disability classification or label, but to a free appropriate public education. (*Letter to Fazio*, U.S. Dept. of Ed., Office of Special Ed. Programs (Apr. 26, 1994).) Whether a child is described as cognitively disabled, other health impaired, or learning disabled is all beside the point. The IDEA concerns itself not with labels, but

with whether a student is receiving a free and appropriate education. (*E.M. ex rel. E.M. v. Pajaro Valley Unified School Dist.* (9th Cir. 2014) 758 F.3d 1162, 1173, citing *Heather S. v. Wisconsin* (7th Cir.1997) 125 F.3d 1045, 1055.)

It is when a school district fails to assess a child in all areas of suspected disability or fails to take into account a child's disability due to an incorrect or missing eligibility category, that a student may be denied a FAPE by making it impossible for the IEP team to develop a plan reasonably calculated to provide the child with meaningful educational benefit. (*S.P. v. East Whittier City School Dist.* (9th Cir. 2018) 735 F.App'x 320, 322, citing *N.B. v. Hellgate Elementary School Dist.* (9th Cir. 2008) 541 F.3d 1202, 1210.)

A child may have a qualifying disability, yet not be found eligible for special education, if the student does not meet the IDEA eligibility criteria. (See *Hood v. Encinitas Union School District* (9th Cir. 2007) 486 F.3d 1099, 1107-1108, and 1110.)

A child qualifies for special education under the category of autism if they have a developmental disability significantly affecting verbal and nonverbal communication and social interaction adversely affecting the child's educational performance. (Cal. Code Regs., tit. 5, § 3030(b)(1).) Other characteristics often associated with autism are engagement in repetitive activities and stereotyped movements, resistance to environmental change or change in daily routines, and unusual responses to sensory experiences. (*Ibid.*)

Student was found eligible for special education in 2014, and that eligibility entitled him to a FAPE, not to a particular disability classification. In addition, Student was thoroughly assessed for eligibility under the category of autism during the 2020-2021 and 2021-2022 school years, and his IEP teams had sufficient information of

the impact of Student's autism on his ability to access the curriculum to develop an IEP reasonably calculated to provide the child with meaningful educational benefit. The February 2021 multidisciplinary assessment evaluated the impact of Student's autism on distance learning, and the February 2022 additional social emotional assessment specifically looked at Student's eligibility under autism after his return to in-person classes. Both assessments included autism rating scales included and discussed in the assessment reports and at the IEP team meetings to review those assessments. Student's IEPs during the 2020-2021 and 2021-2022 school years were not developed without awareness of the ways in which Student's autism affected his access to the curriculum. Accordingly, the lack of autism as a disability classification did not itself result in a denial of FAPE.

Even if Student was entitled to have additional eligibility categories identified in his IEPs, and he was not, the evidence did not establish that Student was eligible for special education under the category of autism.

Parent and Student's advocate were adamant that Student's medical diagnosis of autism spectrum disorder was sufficient to make him eligible under the category of autism. But as explained by Patterson in the social emotional assessment, at the February 2021 and February 2022 IEP team meetings, and persuasively at hearing, Student did not meet the criteria for IDEA autism eligibility, which is a different standard.

In the 2020-2021 school year, Student's autism did not significantly affect his verbal or nonverbal communication, and Student's social interaction did not adversely affect his educational performance. Although in-person classroom observations were



not available, Student demonstrated adequate verbal and nonverbal communication skills during online classroom participation and during one-to-one testing. Student struggled with some social interaction and needed help with peer conflicts, but Student's poor attention and hyperactivity were also responsible for Student's failure to notice social cues and his frequent off-topic remarks. Student had friends and displayed empathy and interest in others. Student was not observed to engage in repetitive activities or stereotyped movements, be resistant to environmental change or change in daily routines, or exhibit unusual responses to sensory experiences, although some of these things were reported by Parent in the home. Parent reported that Student had sensory issues with wearing a mask, but Student did wear a mask soon after returning to in-person junior high. In February 2021, Student's occasional social awkwardness and need to regulate behaviors were minor and did not interfere with access to the curriculum, so Student did not meet the autism eligibility criteria.

Student's autism did not significantly affect his verbal or nonverbal communication, and his social interaction did not adversely affect his educational performance during the 2021-2022 school year. Modesto re-assessed Student for autism eligibility in February 2022, and Student's most significant behavior on autism rating scales was atypicality, characterized as misperceiving social situations, oversharing personal information, and demonstrating marked immaturity. His teachers also reported concerns with social communication and impulse control. However, in general, Student had friends, was kind and helpful with peers, communicated effectively with teachers and peers nonverbally both in social and learning settings. From the results of the February 2022, it was more

likely that Student struggled with appropriate verbal and social communication due to emotional and attention problems rather than as a pattern of autism-related behaviors. Student did not have other characteristics of autism, as he

- did not engage in repetitive activities or stereotyped movements,
- did not resist environmental or daily changes, and
- did not react in unusual ways to sensory experiences.

Student did not meet the eligibility criteria for autism in 2021-2022.

Edwards acknowledged that Student had a medical diagnosis of autism and that a medical diagnosis was not enough for IDEA eligibility. She did not opine that Student met the criteria for autism eligibility. Edwards believed that Student had emotional issues that impacted his education, based on Parent's report and Edwards's limited review of Student's assessments and one IEP. The evidence of Student's autism eligibility was sparse and unpersuasive.

Student did not meet his burden of proving by a preponderance of the evidence that Modesto denied him a FAPE by not finding him eligible for special education under the category of autism, from July 8, 2020 through the filing of Student's complaint.

#### ISSUE 10: DID MODESTO DENY STUDENT A FAPE BY FAILING TO OFFER IN-HOME APPLIED BEHAVIOR ANALYSIS THERAPY AND CLINIC MEETINGS FOR THE 2021-2022 SCHOOL YEAR?

Student contends that Modesto denied him a FAPE by not offering applied behavior analysis services, both direct services and clinic meetings, during the 2021-2022 school year. Modesto contends that Student did not require those services.

Student's closing brief concedes that the only evidence of Student's need for applied behavior analysis was the testimony of Parent and Student's grandmother, called Grandmother, that Student had more frequent and pronounced behaviors in the home than at school. Neither Parent nor Grandmother had education, training or experience in applied behavior analysis. No expert with education, training or experience in applied behavior analysis testified at all, let alone that Student required applied behavior analysis service as part of his educational program. In contrast, multiple witnesses testified that the February 17, 2021, February 9, 2022, May 13, 2022, and May 26, 2022 IEPs offered Student a FAPE without those services.

In addition, the only evidence of a request by Parent for applied behavior analysis occurred at the May 26, 2022 IEP, the last day of the 2021-2022 school year.

Student did not meet his burden of proving by a preponderance of the evidence that Modesto denied him a FAPE by failing to offer in-home applied behavior analysis therapy and clinic meetings for the 2021-2022 school year.

#### ISSUE 11a: DID MODESTO DENY STUDENT A FAPE BY DENYING PARENT'S REQUESTS AFTER THE FEBRUARY 9, 2022 AND MAY 26, 2022 IEP TEAM MEETINGS FOR PLACEMENT IN A RESIDENTIAL TREATMENT PROGRAM IN A STATE FACILITY OF PARENT'S CHOICE?

Student contends that Modesto denied Student a FAPE by failing to offer Student placement in a residential treatment program of Parent's choice. Student argues that all non-district witnesses have testified that Student requires a residential placement. Modesto contends that Student did not need placement in a residential treatment

center, and that its offer of a therapeutic nonpublic school placement with wrap-around services, called WRAP services, in the May 13, 2022 IEP offered Student a FAPE in the least restrictive environment.

Preliminarily, Student argues in his closing brief that he requires a residential placement as the result of in-home events that occurred after Student's complaint was filed. Student did not amend his complaint to include these events. Although information of post-filing events may be relevant to an award of remedies, and may have been considered for that purpose, it is not relevant to a determination of whether Student was offered a FAPE prior to the filing of his complaint. (See *Adams, supra*, 195 F.3d at p. 1149.)

Student also argues that he has a court order for Modesto to place him in residential treatment at Benchmark. Student's exhibit was not a court order. Nor was there any evidence that Modesto was subject to the jurisdiction of any court proceedings involving Student other than this due process hearing.

In determining the educational placement of a child with a disability, a school district must ensure that, in selecting the least restrictive environment,

- consideration is given to any potential harmful effect on the child or on the quality of services that he or she needs, and
- that the child with a disability is not removed from education in age-appropriate regular classrooms solely because of needed modifications in the general education curriculum. (34 C.F.R. § 300.116(d) and (e).)

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 occur only if the nature or severity of the 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:

1. the educational benefits of placement full-time in a regular class;
2. the non-academic benefits of such placement;
3. the effect the student has on the teacher and children in the regular class;  
and
4. 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 a further determination of 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 Dist.* (9th Cir. 2005) 394 F.3d 634, 640, fn. 7.)

The continuum of program options includes but is not limited to

- regular education;
- resource specialist programs;
- designated instruction and services;
- special classes;
- nonpublic, nonsectarian schools;
- state special schools;
- specially designed instruction in settings other than classrooms;
- itinerant instruction in settings other than classrooms; and
- instruction using telecommunication instruction in the home or instructions in hospitals or institutions. (Ed. Code, § 56361.)

Residential treatment removes a student from typical peers at school, from home and family, and from the community, and is understandably the most restrictive environment on the continuum.

Placement in a residential program is only required if necessary to meet the student's educational needs, and is not a response to medical, social, or emotional problems apart from the learning process. (*Ashland School Dist. v. R.J.* (9th Cir. 2009) 588 F.3d 1004, 1110 (*Ashland*), citing *Clovis Unified School Dist. v. California Office of Administrative Hearings* (9th Cir. 1990) 903 F.2d 635.)

## APRIL 7, 2022 IEP TEAM MEETING

By April 2022, Student was putting his head down more in class, completing less classwork and homework, and his grades were dropping. In response, Modesto convened an IEP on April 7, 2022, to consider increasing Student's academic support and transition to high school. The meeting was attended by Parent, Mynear, another resource teacher and administrator Mayer.

The IEP team discussed increasing Student's specialized academic instruction through the end of the school year. Modesto doubled the push-in services for math and English language arts from 235 per week in the February 9, 2022 IEP to 470 minutes per week. It added another 241 minutes per week of push-in services into Student's other academic classes. The increased support totaled an additional 476 minutes of specialized academic instruction. Parent did not consent to the April 7, 2022 IEP, and Student did not receive the additional academic support.

## MAY 13, 2022 IEP TEAM MEETING

On May 13, 2022, Modesto convened an IEP team meeting at Parent's request. It was attended by

- Parent,
- Student's advocate,
- Mynear,
- Patterson,
- Addington,

- the Student Assistance Specialist,
- Mayer, and
- a clinician from the Center for Health and Human Services.

Parent told Myneer in advance of the meeting that she was going to request residential placement, and he arranged for two people familiar with more restrictive settings to attend the meeting, specifically Modesto's supervisor of special education, and Andrew Conteh, a program specialist responsible for Modesto's mental health programs.

By May 13, 2022, Student was putting his head down in class every day and completing virtually no assignments. Teachers reported that when Student was focused, he was moderately successful, although he still required help with classwork and homework. In math, Student rushed through difficult concepts and made errors that caused him to fail. Student was complaining that the material was too hard. In English language arts, Student did better when he could listen to audio lessons and dictate his answers or essays to someone else. In Addington's history class, Student performed well on a recent test, but was sleeping in class or putting his head down almost every day. Student was respectful, and responded appropriately when alert, but simply failed to participate. Although Student told teachers in his core classes that he was tired or did not feel well, Student was alert and participated well in his resource classroom.

Socially and emotionally, outside of class Student was kind and thoughtful. He engaged in reciprocal conversations, although he often talked too much and overshared, and made off topic and socially inappropriate comments.



By May 2022, Student met his math goals of using positive and negative numbers, and using variable numbers represented by a letter. Student had not made progress on his written conclusion goal, although he continued to do better when orally stating a conclusion rather than writing one.

In light of the fact that Student required many reminders to get on task and remain focused, the team adopted an annual behavior goal for Student to complete assignments, and to ask for assistance if needed.

Student had expressed that he felt isolated in social situations with resultant anxiety and emotional dysregulation, but often needed to be told multiple times to take a break. The team adopted a social emotional goal to accurately identify situations that caused anxiety or emotional dysregulation and to manage his feelings through activities or coping strategies without prompting. Student's behavior plan was also updated by Patterson with additional coping strategies.

Parent told the team she had requested the meeting because she felt that Student was a school safety concern. Parent speculated that Student was at the point where he was a danger to himself and others. Parent told the IEP team that at home Student would get assaultive with her, threaten her and Student's siblings, and had to be restrained. She wanted Modesto to place him in a residential treatment center.

Parent stated that Student often did not want to get up to go to school. Myneer noted that Student looked happy and not distressed when he arrived at school, and Student's advocate speculated that was due to the incentives Student earned under the behavior plan. Parent attributed any success to Student receiving private therapy.

Dr. Brar emphasized at hearing that she was not a therapist. The only therapy Student received in May 2022 was from Weston Lange, a doctor of psychology and a licensed clinical social worker. Lange counseled Student, Parent, or Student and Parent together in-person for a total of one hour every two to three weeks from July 2021 through July 2022.

Lange testified at hearing with a professional demeanor and was thorough and informative in answering questions. He recalled Parent complaining that Student yelled, screamed, made threatening gestures, broke items, and pushed family members, but he had no recall that Student had ever caused physical harm. He understood that Student had problems with peers, with following rules, and had a negative view of school. He was aware that Student had said he might bring a gun to school, and that Student had been in a minor scuffle. Lange wrote two letters to Modesto in April and May 2022 recommending residential treatment at Parent's request.

Lange characterized Student's main challenges as poor emotional regulation, interpersonal conflict, and impaired decision making. He opined outside services had not been very helpful to Student. Lange speculated that based on what he had heard from Parent, Student was beyond the point of benefitting from a therapeutic day school program, and so he recommended a residential treatment center.

Lange was unfamiliar with the services, or type of services, that had been offered to Student. He was unaware of the qualifications and training of Modesto staff in the programs offered. He recommended residential placement because it would have staff trained to deal with school resistance and would use a point system to keep Student on track, but was unaware if any of Modesto's IEPs offered the same. He opined that the safety of other students depended on how well equipped program staff was to handle

Student's impulsiveness, but freely admitted that he did not know the qualifications or resources of the staff in programs offered in his IEPs. Lange could not opine on Student's academic needs. Lange's lack of personal knowledge of Student's educational needs, or of the types of programs and the qualifications of staff offered Student in his IEPs, adversely affected the persuasiveness of his opinion. His opinion that Student required an educational placement in residential treatment, particularly in light of his lack of personal knowledge regarding Student's educational performance or needs, was of little to no weight.

In light of Student's increased shutdowns in the classroom, Modesto team members changed Student's placement offer to include the Therapeutic Learning Center, or TLC program, for ninth grade. Program specialist Conteh explained that the TLC program provided a therapeutic learning environment with comprehensive social emotional support. TLC classes were smaller, had a lower student-to teacher ratio, and the TLC staff were trained to support students with social emotional functioning needs and resultant behavioral issues. The ninth grade TLC program was on a comprehensive high school campus, and Student would have access to typically developing peers during recess, lunch, and extracurricular activities. The IEP also included transportation to the TLC program, which was not at Student's home school.

Modesto team members also added WRAP services to the May 13, 2022 IEP. Conteh explained the WRAP services to Parent and other IEP team members. WRAP services included a parent partner to counsel Parent for one hour weekly, clinical sessions for Student for one hour weekly, support counseling for 10 hours weekly, child and family team meetings for one hour weekly, wraparound facilitation for one hour weekly, and family counseling for one hour weekly. WRAP services also included access

to a 24/7 crises response team. WRAP staff would interview the family and create their own treatment plan, and could go into the home to teach Student strategies to get up for school without inappropriate behaviors.

Lastly, the team discussed further assessment of Student, to include a functional behavior assessment, and an assessment for educationally related mental health services which would include record review, observation of Student during school, and an interview of Student and his family. An assessment plan, dated May 13, 2022, was given to Parent, and a copy was attached to the IEP.

Parent did not consent to the May 13, 2022 IEP. She wrote a letter that stated she believed Student was showing the signs of being a sociopath, and repeated many of the behavioral complaints she had previously reported in a more dramatic light, such as

- Student breaking doors,
- kicking holes in walls,
- calling people names,
- threatening to beat up his mother,
- hitting his younger brothers,
- waving items at others in a dangerous manner, and
- refusing to go to school.

She concluded that she felt unsafe with Student and requested that he be placed outside of the home.

Grandmother also wrote a letter attached to the IEP, stating that

- Student threw tantrums,
- was obstinate,
- refused to do things he did not want to do,
- lied,
- made up stories, and
- stole sweets hidden in her house.

She relayed a few examples, including one in which Student threw a tantrum when Parent turned off his gaming system after he refused to stop playing, and then banged on the door for 20 minutes after Parent and another adult carried Student out of the house and locked him outside. She relayed that Student had taken a bug in a jar away from his younger brothers and made them chase him to get it back and lied about Parent giving him permission to go to a friend's house.

Grandmother testified credibly at hearing. She had observed Student during distance learning, as she went to Student's home during the week to assist Student's younger sibling with online classes. Student was disruptive during distance learning when he stomped and yelled, so Grandmother and the sibling had to go into another room for quiet. Not all Student's outbursts were related to school, but some were when the subject matter was too difficult or he did not understand the work. Student played with friends after school. At the time of hearing, Student had been living at Grandmother's house for several weeks and Student's behavior was very good, although he recently threw a fit about having to take a shower. Grandmother, who had been a teacher at a private school, opined that Student needed more than most teachers could provide, and recommended

residential treatment for Student to get specialized help. Grandmother was unfamiliar with Modesto's IEP offers and programs, which seriously undermined her opinion that Student would do better in a residential placement.

In school prior to May 26, 2022, Student was shoulder bumped by another male student in Harrington's class, and Student shoulder bumped the other student in return. A shoulder bump is a shove to the person next to you, using your shoulder. There was then a series of shoulder bumps until Harrington told the boys to stop. Harrington testified shoulder bumping is a usual form of roughhousing among middle schoolers. Nonetheless, Harrington made a discipline report, and sent the student who started the incident to detention. Student was not punished.

#### MAY 26, 2022 IEP TEAM MEETING

Parent requested, and Modesto convened, another IEP team meeting on May 26, 2022. It was attended by the same IEP team members as the May 13, 2022 IEP team meeting.

Parent wanted to show the IEP team video recorded on her phone of Student upset and being restrained, and to renew her request for residential treatment. The videos showed Student upset and being restrained by his brother, with Parent asking him questions. At hearing, Modesto witnesses who saw the video expressed concerns that it appeared that Parent was taunting Student and upsetting him and explained that it did not show Student's actions in context.

Parent told the team that her video, Student's gun statement, and the shoulder bumping incident demonstrated that it was not safe for other students to have Student

on campus. She reviewed letters from Dr. Brar and Lange recommending residential treatment for medical reasons. Parent reiterated her opinion that Student was becoming a psychopath, as Student would laugh when he hurt his brothers. She stated that Student's aggressive and dangerous behaviors were increasing in the home. Parent concluded that it was urgent that Student be placed in a residential treatment center.

Modesto team members inquired whether Parent had signed the assessment plan, but Student's advocate responded that the doctor's letters were enough, and Modesto did not need to assess Student further.

In light of Parent's report of Student's increased anger and frustration, Modesto team members offered 2022 extended school year services on a diagnostic basis in a non-public school that offered services and staff similar to the TLC program.

Parent told the May 26, 2022 IEP team that she was agreeable to Student attending a non-public school for extended school year, and to WRAP services to support Student and the family. She also requested respite services as part of the WRAP program, which Modesto team members said would be noted in the WRAP request if Parent consented to the IEP offer. Parent also requested applied behavior analysis services, and Conteh informed her that the proposed functional behavior assessment would be completed by a Board Certified Behavior Analyst who could make a recommendation to the IEP team. The team agreed to add 30 minutes per month of behavioral intervention services as a consult until the functional behavior assessment could be reviewed.

The May 26, 2022 IEP restated the May 13, 2022 offer of specialized academic instruction for 923 minutes per week in the TLC classroom, 235 minutes per week of push-in support for English language arts and math, and 241 minutes of push-in

support in Student's other classes, plus a diagnostic placement in a non-public school for the 2022 extended school year. It also offered WRAP services. Placement in the TLC classroom would place Student in special education for 53 percent of the school day, and in regular education for 47 percent of the school day.

Parent consented to the May 26, 2022 IEP on May 31, 2022, after the 2021-2022 regular school year was over, with written exceptions. She disagreed with any placement other than residential treatment. She wanted respite care until such time as Student was placed in residential treatment. She wanted a psychologist other than Patterson to conduct Student's assessments and requested that an outside agency be retained to conduct the assessments and give an unbiased opinion.

Modesto responded to Parent's exceptions with a prior written notice letter on June 20, 2022. Modesto stated that it believed the TLC program with WRAP support and the other supports in the May 26, 2022 IEP provided Student with a FAPE. It also declined to provide respite services to Parent as not required for Student to receive educational benefit. As discussed below in Issue 12, Modesto proposed to conduct multiple assessments, by a school psychologist and private educational psychologist Adam Frank. These assessments were designated in a subsequent June 10, 2022 assessment plan, and included

- a functional behavior assessment,
- an educationally related mental health services assessment, and
- an independent cognitive, social emotional and functional behavior assessment.

In that letter, Modesto also offered 10 hours of in-home academic support pending an IEP team review of the assessments.



## LEAST RESTRICTIVE ENVIRONMENT

The evidence did not establish that a residential treatment center was the least restrictive placement for Student.

The parties agreed that Student could not be placed in general education for 100 percent of his school day. As to the first *Rachel H.* factor of academic benefit, despite Student being eager to learn and having made substantial progress, Student was not working at grade level. Student's disabilities related to autism, ADHD and mood dysregulation, when combined with his low average cognitive ability and slow information processing speeds, interfered with his understanding of grade level materials and his ability to keep up in general education academics. The February 9, 2022 and May 26, 2022 IEP teams were justifiably concerned that Student would have difficulty keeping up with general education as he progressed to high school, and offered resource periods with extensive push-in instruction into the general education core classes, and a therapeutic special day class with WRAP supports, respectively. Student needed more support than general education classes could provide.

As to the second *Rachel H.* factor, the nonacademic benefits of a general education placement, Student clearly benefitted socially from general education with typically developing peers. Although Student sometimes misperceived peer statements as criticism, and grew quickly frustrated with peer conflict, Student was well liked by his typical classmates and Student enjoyed participating with his peers in class and on the playground. The second factor weighed heavily in favor of placing Student where he would get the non-academic benefits of a therapeutic social emotional program without forfeiting the non-academic benefit of daily interaction with typical peers.

Particularly with push-in instructional support, Student did not interfere with access of other students to the general education teachers, the third *Rachel H.* factor. Student sometimes dominated class discussions, but participated in and contributed to grade level classes without taking teachers such as Harrington or Addington away from other students. Student was well-behaved and compliant in the general education classrooms. There was no evidence that cost, the fourth *Rachel H.* factor, was a factor in Modesto's placement decision.

Applying the *Rachel H.* factors to the facts, Student could not have been satisfactorily educated solely in a regular education environment. Therefore, the least restrictive environment analysis requires a determination of whether Student was to be mainstreamed to the maximum extent that is appropriate per *Daniel R.R.*

At the time of the February 9, 2022 IEP, Student was doing well in his classes, and making good progress on his goals. The February 9, 2022 IEP team maximized Student's time in regular education by pulling him out for only 14 percent of his school day for one period of resource specialist support. Student had been successful in seventh and eighth grade general education classes with push-in supports, and the February 2022 IEP team reasonably calculated its offer maximized Student's time with his typical peers to the extent appropriate.

By May 26, 2022, it was apparent to Student's IEP team that he needed a more restrictive, therapeutic placement. The TLC program on a comprehensive high school campus ensured Student's ability to engage with typical peers during breaks, at lunch and during extracurricular activities. Although the May 26, 2022 IEP would take Student out of general education for 53 percent of his school day for therapeutic and specialized

academic instruction, the TLC program offered opportunities for Student to stay in regular education for 47 percent, or nearly half, of Student's school day in compliance with the IDEA's least restrictive environment mandate.

The evidence established that a residential treatment center would be much more restrictive than the TLC program, with Student outside of regular education and isolated from typical peers for 100 percent of his school day. A residential treatment center constitutes one of the most restrictive placements on the continuum of placements, and the IDEA's requirement that students be educated in the least restrictive environment would have barred placement there when the TLC program with WRAP services provided Student with a FAPE.

The evidence did not establish that Student required placement in a residential treatment center in February or May 2022. Dr. Brar and Lange expressly admitted at hearing that they did not know what Student's educational needs were. Their opinions that Student required an educational placement in residential treatment because of behaviors Student exhibited at home, but not at school, were unpersuasive. Dr. Brar's contemporaneous treatment notes through March 2022 indicated no safety concerns and reported that Student's behavior in the home was stable, so her opinion at hearing that Student required a residential placement during the 2021-2022 school year because Student was a threat to himself and others was particularly unpersuasive.

At hearing, Dr. Brar justified placement in residential treatment in large part because she recommended that Student be taken off all medications prior to trying other medications, and Student would need to be monitored 24/7 over a period of months by medical staff. Dr. Brar recommended that Student be placed at Benchmark because Student had not responded to her treatments, and not because she had an

opinion on Student's educational needs, which she did not. Per *Ashland*, a residential placement in an IEP as a response to medical, social, or emotional problems, rather than Student's educational needs, is unwarranted and violates the IDEA's least restrictive environment requirement.

Lange was not familiar with Benchmark, and freely explained that his recommendations were based largely on Parent's reports that Student was a danger to himself and others, although he could not recall any report of Student causing physical harm. School psychologist Edwards expressly stated that she did not have sufficient information to offer an opinion on whether Student required a residential placement.

In contrast, the Modesto witnesses familiar with Student's performance and functioning in the school setting testified persuasively that Student's needs could be met in the TLC program with WRAP services and the supports in Student's May 26, 2022 IEP. Student would be taught in a therapeutic environment with a focus on management of social and emotional issues in his core classes, minimizing the impact of Student's autism, mood dysregulation and frustration on his access to curriculum. Modesto offered WRAP services to provide another layer of support for Student and his family while they went through an unprecedented time of court battles and stress, and was reasonably calculated to address Student's burgeoning

- school resistance,
- executive functioning tasks such as tracking, completing and turning in homework, and
- other emotional problems that Student encountered while not in school.

The placement in a therapeutic special day classroom with WRAP services and other supports in the May 26, 2022 IEP was reasonably calculated to ensure that Student made progress appropriate in light of his circumstances, in the least restrictive environment.

There was no dispute that Student's family dynamics were chaotic, and Parent was under a great strain, particularly during school closures with several school-aged children at home. However, much of the behavior reported by Parent at home appeared not atypical for a teenage boy and insufficient to justify being pulled from his family, friends, home, school, and community. For example, although Parent may have been at her wit's end, Student yelling when a video game is turned off mid-game, slamming doors, stomping his feet, lying about parental permission to visit a friend, disagreeing with siblings, and even hitting siblings without causing physical harm, is not such atypical pubescent behavior as to warrant institutionalization. Even if extreme medical, social, or emotional concerns in the home or community setting would justify an educational placement in residential treatment, the behaviors reported to Modesto staff were simply not that extreme. Patterson, Conte and Myneer testified persuasively that WRAP services designed to provide therapeutic support in the home would have been reasonably calculated to address any in-home behaviors of Student that impacted his access to education.

Conte, a credentialed education specialist and Modesto's mental health program coordinator, testified at hearing with a professional demeanor, and was very straightforward and thorough in his responses. He taught students with emotional problems in a therapeutic classroom for six years and administered Modesto's mental health programs for the past five years. He was familiar with the TLC program and local residential treatment centers. He testified credibly about multiple observations of Student at school in Spring 2022, in which Student was engaged with his peers in

basketball games on the playground, assisting peers in class, and doing independent work. Conte was a member of Student's IEP teams in May 2022, and had reviewed Student's educational records, including Student's discipline record, and spoken with Student's teachers. He persuasively opined that Student was not a danger to other students on campus, and that Student taking a break or putting his head down was precisely the type of conduct Student had been taught to self-police himself and deescalate frustration and conflict. He opined that the therapeutic environment of the TLC program would help Student address his anger and frustration and give Student immediate feedback that would enable Student to eagerly participate in his education again. He also persuasively opined that the wide range of supports provided by WRAP services would address Student's behavioral and social emotional needs in school and as needed in the home to support Student's access to education.

Even if a residential treatment placement was the least restrictive educational environment for Student, which it was not, Parent was not entitled to a placement of Parent's choice. Development of an IEP is a team decision, but if the team members do not agree, it is the school district that is ultimately responsible for ensuring that a student is offered a FAPE. (*Union School Dist. v. Smith* (9th Cir. 1994) 15 F.3d 1519, 1526; *Letter to Richards*, U.S. Dept. of Ed., Office of Special Ed. Programs (Jan. 7, 2010).) The IDEA gives parents the right to participate in decisions about their child's program, but it does not give parents the right to control or veto any individual IEP offer provision. (*Ms. S. v. Vashon Island Sch. Dist.* (9th Cir. 2003) 337 F.3d 1115, 1131.)

Lastly, none of the witnesses at hearing had personal knowledge of the components of the Benchmark program, and whether it would offer Student a FAPE. Dr. Brar's, Lange's, and Edwards's knowledge of Benchmark had come from looking at Benchmark's website. Dr. Brar had recommended Benchmark to other families for

whom Dr. Brar's treatment did not work and received some second-hand information about Benchmark's general program from those families. At hearing, Student was not permitted to call a witness from Benchmark on rebuttal to describe the Benchmark program or opine about its appropriateness for Student. Such testimony was improper to rebut the testimony of Student's own witnesses that they were not familiar with the Benchmark program. Modesto's witnesses had also testified that they were unfamiliar with the Benchmark program, and testimony describing the Benchmark program, or an opinion by a Benchmark representative about the appropriateness of the Benchmark program, would not rebut that testimony.

Student did not meet his burden of proving by a preponderance of the evidence that Modesto denied him a FAPE by denying Parents' requests after the February 9, 2022 and May 26, 2022 IEP team meetings for placement in a residential treatment program in a State facility of Parents' choice.

#### ISSUE 11b: DID MODESTO DENY STUDENT A FAPE BY DENYING PARENT'S REQUESTS AFTER THE FEBRUARY 9, 2022 AND MAY 26, 2022 IEP TEAM MEETINGS FOR AN EXPLANATION OF ALLEGED VIOLATIONS OF THE HEALTH INSURANCE PORTABILITY AND ACCOUNTABILITY ACT?

Student contends that Modesto denied him a FAPE by improperly sharing information with a third party in violation of the Health Insurance Portability and Accountability Act of 1996, called HIPAA, and failing to tell Parent who released the information, or what Modesto had done to mitigate the damage. Modesto contends that the alleged conduct is not within OAH's jurisdiction to decide.

A party has the right to present a complaint in due process with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a FAPE to such child. (20 U.S.C. § 1415(b)(6); Ed. Code, § 56501, subd. (a).) The jurisdiction of OAH is limited to these matters. (*Wyner v. Manhattan Beach Unified School Dist.* (9th Cir. 2000) 223 F.3d 1026, 1028-1029.)

OAH does not have jurisdiction to decide claims based on HIPAA, or other civil rights laws. A determination of whether Modesto violated Student's HIPAA rights is outside of OAH jurisdiction.

However, if such a violation could be found to somehow violate the IDEA, a procedural error does not automatically require a finding of a denial of FAPE. A procedural violation does not constitute a denial of FAPE unless the procedural inadequacy

- impeded the child's right to a FAPE,
- significantly impeded the parent's opportunity to participate in the decision making process regarding the provision of FAPE
- or caused a deprivation of educational benefits. (20 U.S.C. § 1415(f)(3)(E)(i) & (ii); Ed. Code, § 56505, subd. (j); *W.G. v. Board of Trustees of Target Range School Dist. No. 23* (9th Cir. 1992) 960 F.2d 1479, 1483-1484; see also *Park v. Anaheim Union High School Dist., et al.* (9th Cir. 2006) 464 F.3d 1025, 1033, fn. 3 [assessments].)



If a HIPAA violation occurred, it did not significantly impede Parent's opportunity to participate in making decisions about Student's educational program. Parent

- attended all IEP team meetings,
- was informed of Student's struggles with the curriculum,
- asked questions that were thoughtfully answered, and
- objected to Modesto's determinations of components of Student's IEP when in disagreement.

Parent was an active participant in the development of Student's IEPs at all times.

Student did not meet his burden of proving by a preponderance of the evidence that Modesto denied him a FAPE by denying Parents' requests after the February 9, 2022 and May 26, 2022 IEP team meetings for an explanation of alleged violations of the Health Insurance Portability and Accountability Act.

**ISSUE 11c: DID MODESTO DENY STUDENT A FAPE BY DENYING PARENT'S REQUESTS AFTER THE FEBRUARY 9, 2022 AND MAY 26, 2022 IEP TEAM MEETINGS FOR COMPLETED DOCUMENTATION REGARDING A DISCIPLINE REPORT AND FOR FAILING TO REPORT THREATS TO OTHER STUDENTS?**

Student contends that Modesto denied Student a FAPE by sending Parent a letter on June 3, 2022, that Parent's concerns regarding complete documentation of Student's discipline record had been handled, without sending her a copy of the revised discipline record. Modesto contends that the late entry of one discipline incident did not deny Parent participation in the IEP development process.

Until the Spring semester of the 2021-2022 school year, Student's discipline record did not reflect that Student had made a statement about bringing in a gun to school. An entry regarding the statement was not entered until months after the statement was made, and Student was not provided with a copy of the discipline record with that entry until the due process hearing.

However, Parent was aware of Student's gun statement the same day the statement occurred. Mynear called Parent the day Student made the gun statement and discussed it with her. Parent was aware that Mynear had investigated the incident and found Student's statements to not pose a credible threat. Student's statement was discussed by Parent with Dr. Brar and Lange soon after the statement was made and prompted Parent to remove guns from the family home. The gun statement was expressly referenced in the November 18, 2021 classroom behavior plan signed by Parent. Modesto's late entry of the statement into Student's discipline records did not significantly impede Parent's opportunity to participate in the decision making process regarding the provision of FAPE to Student. It did not interfere with Parent's opportunity to participate in the design of Student's educational program at all.

Student did not meet his burden of proving by a preponderance of the evidence that Modesto denied him a FAPE by denying Parents' requests after the February 9, 2022 and May 26, 2022 IEP team meetings for completed documentation regarding a discipline report and for failing to report threats to other students.

ISSUE 11d: DID MODESTO DENY STUDENT A FAPE BY DENYING PARENT'S REQUESTS AFTER THE FEBRUARY 9, 2022 AND MAY 26, 2022 IEP TEAM MEETINGS FOR A THREAT ASSESSMENT OF STUDENT AND A SAFETY PLAN?

Student contends that Modesto denied him a FAPE by failing to do a threat assessment of Student or develop a safety plan after Student made the gun comment. Modesto contends that it assessed Student's threat as not credible and developed the classroom behavior plan partially in response to Student's gun statement.

As discussed in Issue 11c, Parent was aware of the gun statement the day it happened and participated in IEP discussions about the incident soon after at the February 9, 2022 IEP. Mynear did conduct a threat assessment the day of the statement, with the participation of Parent who told Mynear that Student did not have the means to bring a gun to school. Student did not cite in his complaint, or in his closing brief, any federal or State statute or regulation requiring Modesto to conduct a threat assessment of Student, or to develop a safety plan because of the gun statement or any other conduct by Student, at home or at school. Modesto promptly developed a behavior plan that expressly referenced Student's gun comment on November 18, 2021, to which Parent consented the same day. The lack of an unidentified type of threat assessment or safety plan did not significantly impede Parent's opportunity to participate in the decision making process regarding the provision of FAPE to Student.

Student did not meet his burden of proving by a preponderance of the evidence that Modesto denied him a FAPE by denying Parents' requests after the February 9, 2022 and May 26, 2022 IEP team meetings for a threat assessment and development of a safety plan.

#### ISSUE 11e: DID MODESTO DENY STUDENT A FAPE BY DENYING PARENTS' REQUESTS AFTER THE FEBRUARY 9, 2022 AND MAY 26, 2022 IEP TEAM MEETINGS FOR AN INDEPENDENT PSYCHOEDUCATIONAL EVALUATION?

Student contends that Modesto denied Student a FAPE by denying Parent's request for an independent educational evaluation. Modesto contends that it promptly responded and agreed to fund independent educational evaluations.

The procedural safeguards of the IDEA provide that under certain conditions a student is entitled to obtain an independent educational evaluation at public expense. (20 U.S.C. § 1415(b)(1); 34 C.F.R. § 300.502 (a)(1); Ed. Code, §§ 56329, subd. (b) and 56506, subd. (c).) An independent educational evaluation means an evaluation conducted by a qualified examiner who is not employed by the public agency responsible for the education of the child in question. (34 C.F.R. § 300.502(a)(3)(i).) To obtain an independent educational evaluation, the student must disagree with an assessment obtained by the public agency and request an independent educational evaluation. (34 C.F.R. § 300.502(b)(1), (2).)

The provision of an independent educational evaluation is not automatic. The implementing regulations of the IDEA provide, in relevant part, that following the student's request for an independent educational evaluation, the public agency must, without unnecessary delay, either file a due process complaint to request a hearing to

show that its assessment is appropriate or ensure that an independent educational assessment is provided at public expense. (34 C.F.R. § 300.502(b)(2) [nonrelevant exceptions not referenced]; see also Ed. Code, § 56329, subd. (c) [providing that a public agency may initiate a due process hearing to show that its assessment was appropriate].)

Here, Parent did not request independent educational assessments until May 2022. Parent requested both a different psychologist to assess Student and an independent educational evaluation by an unbiased assessor in her May 31, 2022 exceptions to the May 26, 2022 IEP. Specifically, Parent wrote that she wanted a new school psychologist to conduct Student's evaluations, and a third party outside evaluator, such as a psychologist or behaviorist, to conduct an independent educational evaluation and give unbiased opinions.

Modesto responded on June 20, 2022, with a prior written notice letter in which it agreed to fund independent educational evaluations in the areas of cognitive development, social emotional functioning, and functional behavior, constituting the disputed areas between Parent and Modesto as articulated in May 2022 IEP team meetings.

In May 2022, Modesto had not yet conducted an educationally related mental health services assessment, so Parent had no dispute with such an assessment and was not entitled to an independent educational evaluation in that area.

Student did not meet his burden of proving by a preponderance of the evidence that Modesto denied him a FAPE by denying Parents' requests after the February 9, 2022 and May 26, 2022 IEP team meetings for an independent psychoeducational evaluation.

ISSUE 11f: DID MODESTO DENY STUDENT A FAPE BY DENYING PARENT'S REQUESTS AFTER THE FEBRUARY 9, 2022 AND MAY 26, 2022 IEP TEAM MEETINGS FOR DEVELOPMENT OF A PLAN TO TRANSITION STUDENT FROM ONE LOCATION TO ANOTHER LOCATION FOR EXTENDED SCHOOL YEAR?

Student contends that Modesto denied him a FAPE because it denied Parent's June 3, 2022 request for a plan to transition Student from his current school for the 2021-2022 school year to a nonpublic school for the 2022 extended school year.

Neither party moved a June 3, 2022 letter into evidence, so the nature of Parents' alleged request for transition services, and the reason or reasons for the request, cannot be determined. The offer of a diagnostic nonpublic school placement for extended school year 2022 was not made until the May 26, 2022 IEP team meeting, so transition services to that placement could not have been requested prior to the May 26, 2022 IEP offer. However, the evidence did not establish that Parent's opportunity to participate in development of Student's educational program was significantly impeded because of a failure to offer transition services from Student's regular school placement to a nonpublic school placement for the extended school year.

First, Parent's testimony at hearing was that Student enjoyed going to the nonpublic school during extended school year because it had daily outdoor activities or field trips and was not, in Parent's opinion, academically rigorous. Second, the behavior log from the nonpublic school demonstrated that Student attended and did not display any inappropriate behaviors until the last week of school, after he was familiar with the school and its routines and so did not support the need for transition services for entry

into that school. Third, Modesto offered Parent WRAP services in the May 26, 2022 IEP, consented to by Parent on May 31, 2022, which included in-home support to assist Student in getting to school. The evidence established that WRAP personnel contacted Parent to schedule services as early as June 3, 2022, the day of extended school year enrollment, and could have assisted with Student's transition. Student did not require a transition plan for the non-public school diagnostic placement.

The evidence did not establish that a failure to develop a transition plan impeded parent's opportunity to meaningfully participate in developing Student's educational program. Parent attended the May 26, 2022 IEP team meetings, and brought an advocate. Parent was informed of Student's problems at those meetings, had opportunities to ask questions that were thoroughly answered, contributed to the discussion of Student's placement and need for extended school year, and objected to placement in any setting except residential treatment. Parent's letter, and Grandmother's letter, were provided to the IEP team and attached to the May 13 and May 26, 2022 IEPs.

Student did not meet his burden of proving by a preponderance of the evidence that Modesto denied him a FAPE by denying Parents' requests after the February 9, 2022 and May 26, 2022 IEP team meetings for development of a plan to transition Student from one location to another location for extended school year.

## ISSUE 12: MAY MODESTO ASSESS STUDENT PURSUANT TO THE JUNE 9, 2022 ASSESSMENT PLAN, AND WILL THAT ASSESSMENT CONSTITUTE AN INDEPENDENT EDUCATIONAL EVALUATION?

Modesto contends that the law is vague on whether an ALJ can or cannot order an independent educational evaluation over a parent's objection, but urges that OAH do

so in this circumstance because an assessment is necessary and Parent is unlikely to trust the outcome if Modesto conducts its own assessments. Student contends that Modesto's proposed assessments would not address Student's current circumstances of being homebound and seeking independent study.

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 and his or her parents. (20 U.S.C. §§ 1414(b)(1), 1415(b)(3) & (c)(1); Ed. Code, §§ 56321, subd. (a), 56381, subd. (a).) The notice consists of the proposed assessment plan and a copy of parental rights and procedural safeguards under the IDEA and companion State law. (*Id.*) The assessment plan must

- be in language easily understood by the general public,
- be provided in the native language of the parent,
- 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, subds. (b)(1)-(4).)

If a parent does not consent to a reassessment plan, the school district may conduct the reassessment without parental consent if it shows at a due process hearing that conditions warrant reassessment of the student and that it is lawfully entitled to do so. (20 U.S.C. § 1414(c)(3); 34 C.F.R. § 300.300(c)(ii); Ed. Code, §§ 56381, subd. (f)(3), 56501, subd. (a)(3).) Therefore, a school district must establish that the educational or related services needs of the child warrant reassessment of the child, and that the district has complied with all procedural requirements to obtain the parent's informed



consent. The school district must also demonstrate that it has taken reasonable measures to obtain informed consent, but the parent has failed to respond. (20 U.S.C. § 1414(c)(3); Ed. Code, § 56381, subd. (f)(1).)

Modesto first proposed the assessments at issue at the May 13, 2022 IEP team meeting, at which Modesto offered the TLC and WRAP programs. In the IEP notes, the assessment plan was described as seeking an educationally related mental health services assessment. However, the assessment plan, attached to the IEP and also dated May 13, 2022, had checked boxes proposing to conduct evaluations in three areas. The proposed assessments included

- a social emotional/behavior assessment,
- a review of records, observation and interview of student and family by a school psychologist and educationally related mental health services clinician, and
- a psychoeducational assessment.

The words “functional behavior assessment” were typed near the box checked “social/emotional/behavior.” Modesto appeared to be proposing to conduct a functional behavior assessment, an educationally related mental health services assessment and another psychoeducational assessment.

At the May 26, 2022 IEP team meeting, program manager Conte explained that Modesto sought consent for functional behavior and educationally related mental health services assessments. Parent requested applied behavior analysis services in the home, and Conte assured Parent that the functional behavior assessment would be conducted by a Board Certified Behavior Analyst who was qualified to make a recommendation on

those services. The notes section of the May 26, 2022 IEP stated that Modesto was seeking an educationally related mental health services assessment to address Student's mental health needs within school, and a functional behavior assessment to address behavioral concerns. It did not mention another psychoeducational assessment. Nonetheless, the May 13, 2022 assessment plan included a psychoeducational assessment, although Modesto had completed a psychoeducational assessment as part of the multidisciplinary assessment in February 2021, with an additional social emotional component in February 2022.

Parent signed consent to the May 13, 2022 assessment plan on May 31, 2022, but wrote onto the assessment plan that she wanted the assessors to wait on assessment until Student was past the honeymoon window at the new school, that she wanted the assessors to use the entire assessment window, and that she wanted a different school psychologist than Patterson to assess Student.

Also on May 31, 2022, Parent signed consent to the May 26, 2022 IEP with five written exceptions, which were attached to the IEP. Two of those were that Parent wanted a new school psychologist to assess Student, and that she wanted a third party outside agency to conduct the evaluations, explaining that she wanted a psychologist, behaviorist or other assessors who would provide unbiased opinions.

Modesto responded to Parent's requests with a confusing prior written notice letter on June 20, 2022. In that letter, Christi Allen, the senior director of special education for Modesto, stated that Modesto agreed to allow a new school psychologist to complete the evaluation, without designating which evaluation. She also stated that Modesto agreed to fund an assessment by an outside private school psychologist, without designating which evaluation. Allen indicated that Parent had received an

assessment plan dated June 10, 2022, which designated Adam Frank as an outside assessor to complete evaluations, without specifying which evaluations. The letter stated that in addition to the assessment plan previously provided, Modesto proposed to conduct a functional behavior assessment and an educationally related mental health services assessment of Student. It also stated that Modesto agreed to conduct independent educational evaluations for both the cognitive, social emotional and functional behavior assessment. A June 10, 2022 assessment plan was not attached to Allen's June 20, 2022 letter, and not moved into evidence as a separate exhibit. Without a copy of the June 10, 2022 assessment plan, it is unclear which assessments Modesto proposed to conduct itself with a new school psychologist or with outside psychologist Frank. However, Modesto clearly offered independent educational evaluations for cognitive and social emotional function, and for functional behavior.

A June 9, 2022 assessment plan was filed with Modesto's evidence, but neither Allen nor Conteh identified or testified about that document, and it was not moved into evidence. Even were that plan to be considered, it was confusing and contrary to the information given to Parent at the May 26, 2022 IEP team meeting. The June 9, 2022 assessment plan proposed

- an assessment in the area of intellectual development to be done by licensed educational psychologist Frank,
- a social emotional/behavior assessment to be completed by Frank, and
- a functional behavior assessment to be done by Frank.

Frank was designated as an independent assessor for the functional behavior assessment, but not for the other assessments. The plan did not state that Frank was a

Board Certified Behavior Analyst, although the May 26, 2022 IEP documented that the functional behavior assessment would be conducted by a Board Certified Behavior Analyst.

The June 9, 2022 assessment plan appears to have been superseded by a June 10, 2022 assessment plan that was also not moved into evidence. The June 9, 2022 assessment plan is not the plan referenced in Modesto's June 20, 2022 prior written notice letter to Parent explaining the district assessments and independent educational evaluations Modesto proposed. For these reasons, and because it was not moved into evidence, the June 9, 2022 assessment plan cannot be analyzed for procedural compliance.

More disturbingly, Modesto attempts to deprive Parent of her right to request an independent assessment by simply funding a contractor of Modesto's choice to complete district assessments. As of May 31, 2022, Modesto completed a psychoeducational assessment and additional social emotional assessment, and as discussed in Issue 11e, Parent had the right to request an independent educational evaluation in those areas because she disagreed with those results. The very term "independent" suggests that a parent and school district agree on a neutral assessor, not that the school district unilaterally determines who will conduct the assessment.

The United States Supreme Court has found that the IDEA provision for requesting an independent evaluation at public expense ensures that parents have access to an expert who can evaluate all the materials that the school must make available, and who can give an independent opinion. Parents are not left to challenge

school districts without a realistic opportunity to access the necessary evidence, or without an expert with the fire power to match that of the school district. (*Schaffer, supra*, 546 U.S. at pp. 60-61.)

Here, Parent had the right to seek an independent educational evaluation to challenge Modesto's February 2021 psychoeducational assessment as updated by the February 2022 social emotional assessment, because Modesto has completed those assessments. However, Modesto had not yet completed its own functional behavior or educationally related mental health services assessments, and concedes it has no authority to support its contention that by hiring an outside contractor it can deprive Parent of an opportunity to request an independent educational evaluation if she disagrees with those assessment results. Modesto's argument that OAH should order Parent to accept Modesto's choice of assessor and lose her right to request an independent educational evaluation because Parent would otherwise not trust Modesto's assessment results turns logic on its head.

In sum, Modesto seeks an order under OAH's broad equitable authority requiring Student to submit to an assessment by an assessor unilaterally chosen by Modesto and preventing Parent from challenging that assessor's results. Such an order would eviscerate Parent's statutory right under the IDEA and California law to request an independent educational evaluation to challenge an assessment by Modesto, or by one of Modesto's agents. This Decision declines to make such an order, which is neither appropriate nor equitable.

Modesto did not meet its burden of proving by a preponderance of the evidence that it may assess Student pursuant to the June 9, 2022 assessment plan, or that the assessment should constitute an independent educational evaluation.

## 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.

### ISSUE1:

Modesto did not deny Student a FAPE by providing distance learning instead of in-person services from July 8, 2020 through the end of the 2019-2020 school year, and the 2020-2021 school year.

Modesto prevailed on Issue 1.

### ISSUE 2:

Modesto did not deny Student a FAPE by providing distance learning without necessary accommodations from July 8, 2020 through the end of the 2019-2020 school year, and the 2020-2021 school year.

Modesto prevailed on Issue 2.

### ISSUE 3:

Modesto did not deny Student a FAPE by failing to assess Student to determine if distance learning was appropriate for Student from July 8, 2020 through the end of the 2019-2020 school year, and the 2020-2021 school year.

Modesto prevailed on Issue 3.

#### ISSUE 4:

Modesto did not deny Student a FAPE in the February 17, 2021 IEP by failing to include adequate goals for Student to receive educational benefit, particularly academic, social emotional, social skills, work habits, and vocation.

Modesto prevailed on Issue 4.

#### ISSUE 5:

Modesto did not deny Student a FAPE by failing to address regression suffered by Student as a result of distance learning from July 8, 2020 through the end of the 2019-2020 school year, and the 2020-2021 school year.

Modesto prevailed on Issue 5.

#### ISSUE 6:

Modesto did not deny Student a FAPE by failing to offer Student extended school year in Summer 2021.

Modesto prevailed on Issue 6.

#### ISSUE 7:

Modesto did not deny Student a FAPE by failing to offer sufficient related services in Student's February 17, 2021 IEP, specifically in occupational therapy and speech and language.

Modesto prevailed on Issue 7.

#### ISSUE 8:

Modesto did not deny Student a FAPE by failing to offer sufficient related services in Student's February 2, 2022 IEP, specifically in counseling and speech and language.

Modesto prevailed on Issue 8.

#### ISSUE 9:

Modesto did not deny Student a FAPE by not finding him eligible for special education under the category of autism, from July 8, 2020 through the filing of Student's complaint.

Modesto prevailed on Issue 9.

#### ISSUE 10:

Modesto did not deny Student a FAPE by failing to offer in-home applied behavior analysis therapy and clinic meetings for the 2021-2022 school year.

Modesto prevailed on Issue 10.

#### ISSUE 11a:

Modesto did not deny Student a FAPE by denying Parent's requests after the February 9, 2022 and May 26, 2022 IEP team meetings for placement in a residential treatment program in a State facility of Parents' choice.

Modesto prevailed on Issue 11a.



#### ISSUE 11b:

Modesto did not deny Student a FAPE by denying Parent's requests after the February 9, 2022 and May 26, 2022 IEP team meetings for an explanation of alleged violations of the Health Insurance Portability and Accountability Act.

Modesto prevailed on Issue 11b.

#### ISSUE 11c:

Modesto did not deny Student a FAPE by denying Parent's requests after the February 9, 2022 and May 26, 2022 IEP team meetings for completed documentation regarding a discipline report and for failing to report threats to other students.

Modesto prevailed on Issue 11c.

#### ISSUE 11d:

Modesto did not deny Student a FAPE by denying Parent's requests after the February 9, 2022 and May 26, 2022 IEP team meetings for a threat assessment of Student and a safety plan.

Modesto prevailed on Issue 11d.

### ISSUE 11e:

Modesto did not deny Student a FAPE by denying Parent's requests after the February 9, 2022 and May 26, 2022 IEP team meetings for an independent psychoeducational evaluation.

Modesto prevailed on Issue 11e.

### ISSUE 11f:

Modesto did not deny Student a FAPE by denying Parent's requests after the February 9, 2022 and May 26, 2022 IEP team meetings for development of a plan to transition Student from one location to another location for extended school year.

Modesto prevailed on Issue 11f.

### ISSUE 12:

Modesto may not assess Student pursuant to the June 9, 2022 assessment plan, and any assessment under that assessment plan will not constitute an independent educational evaluation.

Student prevailed on Issue 12.

### ORDER

1. All of Student's requests for remedies are denied.
2. Modesto's request for an order that it may assess Student without parental consent is 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.

*/s/*

Alexa Hohensee

Administrative Law Judge

Office of Administrative Hearings