

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

CASE NO. 2022070348

PARENT ON BEHALF OF STUDENT,

v.

ALAMEDA UNIFIED SCHOOL DISTRICT.

DECISION

OCTOBER 24, 2022

On July 11, 2022, the Office of Administrative Hearings, called OAH, received a due process hearing request from Student naming Alameda Unified School District. Administrative Law Judge June R. Lehrman heard this matter via videoconference on August 30 and 31, and September 1, 6, 7, 8 and 13, 2022.

Brett Allen represented Student. Mother and Father attended all hearing days on Student's behalf. Lenore Silverman and Ankita Thakkar represented Alameda Unified School District. Senior Director Dr. Randhir Bains attended all hearing days on Alameda's behalf.

The matter was continued to October 3, 2022 for written closing briefs. The record was closed, and the matter was submitted on October 3, 2022.

ISSUES

1. Did Alameda deny Student a free appropriate public education, called a FAPE, by failing to include all necessary individualized educational plan, called an IEP, teams members at the March 7, 2022 IEP?
2. Did Alameda deny Student a FAPE by failing to include meaningful present levels of academic achievement and functional performance in the March 7, 2022 IEP?
3. Did Alameda deny Student a FAPE by failing to offer goals in all areas of need in the March 7, 2022 IEP?
4. Did Alameda deny Student a FAPE by failing to offer services, accommodations, supports and modifications to meet Student's individual and unique needs in speech/socialization in the March 7, 2022 IEP offer?
5. Did Alameda deny Student a FAPE by failing to offer services, accommodations, supports and modifications to meet Student's individual and unique needs in fine motor skills/dysgraphia in the March 7, 2022 IEP offer?
6. Did Alameda deny Student a FAPE by failing to offer services, accommodations, supports and modifications to meet Student's individual and unique needs in executive functioning in the March 7, 2022 IEP offer?

7. Did Alameda deny Student a FAPE by failing to offer services, accommodations, supports and modifications to meet Student's individual and unique needs in mental health (anxiety) in the March 7, 2022 IEP offer?
8. Did Alameda deny Student a FAPE by failing to offer services, accommodations, supports and modifications to meet Student's individual and unique needs in sensory regulation in the March 7, 2022 IEP offer?
9. Did Alameda deny Student a FAPE by failing to offer services, accommodations, supports and modifications to meet Student's individual and unique needs in transition planning in the March 7, 2022 IEP offer?

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.) All subsequent references to the Code Of Federal Regulations are to the 2006 edition, unless otherwise noted. The main purposes of the Individuals with Disabilities Education Act, referred to as the IDEA, are to ensure:

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

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

Student was 16 years old and in tenth grade at the time of hearing. Student resided within Alameda's geographic boundaries at all relevant times. Student was eligible for special education under the category of autism.

PRELIMINARY MATTERS

Student attended Orion Academy for the 2020-21 and 2021-22 school years as a parentally-placed private school student. Orion Academy, a high school, caters to the needs of high functioning, high intelligence quotient, students with autism who have executive functioning or social deficits. Under prior settlement agreements, Alameda

provided reimbursement funding for Orion for those two school years. The most recent settlement agreement provided, in pertinent part, that:

- Orion was not stay put;
- Student was considered a parentally-placed private school student;
- an IEP team meeting would occur by March 2022; and,
- other than that IEP, all claims were released until the first day of the 2022-2023 school year.

Alameda convened an IEP team meeting on March 7, 2022. Two IEP document versions exist. The pertinent version is the final version that was emailed to Parents after the IEP team meeting.

The IEP document that existed at the March 7, 2022 IEP team meeting was a draft that contained present levels, goals and accommodations, but no placement or service offer. Alameda forwarded to Parents after the meeting a completed IEP document that contained the placement and services offer. Student contends that the finalized version was never discussed or presented to Parents, and therefore is not the pertinent document. This argument is not persuasive.

At the meeting, Alameda wished to discuss strengths, present levels and goals first, without predetermining placement and services which should be driven by the team's conversation. The normal IEP in due course, first discusses strengths, moves to present levels, then goals, and proceeds from there to the services, accommodations and placement offers. This flow enables the IEP team's offer to directly connect to the previously-discussed goals and student's areas of need. Parents short-circuited the strengths, present levels, goals and accommodations discussion, which Alameda

attempted to conduct in the proper order. Parents first participated in that conversation but had limited interest in it, and were mostly anxious to know whether or not Orion would be offered as a continuing placement for the 2022-23 school year. The evidence was conflicting as to how far along the discussion got as far as Student's strengths, present levels and goals. But the evidence was undisputed that the discussion did not proceed to accommodations and services before it got short-circuited, at Parents' insistence, to a discussion of placement. Parents insisted on knowing whether Orion would be offered and were not amenable to any discussion of a public-school placement.

When Alameda, at Parents' insistence, stated the placement offer was Alameda High School rather than Orion, Parents declared that Student "would not be attending public school." They then said they would be contacting an attorney, as was their right. They then departed the meeting without wanting to discuss the offer in its entirety. Because of Parents' unwillingness to consider the placement offer, and their abrupt departure, there was no discussion of what accommodations or supports would be appropriate in a public-school setting, or any other placement. After Parents left, Alameda finalized the FAPE offer in Parents' absence, as Student acknowledges they were legally obligated to do. A school district may not dispense with the procedural requirement of a FAPE offer as an empty gesture because it anticipates that the parents will not accept it. "[A] school district cannot escape its obligation under the IDEA to offer formally an appropriate education placement by arguing that a disabled child's parents expressed unwillingness to accept that placement." (*Union School Dist. v. Smith* (9th Cir. 1994) 15 F.3d 1519, 1526.) The IDEA does not make a district's duties to make an offer of FAPE contingent on parental cooperation with, or acquiescence in, the

district's preferred course of action. (See *Anchorage School Dist. v. M.P.* (9th Cir. 2012) 689 F.3d 1047, 1055.) Thus, Alameda complied legally with the IDEA when it finalized the IEP offer in Parents' absence.

Alameda then emailed the final version for Parents' consideration. The final version was contained in a computer-generated email document that Parents did not open. The email password expired after seven days, and Parents did not thereafter contact Alameda to reenable access, as directed on the email. For this reason, before commencing due process proceedings, Parents had never seen the final IEP document version.

Parents' unwillingness to open Alameda's email that contained the final offer was their own choice, and does not support an inference that because they made that choice, no final offer was made. Therefore, the document considered here is the March 7, 2022 FAPE offer, in the finalized version, emailed to Parents after the meeting.

Student argued that parents were misled by Alameda into thinking Orion would be offered, and were somehow duped at the IEP team meeting. No evidence supported that contention. Before the meeting, Mother vigorously advocated that Alameda should continue to fund Orion, but there was no commitment by Alameda to do so, and Mother's fervent hopes should not have created any expectation or certainty. The record lacks any evidence to suggest that Parents were duped or misled. Quite the contrary, all of Alameda's communications with Mother leading up to the meeting reiterated that placement was to be discussed at the IEP team meeting, was an IEP team decision, and would not be determined first.

Student also argued that Parents were denied IEP parental participation because the IEP offer details were not discussed at the meeting. Parents' argument fails because that fact was of Parents' own creation by virtue of their departure. Parents are under no obligation to act any particular way at an IEP meeting, and they were completely within their rights to advocate for their son forcefully and to leave the meeting at will. However, they cannot then also argue that they were denied their rights to participate in the discussion they did not allow to occur. It would be inequitable to allow Parents to affirmatively use as a sword, supposed procedural defects in the discussion, that they themselves created and Alameda was powerless to prevent. (See *Orange County Health Care Agency v. Colleen Dodge*, (C.D. Cal. April 11, 2012, Case No. Sacv 10-1689ag (Mlgx) [Order Affirming Administrative Law Judge's Decision])[if parents had withdrawn from or terminated the IEP process before a final plan was offered, they could not also argue that the absence of a finalized IEP resulted in lost educational opportunities for the student].) For these reasons, the final document emailed after the meeting, is the offer examined here.

ISSUE 1: IEP TEAM MEETING ATTENDEES

Student contends that Alameda's IEP team meeting attendees were not the full complement required by law. Student asserts Alameda was required to include a general education teacher on the IEP team. Alameda contends that Student had waived attendance of a general education teacher at the meeting. However, even if the attendees were incorrect, Parents had no interest in discussing any placement other than Orion. Thus, Alameda argues, no denial of parental participatory rights occurred.

Each meeting to develop, review or revise the IEP of an individual with exceptional needs must be conducted by an IEP team. (Ed. Code, § 56341, subd. (a).)

The IEP team must include:

- one or both of the parents or a representative chosen by the parents;
- not less than one regular education teacher if the pupil is, or may be, participating in the regular education environment;
- not less than one special education teacher, or where appropriate, one special education provider to the student;
- a representative of the school district who is
 - qualified to provide, or supervise the provision of, specially designed instruction to meet the unique needs of the student,
 - knowledgeable about the general education curriculum, and
 - knowledgeable about the availability of school district resources; an individual who can interpret the instructional implications of assessment results; at the discretion of the parent, guardian or school district, other individuals with knowledge or special expertise regarding the student; and, if appropriate, the student. (20 U.S.C., § 1414(d)(1)(B); 34 C.F.R. 300.321(a) (2007); Ed. Code, § 56341, subd. (b).)

A regular education teacher who is an IEP team member shall participate in the IEP review and revision. (20 U.S.C. § 1414(d)(4)(B); 34 C.F.R. 300.321(a); Ed. Code § 56341(b)(2).) Congress revised the IDEA to specifically emphasize the role a regular education teacher plays on an IEP team. The regular education teacher on the IEP team, to the extent appropriate, shall participate in the development of the IEP, including the determination of appropriate positive behavioral interventions and supports, and other

strategies, and the determination of supplementary aids and services, program modifications, and needed support for school personnel in the implementation of such. (20 U.S.C. 1414(d)(3)(C).)

The requirement regarding participation of a general education teacher on an IEP team is therefore not merely technical but serves an important function in the provision of a FAPE to a student. (*M.L. v. Federal Way School Dist.*, (9th Cir. 2003) 341 F. 3d 1052, 1064.) The Ninth Circuit held that “the plain meaning of the terms used in section 1414(d)(1)(B) compels the conclusion that the requirement that at least one regular education teacher be included on an IEP team, if the student may be participating in a regular classroom, is mandatory – not discretionary.” (*M.L. v. Federal Way School. Dist.* (9th Cir. 2005) 394 F.3d 634, 643.) The Ninth Circuit found that a general education teacher was required at the IEP team meeting for a preschooler in an integrated general education preschool classroom, even though information was available to the team about the teacher’s opinions, and despite the recommendation of district team members for a special education classroom placement. (*Id.* at 646-8.) The failure to include a regular education teacher on the IEP team deprives the team of “important expertise regarding the general curriculum and the general education environment.” (*Id.* at p. 646-8) Without a general education teacher, a reviewing court has no means to determine whether an IEP team would have developed a different program after considering the views of a regular education teacher, and a failure to include at least one general education teacher is a structural defect in the IEP team constitution. (*Id.* at 646-8)

It is undisputed that the only Alameda attendees at the March 7, 2022 IEP team meeting were two administrators, Senior Program Manager Gabriel Welcher and Secondary Program Coordinator Julie Venuto. No general education teacher attended.

Welcher, by email dated January 25, 2022, asked mother “would you like a General Education Teacher at this IEP meeting [?]” At hearing, Welcher did not provide an explanation for why he thought to pose this question to Mother. Mother responded, “As there are no high-school general education teachers in [Alameda] familiar with [Student], we do not need one present.”

Alameda thus argues that Parent waived the required attendance of a regular education teacher. The law does state that a member of the IEP team is not required to attend an IEP team meeting, in whole or in part, if the parents and school district agree that the attendance of such a member is not necessary. ((20 U.S.C. § 1414(d)(1)(C).) However, the email exchange between Welcher and Mother does not end the inquiry. The allowance for such a waiver is conditional, stating explicitly that it only applies when “the member’s area of the curriculum or related services is not being modified or discussed in the meeting.” (20 U.S.C. § 1414(d)(1)(C)(i).) Here, because Alameda contemplated discussion of all potential placement options including general education, the condition for agreeing to excuse a regular education teacher was not met.

The statute goes on to say that when the meeting will involve a modification to or discussion of the member’s area of the curriculum or related service, that team member may still be excused, but only if the parent and the school district “consent” to the excusal, and the member submits written input to the team before the meeting for IEP development. (20 U.S.C. § 1414(d)(1)(C)(ii).)

Here, Mother’s email did not amount to the “consent” the statute requires. “Consent” requires the school district to fully inform the parent of all information relevant to the team member’s excusal, in the parent’s native language or other mode of communication, and to ensure that the parent’s understanding that the granting of

consent to the team member's absence is voluntary and can be revoked at any time. (34 C.F.R. § 300.9 (2008); 71 Fed. Reg. 46,674 (Aug. 14, 2006).) Welcher's cursory email did not comply. Since Mother's waiver did not amount to the legally required "consent" to excusal when the meeting might have involved a modification to or discussion of the member's area of the curriculum or related service, the excusal does not amount to a legally valid defense. Moreover, no regular education teacher who was an IEP team member submitted written input to the team before the meeting for IEP development. Orion teachers provided written input, as will be discussed below, but this did not suffice, as Orion teachers were not IEP team members. Thus, none of the conditions for excusal were met.

In addition, since Student was anticipated to participate in special education, a special education teacher was also a required IEP team member. (20 U.S.C., § 1414(d)(1)(B)(iii). Venuto's job title was "Secondary Program Coordinator." While she held a special education credential and had been a special education teacher in the past, her current duties were administrative. She supervised Welcher and various service providers. Her job duties included attending all IEP's for students placed at private school or through settlement agreements. The IEP stated that she was attending as an "education specialist." She testified that her IEP team meeting role was a dual role as the special education teacher and program coordinator. But Venuto was not an appropriate special education teacher for the purpose of the IEP, as she would not be a member of Student's educational team. The special education teacher or provider of the child who is a member of the child's IEP team should be the person who is, or will be, responsible for IEP implementation. (64 Fed. Reg., 12477 (March 12, 1999).) Thus, Alameda failed to have the legally required attendees at the March 7, 2022 IEP team meeting.

Student's contentions about other required team members are not persuasive. Student's expert witness, educational psychologist Dr. Danielle Maloff, contended that an occupational therapist, assistive technology specialist, speech language pathologist and school psychologist should have attended the IEP team meeting. However, the law only requires

- parents or their representative,
- one regular education teacher,
- one special education teacher, and
- individuals (here Welcher and Venuto) who can interpret the instructional implications of assessment results.

Other attendees are discretionary, not mandatory. (20 U.S.C., § 1414(d)(1)(B); 34 C.F.R. 300.321(a); Ed. Code, § 56341, subd. (b).)

In the event of a procedural violation, a FAPE denial may only be found if the procedural violation impeded the child's right to a FAPE, significantly impeded the parents' opportunity to participate in the decisionmaking process regarding the provision of a FAPE, or caused deprivation of educational benefits. (20 U.S.C. § 1415 (f)(3)(E)(ii); 34 C.F.R. § 300.513(a)(2); Ed. Code, § 56505, subds. (f)(2) & (j).) Here, Parents made it abundantly clear at the IEP team meeting that Student would not be attending public school no matter what the offer contained in the way of accommodations, services or supports. Nevertheless, the absence of a general education teacher at the IEP team meeting was such a "structural defect" as to deny Parental rights no matter how disinterested Parents may have been in discussing such a placement. Such a finding is mandated by the Ninth Circuit reasoning in *M.L. v. Federal Way Sch. Dist.*, *supra*, 394 F.3d at 646-8, where the Court found that the absence of a general education

teacher was such a structural defect as to overcome any arguments that Parents' disinterest made the defect harmless. Similarly, here, it was a clear denial of parental participation to fail to have a general education teacher present when a transition from a private placement to public school was anticipated. A general education teacher is considered indispensable to speak towards how Student's goals, services, and accommodations could be implemented in the general education environment.

Also, Alameda's failure to have a grade-appropriate special education teacher present meant that they lacked a team member who could objectively consider Student's unique special education needs as a high school student, and contribute relevant considerations as to Student's placement. Accordingly, the failure to include a special and general education teacher at the IEP team meeting denied Parents the opportunity to meaningfully participate in the IEP. Student prevailed on Issue 1.

ISSUE 2: PRESENT LEVELS

Student contends Alameda denied Student a FAPE by failing to include meaningful present levels of academic achievement and functional performance in the March 7, 2022 IEP. Alameda contends the present levels listed in the IEP were accurate.

Here, as discussed below, Student established that Alameda failed to offer appropriate present levels for executive functioning. As discussed below, the failure impeded Student's right to a FAPE, significantly impeded the opportunity of the parents to participate in the decision-making process regarding the provision of a FAPE, and caused a deprivation of educational benefits. Student therefore prevails on Issue 2.

An IEP is a written document for each child with a disability that includes:

- a statement of the child's present levels of academic achievement and functional performance; and
- a statement of measurable annual goals, including academic and functional goals, designed to meet the child's needs that result from the child's disability to enable the child to be involved in and make progress in the general education curriculum, and meet each of the child's other educational needs that result from the child's disability. (20 U.S.C. § 1414(d)(1)(A); 34 C.F.R. § 300.320 (2007); Ed. Code, § 56345, subd.(a).)

The IEP shall show a direct relationship between the present levels of performance, the goals and objectives, and the specific educational services to be provided. (Cal. Code Regs., tit. 5, § 3040.) The IEP should include a description of how the child's progress toward meeting the annual goals will be measured, and when periodic reports of the child's progress will be issued to the parent. (20 U.S.C. § 1414(d)(1)(A); 34 C.F.R. § 300.320 (2007); Ed. Code, § 56345, subd. (a)(3).) When developing an IEP, the team must consider: the student's strengths; the parents' concerns; the results of assessments; and the academic, developmental, and functional needs of the child. (20 U.S.C. § 1414(d)(3)(A); 34 C.F.R. § 300.324 (a) (2017); Ed. Code, § 56341.1.)

SOCIAL SKILLS

Here, Student had needs in social skills, including pragmatic language. The required description of "how Student's disability affects his involvement and progress in general education" noted that Student demonstrated deficits in social skills and

interpersonal relationships. The present levels of performance in the area of social skills, including pragmatic language, sufficiently captured Student's educational needs that resulted from his disability.

The IEP stated that Student had challenges in providing appropriate interpersonal feedback to his peers. He needed to grow in asking peers thoughtful questions, giving encouragement or compliments, and being able to accept and integrate feedback, especially when he might have an opinion different from others. The IEP noted that he could be too rigid and unreceptive to edits, and needed to "decrease his policing." Orion created these present levels and provided them to Alameda's Gabriel Welcher, who typed them into the IEP. Orion's present levels were accurate and would have been sufficient to create appropriate goals, and to show a direct relationship between the present levels of performance, the goals and objectives, and the specific educational services to be provided. (Cal. Code Regs., tit. 5, § 3040.) In addition, the IEP appropriately reflected a "[Speech Language] Update April 2021," which stated that Student "has been instructed by team members at school about the importance of communicating appropriately with his teachers about their class and curriculum." Student's needs were sufficiently captured by these statements of present levels in the IEP. Thus, there was no procedural violation apparent in the IEP's present levels concerning speech/socialization.

Student argued that the present levels were based solely on Student's performance at Orion, could not be generalized to public school, and were not transferrable to understand how he would function in any placement other than Orion, and thus were insufficient to generate appropriate goals for a different placement. Student's expert Dr. Maloff asserted that assessments should have been required to

update the present levels. This contention is not persuasive. Student had been comprehensively assessed for his triennial review in 2020. Then, in 2021, Alameda offered Student a comprehensive annual assessment plan dated February 12, 2021, to which Mother did not consent. Mother did not wish Student to undergo further testing. Therefore, Mother agreed only to a records review, which District conducted in 2021 in the areas of psychoeducational functioning, speech and language and occupational therapy. The settlement agreement waived any claims arising before the first day of the 2022-23 school year, with the exception of the IEP at issue here. Therefore, Alameda could not have insisted, over Mother's objections, on the necessity of conducting assessments leading up to the IEP. Finally, and most importantly, the present levels in social skills were accurate.

SENSORY SENSITIVITIES

Student had sensory needs. The required description of "how Student's disability affects his involvement and progress in general education" noted that Student demonstrated deficits in sensory processing and had been diagnosed with dysgraphia. The present levels of performance in this area of need sufficiently captured Student's educational needs that resulted from his disability.

Alameda conducted an occupational therapy assessment as part of Student's 2020 triennial assessment, and recounted the results in an April 2021 records review.. These reported, as of March 2020, Student had a low threshold for certain types of sensory input and a high threshold for other types of input. His low threshold for certain input might result in him perseverating on a topic and participating in groups much less than his peers. Conversely, his high threshold for other types of input, especially visual input, could result in him missing various types of class direction,

leaving items blank on a busy worksheet despite knowing the answer, slumping in his seat, and doing things in a harder way than is needed. This could cause him to seem distracted or like he is avoiding the task at hand. Further, the IEP present levels recounted this information and also stated that "Orion Academy provided input" as of January 2020 and March 2022 which noted his dysgraphia diagnosis. The present levels of performance in this area of need sufficiently captured Student's sensory needs that resulted from his disability. These present levels were meaningful as to Student's sensory functioning at the time of the March 7, 2022 IEP.

Student presented no persuasive evidence that his sensory needs had changed since the assessment, or were not sufficiently captured by these IEP statements. Mother's testimony established that Student has sensory sensitivities to noise, textures and tastes and a tendency to become overstimulated. These needs were sufficiently captured by the IEP statements. Thus, there was no procedural violation apparent in the IEP's present levels concerning this area of need.

EXECUTIVE FUNCTIONING

Student had needs in executive functioning. The required description of "how Student's disability affects his involvement and progress in general education" noted that Student demonstrated deficits in attention and focusing, organizational skills, cognitive flexibility and adaptability. The present levels of performance in this area of need were captured from Orion's input and were accurate. But, although the present levels information from Orion was accurate, Alameda did not recount these present levels when stating Student's baselines for goals in executive functioning. The baselines were disconnected from the present levels. The IEP baseline data that Alameda used in the IEP was outdated and inaccurate. The failure to track the present levels into the

baselines and goals was a procedural error. The failure impeded Student's right to a FAPE, significantly impeded the opportunity of the parents to participate in the decision-making process regarding the provision of a FAPE, and caused a deprivation of educational benefits. Student therefore prevailed on Issue 2.

The IEP stated that in literature class, Student was often off-task on his computer. He could work slowly and with low motivation until prompted. In literature class, Student had also required prompting to remain on task and complete assignments, particularly assignments that had a component with which he disagreed. In geometry class, he did well in class and homework, but poorly on tests and quizzes because of lack of study or preparation. In Latin class, he could veer off-task and off-topic, and sometimes struggled to understand what material was most relevant and how best to organize that information. Student's executive functioning needs were sufficiently captured by these statements of present levels in the IEP.

However, the purpose of present levels is to translate them into goals. The IEP shall show a direct relationship between the present levels of performance, the goals and objectives, and the specific educational services to be provided. (Cal. Code Regs., tit. 5, § 3040.) That is not what happened here. Alameda ignored the present levels when generating the baselines, and the Goals 1 through 4 in executive functioning, in the March 7, 2022 IEP. Instead of recounting the accurate present levels that had been stated in the IEP, Alameda used inaccurate and outdated baselines for Goals 1, 2, and 4. Further, the baseline data for Goal 3 was missing.

Instead of using accurate present levels to generate Goal 1, Alameda took the baseline data verbatim from a 2017-18 school year IEP when Student attended middle school. For Goal 2, Alameda cut-and-pasted the baseline verbatim from the 2019-20

school year IEP. Although Goal 3 was cut-and-pasted almost verbatim from a 2017-18 school year, Alameda omitted the baseline altogether. And the baseline for Goal 4 was cut-and-pasted verbatim from the 2018-2019 school year IEP.

These cut-and-pasted baselines were no longer accurate. For example, the baseline for Goal number 2 from 2019-20 stated that Student forgot to email teachers to ask for extended time on assignments. But the Orion-generated and accurate present levels did not state that as an area of need. The baseline for Goal 4 stated that Student struggled to ask teachers for assistance or clarity with assignments. This area of need was not reflected in the present levels. The baseline for Goal 1 stated that Student might become argumentative with teachers, and might lose focus. This baseline does appear to bear some resemblance to Student's present levels. However, it also states that Student is unable to follow a one-step direction which is not reflected in the accurate Orion present levels. And, as already established, Goal 3 stated no baseline.

There would be no prohibition using baselines from a prior IEP if still appropriate and accurate, and it is not the act of cutting and pasting that makes these suspect. But, in the area of executive functioning, the currently accurate present levels from Orion, although accurately reflected in many pages of the IEP, were not reflected in and bore slight resemblance to the cut-and pasted old baselines from past IEP's. Thus, the executive functioning baselines for Goals 1, 2, 3, and 4 were inaccurate and inappropriate. As will be discussed below, the resulting goals showed no relationship to Student's true present levels. The law requires that the IEP shall "show a direct relationship between the present levels of performance, the goals and objectives, and the specific educational services to be provided." (Cal. Code Regs., tit. 5, § 3040.) The goals therefore did not target Student's current needs. The failure to have appropriate current and accurate present levels, and resulting goals targeting those needs that could

be monitored, and progress measured by means of data collection, impeded Student's right to a FAPE. It further significantly impeded the opportunity of the Parents to participate in the IEP decision-making process, and caused a deprivation of educational benefits. Student therefore prevails on Issue 2.

ISSUE 3: GOALS

Student contends Alameda denied Student a FAPE by failing to provide goals in all areas of need in the March 7, 2022 IEP. Alameda contends the goals it offered were appropriate.

Student further contends that the goals that did exist were inappropriate. These contentions were within the language of Student's Complaint but not framed as an Issue in the Prehearing Conference Order. Since the appropriateness, as well as the existence, of goals is stated in the complaint, even if not framed as an issue in the Prehearing Conference Order, and since it was actually litigated without objection, it will be addressed. (*M.C. v. Antelope Valley Union High School Dist.* (9th Cir 2017) 858 F.3d 1189.)

Student established that Alameda failed to offer goals in Student's areas of need. The March 7, 2022 IEP stated that for Student to receive educational benefit, goals would be written to address three areas of need: executive functioning skills, on-task work initiation and work completion. No goals were offered in the areas of need of speech/socialization or sensory sensitivities. These were known areas of need and goals should have been offered. (20 U.S.C. § 1414(d)(1)(A); 34 C.F.R. § 300.320 (2007); Ed. Code, § 56345, subd.(a).) The failure to offer any goals to address speech/socialization

or sensory sensitivities impeded Student's right to a FAPE, significantly impeded the opportunity of the parents to participate in the decision-making process regarding the provision of a FAPE, and caused a deprivation of educational benefits.

NO GOALS IN SPEECH/SOCIALIZATION

As stated above, the required description of "how Student's disability affects his involvement and progress in general education" noted that Student demonstrated deficits in social skills and interpersonal relationships. The present levels also detailed the same challenges.

However, no goals addressed these areas of need. As discussed in further detail below, proposed Goals 2 and 4 peripherally addressed the area of communication with teachers, but did not target the appropriateness of the way Student communicated. Thus, his actual areas of need were not targeted by any goals.

Venuto opined specific goals are not required for every "nuance" of every area of need. Here, however, the question is not the "nuances," but the broad topic itself. No goals addressed the broad topic of Student's speech and socialization, in any of the "nuanced" ways these needs might present.

Venuto explained at hearing that because Student was not receiving speech language related services while at Orion, he did not require speech language goals in the area of social communication or pragmatics. This explanation is unpersuasive, given that the Orion program was devoted entirely to these areas of need. Thus, the absence of related services there should not have led to the conclusion that he required no goals

in these areas of need. Especially if Student were to transition from Orion to a general education classroom, he would need to learn in that setting how to compromise, and how to develop, nurture and maintain friendships.

Therefore, the failure to generate any goals in the area of socialization denied Student a FAPE. Because the IEP team failed to create goals for this area of need based upon the information known at the time of the IEP, Student was left with unaddressed social/emotional issues, which negatively impacted his ability to access his education, and thus denied him a FAPE. Further, the failure to have a goal that could be monitored, and progress measured by means of data collection, impeded the opportunity of the parents to participate in the decision-making process regarding the provision of a FAPE. For this reason, Student prevailed on Issue 3.

NO SENSORY GOALS

With regard to sensory sensitivities, although these needs were known, they were not stated to be areas of need in which goals were necessary, and were not addressed by any goals. Student's reactions to sensory input might result in him

- perseverating on a topic,
- participating in groups less than his peers,
- missing directions,
- leaving items blank,
- slumping in his seat,
- seeming distracted or avoidant.

Although Alameda offered accommodations to address some of these concerns, they did not offer any goals in this area of need. This failure impeded Student's right to a FAPE, significantly impeded the opportunity of the parents to participate in the decision-making process regarding the provision of a FAPE, and caused a deprivation of educational benefits. Student's sensory needs were left unaddressed, and his parents left without significant information, because of the failure to have goals that could be monitored, and progress measured by means of data collection.

EXECUTIVE FUNCTIONING GOALS

The March 7, 2022 IEP offered four goals in the area of executive functioning, but these were cut-and-pasted, and were based on cut-and-pasted baselines from prior IEP's, and not connected to Student's actual present levels. Goal 1 was in the area of need of "Organization, Planning and On Task Behavior." The goal related to gathering materials, working on assigned tasks, staying on task and/or re-directing himself back to task. Goal 1 was verbatim taken from a 2017-18 school year IEP when Student attended middle school. The prior IEP reflected that goal had already been met as of February 6, 2018. Orion present levels did confirm that Student could veer off task, so Goal 1 did peripherally target a current need. However, Goals 2, 3 and 4 did not.

Goals 2 and 4 related to asking for assistance from teachers especially as to seeking extended time for assignments via email. Goal 2 was cut-and-pasted verbatim from a 2019-20 school year IEP. Goal 4 was cut-and-pasted almost verbatim from a 2018-19 school year IEP. Student's current needs related not only to seeking assistance from teachers, but to communicating with teachers in an appropriate and respectful manner. Appropriate goals would have targeted the present area of need.

Goal 3 was cut-and-pasted almost verbatim from a 2017-18 school year IEP. Goal 3 related to completion of assignments using a computer device, which was not a current problem for Student.

The goals therefore did not target Student's current needs. To the extent that Alameda's offer contained appropriate related services, accommodations and modifications in this area of need, discussed below, the failure to have appropriate goals based on current and accurate present levels, that could be monitored, and progress measured by means of data collection, nevertheless impeded Student's right to a FAPE. It further significantly impeded the opportunity of the Parents to participate in the IEP decision-making process, and caused a deprivation of educational benefits. Student therefore prevails on Issue 3.

ISSUE 4: SERVICES, ACCOMMODATIONS, SUPPORTS AND MODIFICATIONS IN SPEECH/SOCIALIZATION

Student contends Alameda denied Student a FAPE by failing to offer services, accommodations, supports and modifications to meet Student's individual and unique needs in speech/socialization in the March 7, 2022 IEP offer. Alameda contends its offer was appropriate.

Student met its burden of proof on this issue. 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.) 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 (*Rowley*); *Endrew F. v. Douglas County School Dist. RE-1* (2017) 580 U.S. 386 [137 S.Ct. 988, 1000] (*Endrew F.*)) The "educational benefit" to be provided to a child requiring special education is not limited to addressing the child's academic needs, but also social and emotional needs that affect academic progress, school behavior, and socialization. (*County of San Diego v. California Special Educ. Hearing Office* (9th Cir. 1996) 93 F.3d 1458, 1467.) A child's unique needs are to be broadly construed to include the child's

- academic,
- social,
- health,
- emotional,
- communicative,
- physical, and
- vocational needs.

(*Seattle School Dist. No. 1 v. B.S.* (9th Cir. 1996) 82 F.3d 1493, 1500, citing H.R. Rep. No. 410, 1983 U.S.C.C.A.N. 2088, 2106), reversed in part on other grounds by *Schaffer, supra*, 546 U.S. 49, 56-58.) Social functioning is a part of "educational performance." (See, e.g., *L.J. v. Pittsburg Unified School Dist.* (9th Cir. 2016) 835 F.3d 1168, amended and superseded on denial of rehearing by *L.J. by and through Hudson v. Pittsburg Unified School Dist.* (9th Cir. Feb. 27, 2017) 850 F.3d 996.)

In the area of speech and socialization, Alameda offered a pull-out special day class called "Communication in the Real World," described as "instruction targeted towards students with significant social, cognitive or executive function challenges" with "high need in social emotional areas, self-advocacy [and] behavior." The only other

entries in the IEP that appear targeted to these areas of need were an accommodation that states that Student should be “praise[d] for doing his personal best during difficult situations for making positive choices, such as being flexible or cooperative.” No other services, accommodations, supports and modifications in the IEP addressed the areas of speech or socialization.

The Communication in the Real-World class had approximately 15 students and three adults with a push-in behaviorist several times a month. It targeted social pragmatics and peer relations using modeling, role play and feedback, and following a curriculum developed by UCLA. The curriculum covered conversational skills, peer relations, turn taking, initiating conversations, and used repetition and practice to learn and generalize these skills. The class population was over 80 percent high functioning autistic students.

Without more, the mere offer of this class was not designed to meet Student’s unique needs, and was not reasonably calculated to provide the pupil with educational benefit.

It must be emphasized that 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. (*Gregory K. v. Longview School Dist.* (9th Cir. 1987) 811 F.2d 1307, 1314; 20 U. S.C. § 1401(9).) The IEP need not conform to a parent’s wishes in order to be sufficient or appropriate. (*Shaw v. Dist. of Columbia* (D.D.C. 2002) 238 F.Supp.2d 127, 139 [The IDEA does not provide for an “education ... designed according to the parent’s desires”], citing *Rowley, supra*, 458 U.S. at p. 207. A school district is not required to maximize the potential of each special education student. (*Rowley, supra*,

458 U.S. 176 at p. 200.) However, the Orion program is pertinent here as student's performance and behaviors inform what services and supports Alameda should have offered in order to provide Student with a FAPE.

Currently Orion has a total of 45 students. Each class has eight-to-10 students. There are 14 students in the 11th grade. Orion provides small classes and minimization of visual distraction in classrooms. Small class size is key, as distractibility is part of the autism disorder and is an issue for Student. Orion offered 10–15-minute breaks to students who were becoming distracted or overwhelmed. Student also received training at Orion, to learn to pay attention to his own arousal states, concentration and attention, and to manage proprioceptive awareness, or the sensation of the body in space. Orion used an "alert" program derived from occupational therapy, the details of which Orion had copyrighted and refused to share at hearing. Orion Students could ask for an "alert" intervention, although it was not clear what this would entail, that involved self-awareness of flagging attention and use of strategies to stay engaged. Orion had a "program" it used, the details of which are "proprietary" such that its Executive Director, founder and proprietress Dr. Kathryn Stewart declined to share these details with Alameda or at hearing. Nor did she or Orion staff respond to subpoenas issued in this due process hearing. Orion's materials are trademarked. Their teachers are trained in the "Orion program." The "program," as far as can be gleaned from the evidence at trial, involves predictable and structured classrooms that are structured the same way for each subject matter. The "Orion Routine" has an agenda for every period, starting with a discussion of the main idea to be covered, then review of what has been covered. Other than this structure, small class sizes and the use of technology, the "routine" was

not clearly defined. Dr. Stewart emphasized that several aspects of the program are “proprietary” and would not be disclosed. Dr. Stewart testified that socialization is the focus at Orion and is “embedded” in the “Orion Routine.” Despite probing, it was unclear exactly what “embedded” means or what is included in the Orion Routine. Thus, there are unknown “embedded supports,” whatever that term means to Orion, in every class. Students were required to participate as audiences in group performances and engage in social activities. Social expectations were documented and enforced by every teacher. Orion teaches writing through a program called EARS or Evidence Analysis Response Synthesis which is copyrighted, and Orion will not share it. Students participated in Orion’s Personal Projects class that addresses executive functioning, in which the students must plan, organize and implement a project, then do a presentation and take questions from an audience of other students. Each personal project elapses over a six-week time period. Executive functioning at Orion is addressed through the Personal Projects curriculum. Dr. Stewart refused to share the Personal Projects curriculum as it is “proprietary.” Teachers from Orion neither testified, nor responded to subpoenas to produce documents.

Here, as far as can be gleaned from the limited information Orion agreed to share about its program, Student benefited from, and required consistent enforcement of social and behavioral expectations across all educational settings. While the offer of the Communication in the Real-World class was not inappropriate, it was not sufficient. The class aimed to teach the initial acquisition of social skills and to practice those skills in that group class, and was appropriate as far as it went. However, the offer did not go far enough in terms of across-the-board management of behavioral expectations and responses, and teaching coping strategies, to teach, encourage and if necessary to

mandate socially appropriate behavior. What was lacking in Alameda's program was consistent enforcement. The Alameda offer contained no provisions for generalizing social skills across settings, nor for feedback and reinforcement.

The Alameda offer also failed to make provisions for the social detriment of Student's use of a scribe for note-taking as an accommodation for his dysgraphia, discussed below. Student disliked having a scribe at middle school as he had to state to the scribe what he wished to have written down, and it made him feel embarrassed and outcast. These social concerns for a 16-year-old high schooler were legitimate, yet Alameda's offer did not address them. The deficits in the offer of services, coupled with the absence of any social emotional goals, combined to deny Student a FAPE in the area of services, accommodations, supports and modifications in speech/socialization. Student prevailed on Issue 4.

ISSUE 5: SERVICES ACCOMMODATIONS SUPPORTS AND MODIFICATIONS IN FINE MOTOR SKILLS/DYSGRAPHIA

Student contends Alameda denied Student a FAPE by failing to offer services, accommodations, supports and modifications to meet Student's individual and unique needs in fine motor skills/dysgraphia in the March 7, 2022 IEP offer. Alameda contends its offer was appropriate.

Student failed to demonstrate any IDEA violation here. Alameda offered Student access to a scribe for note-taking. Alameda also offered the use of a dedicated Chrome Book in all academic subjects for note-taking, assignments, written assignments and any

other pencil to paper activity that could be adapted to Chrome Book usage. The math, history, English language arts, and science teachers already provided written class notes.

The scribe, as needed for note-taking support, offered Student educational benefit and constituted a FAPE in the areas of fine motor skills and dysgraphia. Student's objections to the scribe are addressed elsewhere in this Decision, as their gravamen is not fine motor or writing issues, but rather in the area of need of social skills.

Student argues that he required access to a completely digitized program where all assignments, notes and student work was conducted online, as was provided by Orion. This argument is not persuasive. Student's needs in the area of dysgraphia and note-taking could be accommodated in the public-school setting. Again, the issue is not whether Orion was superior. The issue is whether Alameda offered a FAPE as the law defines it. Alameda prevailed on Issue 5.

ISSUE 6: SERVICES, ACCOMMODATIONS, SUPPORTS AND MODIFICATIONS IN EXECUTIVE FUNCTIONING

Student contends Alameda denied Student a FAPE by failing to offer services, accommodations, supports and modifications to meet Student's individual and unique needs in executive functioning in the March 7, 2022 IEP offer. Alameda contends its offer was appropriate.

Student failed to demonstrate that Alameda denied Student a FAPE regarding this issue. The IEP offered Student a class called Academic Strategies described as "targeted strategic instruction in areas such as executive function, transition, study

methods across various domains” for “students with high level needs in the areas of executive function, behavior, self-advocacy and/or attendance.” The class offered executive functioning supports. The class focused on

- organization of materials,
- organizing time for long range projects,
- scheduling,
- timelines,
- assignments,
- deadlines,
- priorities, and
- time management.

The Academic Strategies class had seven-to-10 students. Student’s expert witness Dr. Maloff’s critique of the class as loud and crowded was unconvincing. The evidence established that she had not observed the Academic Strategies class. Instead, she had observed, and her critique went to a different class that was not at issue here.

Alameda also offered accommodations to address Student’s executive functioning deficits. These included

- large assignments broken down,
- a time line developed,
- due dates assigned which were put into a Google calendar,
- extra time for tests and assessments, and
- extra time for assignments on an assignment-by-assignment basis after consultation between Student, the general education and special education teacher and/or parents.

Alameda also offered

- push-in support for visual prompting for focusing,
- turning in assignments,
- initiating assignments,
- transitioning between activities,
- note-taking support and
- recording assignments.

Alameda further offered consult by an assistive technology specialist to consult with the general and special education teachers.

These services, accommodations and supports targeted the executive functioning need that Orion's present levels had specified, namely:

- deficits in attention and focusing;
- organizational skills;
- cognitive flexibility and adaptability;
- prompting to remain on task and complete assignments;
- study skills and
- organization.

Student argued that Alameda failed to offer any services, modifications, accommodations or supports to address his executive functioning needs, but it is clear from a review of the IEP that is not the case. Student further argued that he should have been offered the services of an assistive technology specialist to determine specialized programs to help him access his curriculum. But in fact that consultation service was indeed offered.

Student further argued that the elements of the Orion program offering a common structure to each class period, a predictable routine and units on executive functioning, were required to provide Student with a FAPE. Student failed to meet his burden of proof in this regard with respect to Student's executive functioning needs.

Here, the Academic Strategies class curriculum corresponded roughly to what can be gleaned about the Orion Personal Projects class. The Academic Strategies class focused on

- organization of materials,
- organizing time for long range projects,
- scheduling,
- timelines,
- assignments,
- deadlines,
- priorities, and
- time management.

The Orion Personal Projects class involved planning, organizing over a six-week time period and implementing a project, then doing a presentation and taking questions from an audience of other students. These classes appear roughly equivalent. Orion's small class size and the resources it devoted to each student may well be superior to Alameda's program, but superiority is not the legal test to be applied.

To meet its substantive obligation under the IDEA, a school must offer an IEP reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances. (*Endrew F.*, 580 U.S. 386, 137 S.Ct. 988 at p. 999.) "Any review of an IEP must appreciate that the question is whether the IEP is *reasonable*, not whether

the court regards it as ideal." (*Ibid.*) Appropriate progress in many cases will involve education in the regular classroom "whenever possible." (*Ibid.*) An IEP typically should be "reasonably calculated to enable the child to achieve passing marks and advance from grade to grade." (*Ibid.*) For most children, a FAPE will involve integration in the regular classroom and individualized special education calculated to achieve advancement from grade to grade. (*Id.* at p. 1000.) The adequacy of a given IEP turns on the unique circumstances of the child for whom it was created. (*Id.* at p. 1001.)

Applying these authorities to the facts presented here, Student failed to meet his burden of proving that Alameda's offer was not appropriate in the area of executive functioning. Student testified to his experience at school, and appeared at hearing as a charismatic, capable, intelligent, creative person with autistic characteristics and undoubted social deficits and sensory sensitivities. But, in the area of executive functioning, no evidence established that Alameda's offer of the Academic Strategies class and other supports would fail to offer him a FAPE as the law defines it. Alameda prevailed on Issue 6.

ISSUE 7: SERVICES ACCOMMODATIONS SUPPORTS AND MODIFICATIONS IN MENTAL HEALTH/ANXIETY

Student contends Alameda denied Student a FAPE by failing to offer services, accommodations, supports and modifications to meet Student's individual and unique needs in mental health and anxiety in the March 7, 2022 IEP offer. Alameda contends that Student did not present with needs in these areas.

Student failed to present a compelling argument on this issue. There was no credible evidence that Student had or would have mental health concerns or anxiety,

except Father's testimony that when Student had attended middle school, Father felt that Student had been depressed. Mother and Student's expert Dr. Maloff speculated that if Student were to return to public school, he would become anxious or depressed. These thoughts were just that, speculative. The present level documents Alameda received from Orion did not indicate that Student had anxiety or mental health concerns. Student presented no past assessment data that might have tended to corroborate the allegation that he did. Mother's concerns that going to public school would devastate Student were speculative. Student's expert, Dr. Maloff's expert opinions on this topic were also conjecture and not credible. Dr. Maloff had not assessed Student. She conducted a records review, observations and interviews. She did not present any written findings. It appears that she based her opinion on this topic entirely on a single interview with Student and on parental concerns, which as stated above were speculative and unproven. Dr. Maloff opined that because Student feels safe at Orion, he would or might have mental health needs at Alameda, but there was no credible evidence of this. At Orion, Student received individual counselling. Dr. Maloff's expansive opinions about the content, goals, data, and efficacy of this service were highly speculative and overreaching, thus, unpersuasive. Dr. Maloff opined extensively about what the Orion counselor "must have" included in his services to Student, but there was a complete absence of any evidence on that topic other than her speculations. Moreover, drop-in counselling on an as-needed basis was also available in Alameda's public high school. Alameda prevailed on Issue 7.

ISSUE 8: SERVICES ACCOMMODATIONS SUPPORTS AND MODIFICATIONS IN SENSORY REGULATION

Student contends Alameda denied Student a FAPE by failing to offer services, accommodations, supports and modifications to meet Student's individual and unique needs in sensory regulation in the March 7, 2022 IEP offer. Alameda contends its offer was appropriate.

Student showed that Alameda failed to make an appropriate offer in sensory regulation, even though the IEP offered numerous accommodations and supports to address sensory needs. It offered

- preferential seating near the teacher,
- visual directions in all academic settings when possible,
- visual prompts for following directions,
- movement/stretch breaks to promote alertness and focus, and
- visual reminders.

It also offered to allow Student to sit in less noisy locations during assemblies or other large events, or to use noise dampening headphones. It authorized Student choice of a work space with minimal visual and auditory distractions to support focus. It offered fidgets, Velcro, and noise reduction headphones. It offered consultation between an occupational therapist and teachers to suggest and implement the sensory supports. These supports, however, would not suffice.

Student's experience at middle school was not successful. There was too much distraction in the environment. Student himself anticipated that a large class in public school would be noisy, and the whispering and talking of others would disrupt and

distract him. Student had a low threshold for certain types of sensory input and a high threshold for other types of input. His high threshold for other types of input, especially

- visual input,
- could result in him missing various types of directions in class,
- leaving items blank despite knowing the answer,
- slumping in his seat, and
- doing things in a harder way than is needed.

This could cause him to seem distracted or seem like he was avoiding a task.

The evidence overall established that the sensory accommodations that Alameda offered were not sufficient enough to enable Student to access his education. The IEP offered some accommodations that were appropriate, such as allowing Student to sit in less noisy locations during large events, the use of noise dampening headphones, and work space with minimal visual and auditory distractions. This comported with some of the accommodations Student argues he needed to receive a FAPE -- classrooms that were not cluttered with visual input, or which contained too much visual input to digest. The IEP also offered movement/stretch breaks to promote alertness and focus, and visual reminders. This comported with what Student argued he needed at Orion, which provided 10–15-minute breaks to students who were becoming distracted or overwhelmed.

However, The IEP did not offer additional needed services or accommodations. Student required small classes, to minimize distractibility, which the IEP did not offer. In addition, although the details of Orion's "copyrighted alert" program were vague, it was clear at least that at Orion, Student was being taught self-awareness of flagging attention and use of strategies to stay engaged. Alameda did not offer these

accommodations, which were appropriate and necessary for him. Thus the IEP did not sufficiently offer to teach Student how to pay attention to his own arousal states, concentration and attention, and how to manage his proprioceptive awareness, or the sensation of the body in space. Nor did it sufficiently minimize visual and other sensory distractions that would impede Student's ability to focus and concentrate in class. Student prevails on Issue 8.

ISSUE 9: SERVICES ACCOMMODATIONS SUPPORTS AND MODIFICATIONS IN TRANSITION PLANNING

Student contends Alameda denied Student a FAPE by failing to offer services, accommodations, supports and modifications to meet Student's individual and unique needs in transition planning in the March 7, 2022 IEP offer. Student contends that Alameda merely relied on a Student Transition Interview form prepared by Student that Welcher requested only the Friday evening before the Monday IEP team meeting. Student argues that Alameda's sole reliance on the form was inadequate, and the subsequent transition plan and goals failed to offer a FAPE. Alameda contends its offer was appropriate.

Student failed to show that Alameda's transition offer was inappropriate. Beginning not later than the first IEP to be in effect when a child with a disability turns 16, and updated annually thereafter, the IEP must include appropriate measurable postsecondary goals related to training, education, employment, and, where appropriate, independent living skills. (20 U.S.C. § 1414(d)(1)(A)(i)(VIII)(aa)-(bb); 34 C.F.R. § 300.320(b) (2007); Ed. Code, §56345, subd. (a)(8).) The postsecondary goals must be updated annually. (*Ibid.*) In addition, every IEP beginning with age 16 must also include

transition services to assist the child in reaching those postsecondary goals. (*Ibid.*)

“Transition services” means “a coordinated set of activities for an individual with exceptional needs” that:

1. is designed within a results-oriented process that is focused on improving the academic and functional achievement of the individual with exceptional needs to facilitate the movement of the pupil from school to post-school activities, including
 - a. postsecondary education,
 - b. vocational education,
 - c. integrated employment, including supported employment,
 - d. continuing and adult education,
 - e. adult services,
 - f. independent living, or
 - g. community participation;
2. is based upon the individual needs of the pupil, taking into account the strengths, preferences, and interests of the pupil, and
3. includes instruction, related services, community experiences, the development of employment and other post-school adult living objectives, and, if appropriate, acquisition of daily living skills and provision of a functional vocational evaluation. (20 U.S.C. § 1401(34); Ed. Code, § 56345.1, subd. (a).)

The focus of this Issue must be the services, accommodations, supports and modifications in transition planning that Alameda offered in the IEP in question, and not

what Orion would have provided. Student emphasizes the superiority of Orion, lauding its transition programs and contending for example that "Orion students intern at places like NASA and Lawrence Livermore Labs." However the internships Orion offers are irrelevant.

Student also disputes the timeliness and appropriateness of Alameda's transition assessment, however assessments were not raised as an issue and were waived in the settlement agreement. Moreover, Student attended the IEP team meeting and answered direct questions about his career path, which was as-yet unformulated in his mind. The IEP team had sufficient information on which to base its offer of services.

The IEP offered a goal in employment readiness that stated Student would participate in three mock interviews and earn satisfactory ratings in communication skills, interpersonal skills, professionalism and enthusiasm. The baselines accurately stated student had no work experience other than volunteering and that he had limited interviewing skills. The IEP offered one goal in career planning that stated that Student would complete interest surveys and career assessments to identify careers of interest and related education/training requirements. The baselines, based on the questionnaire Student completed, accurately stated that he did not know the type of career or job he wanted and had no work experience. The IEP also offered 60 minutes a month of group college awareness in the general education class, and 60 minutes a month of group vocational assessment, counselling guidance and career assessment.

These transition goals and services were appropriate. It is undisputed that as of the time of the IEP, Student had had no work experience, no practice at interviewing and, in terms of career planning, no direction. Learning basic interview skills and divining a career path were therefore both appropriate starting goals. Mother and

Dr. Maloff both disputed the goal to participate in mock interviews, both opining that Student will not participate in practice interviews because they are not “real,” and he will not understand their simulated nature. Mother opined that Student is too rigid, and since the interview would not be real, he would not become engaged in it. This testimony was speculative and not credible, especially in light of contrary testimony that Orion itself offered mock informational interviews, and that Student’s favorite class there was theater arts where he enjoyed acting. Alameda prevailed on Issue 9.

CONCLUSIONS AND PREVAILING PARTY

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

ISSUE 1:

Alameda denied Student a free appropriate public education, called a FAPE, by failing to include all necessary individualized educational plan, called an IEP, teams members at the March 7, 2022 IEP.

Student prevailed on Issue 1.

ISSUE 2:

Alameda denied Student a FAPE by failing to include meaningful present levels of academic achievement and functional performance in the March 7, 2022 IEP.

Student prevailed on Issue 2.

ISSUE 3:

Alameda denied Student a FAPE by failing to offer goals in all areas of need in the March 7, 2022 IEP.

Student prevailed on Issue 3.

ISSUE 4:

Alameda denied Student a FAPE by failing to offer services, accommodations, supports and modifications to meet Student's individual and unique needs in speech/socialization in the March 7, 2022 IEP offer.

Student prevailed on Issue 4.

ISSUE 5:

Alameda did not deny Student a FAPE by failing to offer services, accommodations, supports and modifications to meet Student's individual and unique needs in fine motor skills/dysgraphia in the March 7, 2022 IEP offer.

Alameda prevailed on Issue 5.

ISSUE 6:

Alameda did not deny Student a FAPE by failing to offer services, accommodations, supports and modifications to meet Student's individual and unique needs in executive functioning in the March 7, 2022 IEP offer.

Alameda prevailed on Issue 6.

ISSUE 7:

Alameda did not deny Student a FAPE by failing to offer services, accommodations, supports and modifications to meet Student's individual and unique needs in mental health (anxiety) in the March 7, 2022 IEP offer.

Alameda prevailed on Issue 7.

ISSUE 8:

Alameda denied Student a FAPE by failing to offer services, accommodations, supports and modifications to meet Student's individual and unique needs in sensory regulation in the March 7, 2022 IEP offer.

Student prevailed on Issue 8.

ISSUE 9:

Alameda did not deny Student a FAPE by failing to offer services, accommodations, supports and modifications to meet Student's individual and unique needs in transition planning in the March 7, 2022 IEP offer.

Alameda prevailed on Issue 9.

REMEDIES

PROSPECTIVE PLACEMENT

As a remedy, Student seeks placement at Orion for the remainder of the 2022-23 school year. The request is denied.

Federal and state law govern the placement of students with disabilities into private schools. IDEA's definition FAPE requires that special education and related services be provided "under public supervision and direction" and "meet the standards of the State educational agency." (20 U.S.C. §1401 (9)(a)). The requirement of public supervision and direction applies when a child is placed in a private school by public school officials. (34 C.F.R, §§ 300.146 (2017) and 300.147; Ed. Code § 56365 et seq.) Numerous requirements apply to both the private schools and the school districts entering into these arrangements.

First, the private school must be certified by the State. To obtain and maintain certification, the school must document many components of its programs, including:

- the special education and designated instruction and services it provides;
- a list of appropriately qualified staff; a description and copies of their credentials;
- documentation of staff training in dealing appropriately with behavioral needs;
- documentation of the administrator's credentials; criminal records of any agency personnel; and,
- written assurances that it meets all applicable standards relating to fire, health, sanitation, and building safety.

The private school must also submit to an initial and continuing periodic onsite reviews by the State. (Ed. Code, § 56366.1.) In addition to on-site reviews, nonpublic schools may be visited at any time without prior notice when there is substantial reason to believe that there is an immediate danger to the health, safety, or welfare of a child or group of children. On-site reviews shall include a review and examination of files and

documents, classroom observations and interviews with the site administrator, teachers, students, volunteers and parents to determine compliance with all applicable state and federal laws and regulations. (Cal. Code Regs., tit. 5, § 3063.) The private school must also certify that pupils have access to certain delineated educational materials, services, and programs including state-adopted, standards-based, core curriculum and instructional materials; that the school has and abides by a written policy for pupil discipline that is consistent with state and federal law and regulations. (Ed. Code, § 56366.10.) The school must provide notice within one day of any pupil-involved incident at the school or agency in which law enforcement was contacted. (Ed. Code, § 56366.1.) To be certified, private schools must also provide additional information, including:

- the name and contact information of the administrator and contact person;
- the name of the teacher(s) with a credential authorizing service in special education;
- the types of disabling conditions served;
- the age, gender and grade levels served;
- the total student capacity of the program;
- a description of the program including entrance criteria and exit criteria for transition back to the public school setting, and specific services designed to address student needs as listed on the student's IEP, core curriculum and instructional materials;
- annual operating budget;
- an entity-wide audit in accordance with generally accepted accounting principles;

- a list of all qualified staff, including subcontractors identifying their assignment and qualifications in providing services to pupils;
- tuberculosis clearances for all staff;
- criminal record summary or criminal history clearance dates for all staff, including subcontractors, who have contact with pupils;
- a fire inspection clearance completed within the past 12 months;
- a copy of a business license;
- a written disaster and mass casualty plan of action;
- a building safety inspection clearance; and,
- a health inspection clearance.

(Cal. Code Regs, tit.5, § 3060.) Certified nonpublic schools must make available any books and records associated with the delivery of education and related services for audit inspection or reproduction. (Cal. Code Regs, tit.5, § 3061.)

Next, to have students with disabilities placed there, a private school must by law enter into a contract with a school district. (Ed. Code, § 56365; Cal. Code Regs, tit.5, § 3062.) Numerous requirements apply to the contracts. The master contract shall, at a minimum, include

- general provisions relating to
 - modifications and amendments,
 - notices,
 - waivers,
 - disputes,
 - contractor’s status,
 - conflicts of interest,

- termination,
 - inspection and audits,
 - compliance with applicable state and federal laws and regulations,
 - attendance, record-keeping, and reporting requirements;
 - payment schedules;
 - indemnification and reasonable insurance requirements; and
 - procedures and responsibilities for attendance and unexcused absences.
- (Cal. Code Regs, tit.5, § 3062.)

Student's contention that a master contract is governed only by the California Code of Regulations, section 3062 with "minimum requirements" is ungrounded and unpersuasive, as it ignores the much more extensive contract provisions required by California Education Code, section 56366. Thus, master contracts must specify

- administrative and financial agreements;
- teacher-to-pupil ratios;
- transportation; recordkeeping;
- maintenance of school records;
- oversight by the school district; and,
- evaluating educational progress, among other details, required by law. (Ed. Code, § 56366.)

The master contract or individual services agreement may be terminated for cause. To terminate the contract either party shall give 20 days' notice. (Ed. Code, § 56366.)

For their part, school districts that place students at private schools must undertake due diligence, including onsite initial visits and periodic monitoring visits.

(Ed. Code, § 56366.1.) These must include a review of services provided, a review of progress toward IEP goals, an observation of the pupil during instruction, and a walkthrough of the facility. The local educational agency shall report the findings resulting from the monitoring visit to the State. (Ed. Code, § 56366.1.)

Orion is a certified nonpublic school, but it has not entered into a contract with Alameda due to a dispute over the terms of the Bay Area Collaborative Master contract used by Alameda, which Orion does not wish to sign. At hearing, Dr. Stewart testified that districts who wished to enter into contracts for student placements at Orion must use an Orion-generated master contract. In short, Orion refused to enter into the Bay Area Collaborative Master contract and Alameda declined to enter into Orion's proposed contract. Because the law envisions contractual relationships between districts and private (when certified these are called "nonpublic") schools, a placement absent such a contract would be untenable.

Dr. Randhir Bains, Alameda's Director of Special Education, reviewed both contracts and noted significant differences, particularly in several critical areas. Many terms of the Bay Area Collaborative Master contract not in Orion's contract, would have been essential to Alameda, reasonable to insist upon, and at least some of the terms are legally required. For example, the requirement that teachers be credentialed in special education was absent in the Orion proposed contract, even though that is also legally required to become certified as a nonpublic school. Orion's contract failed to contain other terms that are either legally required to be in the contract or legally required to maintain certification, such as

- providing student records to the local educational agency;
- providing 20 days' notice of termination;

- compliance with behavior intervention services and training staff in behavior interventions;
- reporting of discipline and statutory offenses;
- various requirements for the use of restraints or seclusion;
- cooperation with investigations; and,
- disclosure of complaints.

During Alameda's preparation of the IEP in question, Orion repeatedly rebuffed Welcher's attempts to gain reasonable information about Student's educational program, such as work samples, class syllabi and transcripts. Dr. Stewart stated in an email to Welcher that Orion "[is] not involved in any agreements with your District regarding these students. You have no standing in these cases as they involve Orion Academy. We have tried to be polite, but you have continued to the point of harassment."

Orion's representative at hearing, Dr. Stewart, would provide no information about the specific training the Orion teachers do or do not have, or their credentials. Mother's and Dr. Danielle Maloff's contentions that the Orion teachers were "highly trained" was not established by any evidence. Student's teachers at Orion, with one exception during the 2021-2022 school year, did not hold credentials in the area of special education. It was not clear whether any Orion teachers received any specialized training serving students with high functioning autism outside of that presented by Dr. Stewart herself in the "Orion Routine," a term that remains unclear. The contention that social skills and executive functioning accommodations were "embedded" is inherently vague. Although curriculum, classroom management, and social and

pragmatics were part of the program, when asked if this was written down anywhere Dr. Stewart answered "maybe" then that she "does not know." The "Orion program" is memorialized in "our materials" which are trademarked and copyrighted so they are "not shared with districts." Orion will not share their class syllabi or curriculum.

Dr. Stewart gave vague and elusive answers in response to questions concerning what Student records are in Orion's possession and why none were produced to Alameda or in response to subpoenas. Even though Parents signed a release allowing Orion to share information with Alameda, Dr. Stewart would not share "private copyrighted information" and stated that "we only give out what we give to everyone," which is limited to transcripts and reports. In response to a release of information signed by Mother, when asked if she would produce Student records to Alameda, Dr. Stewart replied that "it depends" on the reason, but "we are not going to spend hours and hours," and would not print them out. She professed to not know whether student records could be produced electronically. She professed to keeping no student work samples. She would not provide staff notes because these might contain information about other students, and it would be "a huge amount of work" to redact these. Thus, all Orion agreed to produce to Alameda was Student's grades, and summaries of his progress.

Dr. Stewart acknowledged at hearing that she and Student's teachers received subpoenas for records but did not respond, stating that it would be too time consuming and that many documents would not be provided as they were "proprietary."

In sum, while Orion holds certification as a non-public school, it is also a private school. According to the evidence adduced at trial, at least as far as Alameda and

Student are concerned, Orion wishes to be treated as a private and not a certified non-public school. The Education Code prohibits prospective placement in a private school. (Cal. Educ. Code Section 56505.2.) Orion has a proprietary program the details of which they are unwilling to disclose. Since Orion is not willing to share with Alameda the same details of its program that are legally required to be disclosed for certification, the requested remedy is not equitable and shall not be ordered. Student's single citation to *Ravenswood City School Dist. v. J.S.*, (N.D. Cal. 2012) 870 F. Supp. 2d 780, 787-788 as authority for an award of prospective placement in a private school is unconvincing. That case involved compensatory education for school years that, by the time of the due process hearing, had already elapsed and had nothing to do with prospective remedies.

REIMBURSEMENT

The same analysis does not hold true for the requested remedy of reimbursement, which is ordered to the extent of the evidence of Parents' out of pocket costs. Under federal and state law, courts have broad equitable powers to remedy the failure of a school district to provide a FAPE to a disabled child. (20 U.S.C. §1415(i)(2)(C) (iii); *School Committee of Town of Burlington, Mass. v. Department of Educ. of Mass.* (1985) 471 U.S. 359, 369 [105 S.Ct. 1996] (*Burlington*)). This broad equitable authority extends to an ALJ who hears and decides a special education administrative due process matter. (*Forest Grove School Dist. v. T.A.* (2009) 557 U.S. 230, 243, n. 11.) Parents may be entitled to reimbursement for the costs of placement or services they have procured for their child when the school district has failed to provide a FAPE, and the private placement or services were appropriate under the IDEA and replaced services that the school district failed to

provide. (20 U.S.C. § 1412(a)(10)(C); *Burlington, supra*, 471 U.S. at pp. 369-371.)

When a school district fails to provide a FAPE to a pupil with a disability, the pupil is entitled to relief that is “appropriate” in light of the purposes of the IDEA.

To permit reimbursement, although the parents’ placement need not be a state approved placement, it still must meet certain basic requirements of the IDEA, such as the requirement that the placement address the child’s needs and provide him educational benefit. (*Florence County School Dist. Four v. Carter* (1993) 510 U.S. 7, 13-16, 50 [114 S.Ct. 361] (*Carter*)). Parents may receive reimbursement for the unilateral placement if it is appropriate. (34 C.F.R. § 300.148(c); Ed. Code, § 56175; *Carter, supra*, 510 U.S. at pp. 15-16.)

Parents are entitled to be reimbursed for costs they have actually incurred in placing Student at Orion through the date of hearing. According to the evidence adduced at hearing, that amount has been one out of pocket partial payment to Orion for this 2022-23 school year in the amount of \$9,766.00. Per *Carter*, Student showed that Orion addressed Student’s needs and provided educational benefit. For reimbursement purposes, Parent’s unilateral placement of Student at Orion was appropriate and reasonable. Student obtained educational benefit and his needs were met through Orion’s small class sizes, structured programming, attention to sensory needs, and consistent enforcement of social/behavioral expectations. Therefore, Parents are entitled to be reimbursed by Alameda for the actual out of pocket costs that they proved through competent evidence they incurred in placing Student there.

ORDER

1. Alameda shall reimburse Parents for their partial payment to Orion for this 2022-23 school year in the amount of \$9,766.00.

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/

June Lehrman

Administrative Law Judge

Office of Administrative Hearings