

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

CASE NO. 2022060874

PARENT ON BEHALF OF STUDENT,

v.

ENCINITAS UNION ELEMENATRY SCHOOL DISTRICT.

DECISION

DECEMBER 5, 2022

On June 22, 2022, the Office of Administrative Hearings, called OAH, received a due process hearing request from Student, naming Encinitas Union Elementary School District as respondent. On July 27, 2022, OAH granted the parties' joint request for continuance, scheduling the due process hearing to begin on October 11, 2022. Administrative Law Judge Claire Yazigi heard this matter via videoconference on October 11, 12, 13, and 17, 2022.

Attorney Wendy Dumlao represented Student. Parent attended all hearing days on Student's behalf. Attorneys Jonathan Read and Juliana Mascari represented Encinitas. Maria Waskin, Special Education Director for Encinitas, and Erin Lain, Special Education Program Specialist, alternated attending hearing days on Encinitas's behalf. The matter was continued to October 31, 2022, for written closing briefs. The record was closed, and the matter was submitted on October 31, 2022.

ISSUES

On October 5, 2020, Student submitted a notice withdrawing Issues 4 and 5 as stated in the Order following prehearing conference. The issues heard were:

1. Did Encinitas fail to offer and provide adequate distance learning supports for Student to make educational progress from April 13, 2020, to June 22, 2022?
2. Did Encinitas fail to offer and provide adequate distance learning services, including speech and occupational therapy, from April 13, 2020, to June 22, 2022?
3. Did Encinitas fail to offer and provide adequate distance learning supports and services for Student to make educational progress from April 13, 2020, to June 22, 2022, every time there was a COVID-19 exposure?

JURISDICTION

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

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

The IDEA affords parents and local educational agencies the procedural protection of an impartial due process hearing with respect to any matter relating to the identification, assessment, or educational placement of the child, or the provision of a free appropriate public education, referred to as FAPE, to the child. (20 U.S.C. § 1415(b)(6) & (f); 34 C.F.R. § 300.511; Ed. Code, §§ 56501, 56502, and 56505; Cal. Code Regs., tit. 5, § 3082.) The party requesting the hearing, here, Student, 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).) 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 10 years old and in fifth grade at the time of hearing. Student resided within Encinitas's geographic boundaries at all relevant times. Student was eligible for special education under the primary category of Autism and the secondary category of Intellectual Disability.

LEGAL FRAMEWORK

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 individualized education program, referred to as an IEP, for an eligible student based upon state law and the IDEA. (20 U.S.C. §§ 1401(14), 1414(d)(1); 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 (*Rowley*); *Endrew F. v. Douglas County School Dist. RE-1* (2017) 580 U.S. ____ [137 S.Ct. 988, 1000] (*Endrew F.*))

STATUTE OF LIMITATIONS

On October 4, 2022, Encinitas filed a motion to limit Student's issues to the two-year statutory time period. As directed in the prehearing conference order, the parties filed briefs with OAH presenting argument on whether Encinitas's motion should be granted. At the beginning of the hearing, the parties presented oral arguments in support of their written arguments. Neither party requested to present evidence regarding the statute of limitations. Accordingly, the matter was submitted following argument. After thoroughly considering the briefs and argument, the ALJ ruled that Student did not meet the burden to extend the statute of limitations. Accordingly, the issues adjudicated commenced June 22, 2020, rather than April 13, 2020, as originally pled. The analysis supporting that ruling is contained below, consistent with the undersigned's representation at hearing.

Student contended that she began distance learning on April 13, 2020. By April 24, 2020, Student's advocate had written to Encinitas requesting in-home support for Student. Parents attended an IEP team meeting on May 28, 2020, to discuss challenges Student was having with distance learning and to reiterate their request for in-person supports and services.

Student alleged that, while Encinitas denied the request at first, by the end of the May 28, 2020, IEP team meeting Maria Waskin, Encinitas' special education director, stated that she would inquire into whether other districts were providing in-person services. Student alleged that Waskin never followed up with Parents on this. Essentially, Student argued that, but for Waskin's representation that she would inquire into how other districts provided in-person services during COVID-19 closures, Student would have filed the complaint sooner instead of waiting to hear back from her.

Student also contended that the Encinitas's failure to provide current progress data in June of 2020 deprived Parents of accurate information on Student's progress, and that Parents did not get an accurate picture of Student's progress on goals until the December 2020 progress report. Student argued that, had Parents been aware of Student's lack of progress on her goals sooner, they would have filed for due process sooner. Encinitas contended that Student's claims should be limited to those beginning June 22, 2020, because neither allegation qualified for an exception to the statute of limitations.

The IDEA requires that due process hearing requests be filed within the time allowed by state law if the state has an explicit time limitation for requesting such a hearing. (20 U.S.C. § 1415(f)(3)(C).) The statute of limitations for filing due process requests in California is two years from the date a party knew or had reason to know of the facts underlying the action. (Ed. Code, § 56505, subd. (l).) It is no matter if the parent understood that the inadequacy of student's education constituted a legal claim, just that parent had knowledge of the problem forming the basis of a claim. The Ninth Circuit Court of Appeals has defined California's standard as "knowledge of the educational activities of the District with respect to the Student." *M.M. & E.M. v. Lafayette School Dist.* (N.D.Cal., Feb. 7, 2012 Nos. CV 09- 4624, 10-04223 SI) 2012 WL 398773, p.18, as aff'd by *M.M. v. Lafayette School Dist.* (9th Cir. 2014) 767 F. 3d 842.

The law contains two express exceptions to the statute of limitations. The first of the exceptions applies in cases where the parent was prevented from filing a request for due process because of specific misrepresentations made by the local educational

agency that it had resolved the problem forming the basis of the complaint. The second exception applies when the local educational agency withholds information from the parent that was required to be provided to the parent pursuant to the IDEA or California special education law. (20 U.S.C. § 1415(f)(3)(D)(i) & (ii); Ed. Code, § 56505, subd. (l)(1) and (2).)

Any representation by Waskin that Encinitas would inquire into what other districts were doing by way of in-person services was not a specific misrepresentation that Encinitas had resolved the problem forming the basis of the complaint. Likewise, Student did not establish that information regarding whether what other districts were doing regarding in-person services was information required to be provided to Parents. Student failed to prove that the statute of limitations should be extended based on either reason set forth by law based on Waskin's representation. Also, Student failed to meet her burden of establishing that failing to provide earlier progress reports prevented Student from filing her complaint by April 13, 2022.

Parents were aware of the facts underlying Student's claim since April 13, 2020, specifically, that Student was receiving instruction and services through distance learning, and that Parents were not satisfied that the offers and services provided during that time satisfied Student's needs. This is particularly true in light of Student's advocate's April 24, 2020, letter requesting additional distance learning services. Parents were also aware that Encinitas was not providing them with reports on Student's goal progress during distance learning. Accordingly, the time period at issue in this matter was limited by the two-year statute of limitations.

Additionally, Parent testified at hearing that that Student's challenges with distance learning arose "immediately." Although not relied upon in reaching the statute of limitations ruling, this testimony further supports its accuracy.

ISSUES 1 AND 2: DID ENCINITAS FAIL TO OFFER AND PROVIDE ADEQUATE DISTANCE LEARNING SUPPORTS AND SERVICES, SPECIFICALLY, SPECIALIZED ACADEMIC INSTRUCTION, ADAPTIVE PHYSICAL EDUCATION, OCCUPATIONAL THERAPY, AND SPEECH AND LANGUAGE, FOR STUDENT TO MAKE EDUCATIONAL PROGRESS FROM JUNE 22, 2020, TO JUNE 22, 2022?

Student contends that, due to the nature of Student's disability-related needs, Encinitas should have offered in-person learning supports and services during periods of distance learning, specifically,

- specialized academic instruction,
- adaptive physical education,
- occupational therapy, and
- speech therapy.

Student asserts that without an appropriate offer of services that met Student's needs during distance learning, Student was unable to make educational progress and was thus denied a FAPE. Encinitas contends that it offered Student a FAPE at all times during periods of distance learning, and that Parents were responsible to ensure that Student attended to distance instruction.

Students Issues 1 and 2 allege the failure to offer adequate services, not generally, but specifically to Student during distance learning. The relevant time period involved three distinct periods of distance learning. This Decision analyses the issues in the following chronological order:

- Extended school year 2020, from June 29, 2020, to July 24, 2020, which was exclusively virtual;
- The first four weeks of the 2020-2021 school year, from August 17, 2020, to September 18, 2020, which were also exclusively virtual; and
- The period from September 21, 2020, to April 12, 2021, which was on a hybrid learning basis whereby Student attended school in-person four days a week Monday through Thursday and virtually on Fridays.
- There were no periods of distance learning from April 13, 2021, through June 22, 2022. Intermittent times when Student was out of school during this time period are analyzed in Issue 3.

Student's claim is that Encinitas failed to offer adequate services during distance learning, not that Encinitas failed to implement Student's IEP regarding in-person services. Accordingly, whether or not Encinitas delivered special education and related services in conformity with Student's IEP, or whether the school district fell significantly short of implementing the IEP in a material way, are not analyzed herein. Prior to hearing, Student withdrew issues asserting that Encinitas denied Student a FAPE by failing to design a program generally to meet Student's needs and failing to offer Student an appropriate placement. As such, issues regarding the failure to offer an appropriate program and placement during periods of in-person instruction from June 2020-2022 are not analyzed herein.

EXTENDED SCHOOL YEAR 2020

Student contends that because of struggles with inattention, maladaptive behaviors, and the nature of her disability, Student could not access the extended school year services. Student also contends that, as a result, Encinitas should have offered in-person services and the support, specifically an in-person aide. Encinitas contends that it offered and provided Student with sufficient distance learning supports and services during the extended school year, and that it was prohibited from providing any in-person services during extended school year 2020 due to pandemic-related government mandates. Encinitas also contends that Parents had a responsibility to facilitate Student's participation in distance learning. Ultimately, Encinitas's arguments were unpersuasive.

Extended school year services shall be provided for each individual with exceptional needs who requires special education and related services in excess of the regular academic year. (Cal. Code Regs., tit. 5, § 3043.) Students who require extended school year are students with disabilities that are likely to continue indefinitely, where interruption to a student's educational programming may cause regression, and when coupled with limited recoupment capacity, render it impossible or unlikely that the student will attain the level of self-sufficiency and independence that would otherwise be expected in view of his or her disabling condition. (Cal. Code Regs., tit. 5, § 3043.) Among other requirements, an extended school year program shall be provided for a minimum of 20 instructional days. (Cal. Code Regs., tit. 5, § 3043 (d).)

Student's then-operative IEP, dated December 10, 2019, offered extended school year in the Teaching Independence through Differentiated Instruction program, or TIDE, program, which consisted of

- 120 minutes monthly of group language and speech service,
- 120 minutes monthly of adaptive PE,
- 60 minutes monthly of occupational therapy, and
- 230 minutes a day of specialized academic instruction.

By the beginning of extended school year 2020, Encinitas was on notice that Student needed additional services and supports during distance learning. While the following facts predate the claim period, they are necessary to establish the information known to Encinitas regarding support Student required for distance learning during the 2020 extended school year. No FAPE findings are made, however, prior to June 22, 2020.

Based on the COVID-19 outbreak and related guidance, Encinitas ceased providing any instruction at all to its students in March 2020. Encinitas resumed instruction through a distance learning model from April 13, 2020, through the remainder of the 2019-2020 school year. Student's then-operative IEP, dated December 10, 2019, offered Student 1255 minutes a week of in-person specialized academic instruction in a self-contained classroom known as the Teaching Independence through Differentiated Instruction program, or TIDE. The pupil to adult ratio in the TIDE special day class was almost one to one, with about eight to 10 pupils to about eight or nine aides, plus the special education teacher. The teachers in the TIDE classroom had behavior training and implemented applied behavior analysis strategies based on each pupil's unique need.

The IEP also offered Student 1,800 minutes a year of in-person group speech and language service, 900 minutes a year of in-person group occupational therapy service, and 1,800 minutes a year of in-person group adaptive PE. The IEP also offered 300 minutes a year of consultation between the occupational therapist and staff. The IEP specified that Student benefitted from a structured learning environment with embedded applied behavior and built-in proactive behavior supports, and identified Student as being easily distracted across all settings.

Starting in March 2020 during distance learning, Liz Kuttler, Student's then second grade special education teacher, provided Student's class with synchronous instruction, asynchronous instruction, or a combination of both. Synchronous instruction meant that an instructor or service provider provided real-time instruction via the Zoom platform. Asynchronous instruction meant that Student's teacher or service provider assigned Student work to be completed independently. Asynchronous assignments were either posted to online learning platforms like Google classroom or Unique Learning Systems, or given to Student as packets of hard copy work. Kuttler also provided training videos for parents on how to support their students at home during distance learning, as well as tutorials specific to Student's individualized goals. Encinitas's district behavior specialists also uploaded online videos and slides meant to coach parents through their pupils' distance learning, and were available to meet with Parents through Zoom by request. Additionally, Encinitas provided Student with an iPad as well as a physical bin of materials that Student would need to work on goals at home. The bin also included instructions for goal work, progress trackers, and Google classroom printouts. Parents picked up these materials on behalf of Student.

In the same way, Cherise Davis, Student's adaptive PE teacher, sent home asynchronous activities for Student to do during distance learning, but did not keep

track of whether Student completed them. Lauren Kempiners, Student's occupational therapist, provided families various synchronous and asynchronous occupational therapy activities, specifically, email, hardcopy or online worksheets, pre-recorded treatment session videos, or phone or video conferencing, but Student did not participate in these opportunities.

Parent testified persuasively and emotionally to the struggles that Student and her family encountered immediately upon transitioning to distance learning. On most days, Student had difficulty attending virtual classes. Parent described Student's "non-stop" tantrums, including hitting the computer screen and screaming, despite Parents' efforts to calm her down or get her to engage in online learning. Student would not sit in her seat or attend to work on the computer, wandering around the house instead. Parent persuasively testified that Encinitas's offers of virtual supports and services to Student and Parents were unhelpful during a time when Student was already having such difficulty with virtual learning.

On April 22, 2020, Parents emailed Kuttler, notifying Encinitas of Student's difficulty with distance learning and online speech services, and informing Kuttler that Student could not sit for more than 30 seconds before she would begin running around the house. Parents requested in-home or in-person support for Student. On April 24, 2020, Student's advocate sent a letter requesting in-home support. Parents also met with the IEP team on May 28, 2020, and reiterated their request. At the meeting, Parents described Student's inability to access her education in the distance learning format. Specifically, Parents described how Student was incapable of sitting in front of a screen, and could not even watch TV or Zoom with her grandparents. While Kuttler did offer Parents virtual ongoing behavior coaching and other online supports from district behavior specialists, Encinitas denied Parents' request for in-person support due to

governmental COVID-19 closure directives. During this time, Parents arranged for private in-person speech services because Student was unable to access the district provided speech services virtually.

By the beginning of the 2020 extended school year, Encinitas was on notice of Student's inability to access her education through distance learning without extensive and constant in-person support from an adult. A school district must ensure that the IEP team revises the IEP, as appropriate, to address "any lack of expected progress toward the annual goals and in the general education curriculum, where appropriate." (20 U.S.C. § 1414 (d)(4)(A); 34 C.F.R. § 300.324(b)(2).) Under her IEP, Student was entitled to extended school year. Encinitas knew that Student was unable to access the extended school year instruction and services in any way. The operative IEP was not reasonably calculated to provide Student a FAPE during distance learning in the 2020 extended school year. Encinitas was obligated to offer and provide additional supports or services that would have enabled her to access extended school year during distance learning. Encinitas failed to offer or provide adequate supports and services to Student during that time. Ultimately, the evidence established that Student received no educational benefit during the 2020 extended school year.

SPECIALIZED ACADEMIC INSTRUCTION, OCCUPATIONAL THERAPY, ADAPTIVE PHYSICAL THERAPY AND SPEECH AND LANGUAGE SERVICES

The 2020 extended school year program began on June 29, 2020, and ended July 24, 2020, consisting of 19 days total. The program included both synchronous and asynchronous instruction. At the beginning of the extended school year, Encinitas was on notice that Student could not access her special education and related services in a distance learning format.

Kelsey Saake was Student's special education teacher during the 2020 extended school year. Each week, Saake provided

- two synchronous online 30-minute group lessons of specialized academic instruction,
- one synchronous online 40-minute individual lesson, and
- at least one 15-minute online individual session with a TIDE instructional assistant.

Student attended only four synchronous special education lessons during the extended school year. Lauren Kempiners, Student's occupational therapist, was responsible for providing Student 60 minutes of occupational therapy during the 2020 extended school year. During the extended school year, Kempiners did not provide synchronous instruction, and only uploaded activities and prerecorded videos into Google classroom. Chelsea Venrick, Student's adaptive PE teacher, was responsible for providing Student with 120 minutes of adaptive PE. During adaptive PE, Student attended some class meetings but would not participate; Student would eat a snack or walk around the house. Malain Brown, Student's speech language pathologist, was responsible for administering 120 minutes of speech and language services. Brown hosted 30-minute synchronous online speech lessons once a week for four weeks. Student did not attend any of these lessons. Brown also posted some asynchronous learning opportunities online, but there was no indication that Student accessed them.

Encinitas staff made available a variety of online resources for Student's distance learning. The evidence established, however, that Student was unable to independently

access any extended school year instruction without continuous, in-person adult support, no matter how many virtual or online resources were made available to her or her parents.

Student's extended school year service providers unanimously reported Student either did not attend at all or did not access any services when attending services virtually. When participating, Student only maintained attention for fewer than five minutes at a time, would get up, walk around, and miss virtually all of the instruction. Given Student's tender age, the nature of her disability, and her inability to read or write, Student could not independently access these materials. Student needed the continuous assistance of an adult to access these materials, stay on task, and access specialized academic instruction.

Encinitas contends that Student's Parents were responsible for ensuring she attended to the distance learning program. Saake did not recall that Student had an adult present during Zoom classes, and opined that Student would likely have been able to focus more if a parent or another adult was in the room with Student. One of Student's Parents was typically in the home during distance learning times, but had another child to attend to as well.

Parents established that they did their best to facilitate Student's participation in online learning, considering Student's behavioral and attention challenges, and that one parent had to work and the other parent was also responsible for Student's sibling during the remote school day. Encinitas offered no legal authority supporting a contention that Student's ability to receive a FAPE was conditioned on Parents' ability or willingness to provide or obtain full-time one-to-one support.

Additionally, extended school year services must be provided at “no cost to the parents of the child.” (citation is in CFR 300.106(b)(iii)) Requiring the degree of support necessary for Student to access her education would have come at an impermissible cost to Parents. Neither of Student’s Parents were special education teachers, service providers, or had behavior training. Under these circumstances, Encinitas’s offers of online parent resources did not ameliorate the problem.

Student established the offer of extended school year specialized academic instruction, occupational therapy, adaptive physical education, and speech and language, as set forth in the December 2019 IEP, based on what Student’s IEP team knew at the beginning of the extended school year, did not meet her needs and was not reasonably calculated to provide educational benefit. Accordingly, Student’s IEP should have been amended to provide additional support during distance learning.

Encinitas argued that even if the services offered to Student during distance learning were not appropriate, Encinitas could not be deemed to have denied Student a FAPE because it was merely complying with Governor Newsom’s stay at home orders. This argument is unpersuasive.

On March 4, 2020, Governor Newsom declared a state of emergency in California due to a catastrophic, worldwide pandemic involving an airborne virus called COVID-19. On March 13, 2020, Governor Newsom issued Executive Order N-26-20 which provided initial instructions for schools during school site closures. Executive Order N-26-20 directed the California Department of Education, or CDE and the California Health and Human Services Agency to jointly develop guidance ensuring that students with disabilities received a free and appropriate public education during distance learning consistent with their individualized education program under the IDEA.

In March of 2020, The United States Department of Education published a series of questions and answers regarding local educational agency, or LEA, responsibilities regarding COVID-19. Notably, the Department of Education stated that it would not waive federal requirements under the IDEA in response to the pandemic. The guidance advised that:

If an LEA continues to provide educational opportunity to the general student population during a school closure, the school must ensure that Students with disabilities also have equal access to the same opportunities including the provision of FAPE. LEAs, and schools must ensure that, to the greatest extent possible, each student with a disability can be provided the special education and related services identified in the student's IEP developed under the IDEA ... (Questions and Answers on Providing Services to Children With Disabilities During a COVID-19 Outbreak (U.S.D.O.E., March 2020) Answer to Question A-1 p.2.)

On March 31, 2020, pursuant to Executive Order N-26-20, CDE issued Special Education Guidance for COVID-19 regarding distance learning. That guidance advised districts that, if they could continue providing special education and related services as outlined in the IEP in a distance learning model, they should do so. Districts were told that, when they provided services to general education students, they were required to provide equitable access to students with disabilities by providing services appropriately tailored to the students' individual needs, to the greatest extent possible. (Special Education Guidance for COVID-19 (CA Dept. of Education, 3-31-2020) p. 1, §§ 1 and 2.) That same document advised districts that, if they were unable to mirror the IEP offer, they would be responsible for making individualized determinations in collaboration with the IEP team, regarding whether compensatory education and services would be

needed, taking into consideration the student's progress in the general education curriculum, progress towards their goals or evidence of regression. (Id. at p. 2, § 3.)

On April 27, 2020, the Secretary of Education declined an opportunity provided by Congress to seek an extension of IDEA timelines due to COVID-19. (Policy and Guidance - Report to Congress of U.S. Secretary of Education Betsy DeVos: Recommended Waiver Authority Under Section 3511(D)(4) of Division A of the Coronavirus Aid, Relief, and Economic Security Act ("CARES Act") April 27, 2020.) Thus, even "[i]f State and local decisions require schools to limit or not provide in-person instruction due to health and safety concerns, IEP Teams are not relieved of their obligation to provide FAPE to each child with a disability under IDEA." *Marrero v. Puerto Rico* (D.C. Puerto Rico, 2021) 2021 WL 219195, p. 3 (*Marrero*).

On June 29, 2020 California passed legislation requiring an IEP to specify the means by which IEP services will be provided under emergency conditions. (Ed. Code, § 56345(9)(A).) School districts were required to ensure the information was included with "the development of an initial individualized education program or the next regularly scheduled revision of an individualized education program." (Id. § 56345(9)(B).) This requirement, however, did not excuse Encinitas from making an IEP offer to Student that was reasonably calculated to provide her a FAPE at all times during which Encinitas was providing his education. (*Marrero*, at p. 3.)

Encinitas points to *E.M.C. v. Ventura Unified School District* ((C.D.Cal. October 14, 2020, No. 2:20-CV-09024-SVW-PD) 2020 WL 7094071 (*E.M.C.*)) to support its position that Encinitas was excused from any obligation to provide Student in-person IEP services during COVID-19 shutdowns. The pupil in *E.M.C.* experienced difficulties with distance learning and alleged she required in-person services despite the Governor's prohibition

on in-person instruction. (*Id.* at p. 2.) The court upheld the Governor's order, and denied the student's request for in-person services despite the student's IEP offering in-person services, as the IEP had been modified by lawful statewide restrictions prohibiting in-person instruction. (*Id.* at p. 6.) The court rejected the student's argument that restrictions on in-person services did not excuse a school district from its obligation to provide in-person IEP services.

Unlike the present case, the pupil in *E.M.C.* sought a temporary restraining order requiring the district to provide an in-person aide during COVID-19 shutdowns pursuant to stay-put principles (*Id.* at p. 1.) The right to stay-put during a dispute's pendency is distinct from whether a student is offered or provided a FAPE. For example, a student's request for stay-put can be granted and ultimately that same placement can be deemed to deny FAPE following a due process hearing. Here, Student filed the present complaint after Encinitas had returned to regular in-person instruction. Any remedy for Student, then, could not include an order for in-person services during COVID-19 shutdown, but would necessarily be an award after the fact.

Also important is the distinction between a district's inability to provide in-person services due to lawful stay at home orders versus a pupil's need for such in-person services. Here, Student demonstrated need for in-person supports and services, regardless of whether she would have qualified for an exception to the Governor's stay home orders.

Encinitas's inability to provide in-person instruction due to lawful stay at home orders did not eliminate Student's need for such in-person support. Importantly, the U.S. Department of Education specifically declined to waive federal requirements under the IDEA in response to the pandemic. (Questions and Answers on Providing Services to

Children With Disabilities During a COVID-19 Outbreak (U.S.D.O.E., March 2020) Answer to Question A-1 p. 2.) Practically, these competing interests may be brought into consonance through compensatory award after-the-fact for the services and supports needed during a time that Encinitas was arguably unable to provide them. Student was entitled to appropriate extended school year services, but was able to access none of them. Encinitas failed to offer or provide Student adequate distance learning services or supports for the 2020 extended school year.

DISTANCE LEARNING FROM THE BEGINNING OF THE 2020-2021 SCHOOL YEAR TO SEPTEMBER 18, 2020

The 2020-2021 school year began on August 17, 2020, via distance learning, and continued until September 18, 2020. During this period, the December 2019 IEP was still operative. Encinitas contended that it essentially amended Student's IEP by offering Student in-person aide support and Parents accepted at the beginning of the school year. Student contended that despite the addition of some aide services, they still were not sufficient to meet Student's needs.

In a telephone conversation a few days before the 2020-2021 school year started, Erin Lain, program specialist, offered Parents in-home services from Verbal Behavior Associates, a non-public agency, for in-home aide support for Student. Parents agreed that Student receive this service and executed a release of information to facilitate the same. Specifically, Encinitas offered two hours of in-home aide support per distance learning school day.

The IDEA requires an IEP to include a statement of the special education and related services that will be provided to the student. (20 U.S.C. § 1414(d)(1)(A)(i)(IV);

Cal. Educ. Code § 56345(a)(4).) The IDEA also requires that the IEP set forth “the anticipated frequency, location, and duration of those services and modifications.” (20 U.S.C. § 1414(d)(1)(A)(VII); Cal. Educ. Code § 56345(a)(7).) The requirement that an IEP be written should be enforced rigorously. (Union Sch. Dist. v. Smith, (9th Cir. 1994) 15 F.3d 1519, 1526.) A written IEP creates a clear record and eliminates future factual disputes about when placements were offered, what placements were offered, and what additional educational assistance was offered to supplement a placement, if any. (Ibid.)

The IDEA directly addresses how parties may amend an IEP. Changes to the IEP may be made either by the entire IEP Team or, as provided in subparagraph (D), by amending the IEP rather than by redrafting the entire IEP, which also requires parental consent. (Board of Education of Yorktown Central School District v. C.S., (2d Cir. 2021) 990 F.3d 152, 170, citing, 20 U.S.C., § 1414(d)(3)(F).) An IEP may not be changed unilaterally. (M.C. ex rel. M.N. v. Antelope Valley Union High Sch. Dist., (9th Cir. 2017) 858 F.3d 1189, 1197.)

A parent may agree to amend an IEP without an IEP team meeting. An IEP may be modified without a meeting, but only when the parent and the public agency agree as to the modification; agree not to convene an IEP team meeting; and develop a written document to amend or modify the IEP. (34 C.F.R. § 300.324(a)(4).) Unless the IEP is modified by agreement in accordance with paragraph (a)(4), it may be modified only by the entire IEP team at an IEP team meeting. (Id. § 300.324(a)(6).)

Saake continued as Student’s third grade special education teacher in the TIDES program for the 2020-2021 school year. For the period of distance learning from August 17, 2020, to September 18, 2020, Saake held daily morning mainstreaming

sessions and synchronous morning meetings containing English language arts and math instruction. Student regularly missed the morning mainstreaming sessions. Each week, Saake offered synchronous one to one instructional time, a synchronous session with an instructional aide, and a mainstreaming reading activity with a general education peer. Saake also posted asynchronous learning opportunities to Google classroom.

For this period of distance learning in the fall of 2020, school was in session for 24 days. Of the 24 days of instruction, Verbal Behavior Associates provided Student with direct behavior therapy service on 13 of those days, for two hours each day. Verbal Behavior Associates also provided a total of 10 hours of "school district supervision time," but these hours were not direct behavior therapy for Student. From September 14 to September 17, 2020, Student's special day class began in-person instruction for two hours a day, with the remainder of instruction as distance learning. Student did not receive any direct behavior service from Verbal Behavior Associates on these days.

Saake noticed some improvement in Student's online attendance and participation during this time. But for 11 of the 24 instructional days of distance learning in fall 2020, or 45 percent of the instructional days, Student did not have the help of an in-home aide. Parent credibly testified that even on days when Student was marked "present" for attendance on days without an aide, Student did not attend to distance learning. Student continued to avoid the computer, could not attend, and required constant adult assistance.

When the 2020-2021 school year commenced, Kempiners provided the first week of occupational therapy to Student asynchronously through Google classroom, and the following three weeks synchronously. When Kempiners did do Zoom calls with Student, Kempiners noticed that Student would begin to wander away from the computer after

about 15 minutes. Kempiners observed that Student could not access distance learning without assistance. Davis conducted one synchronous Zoom adaptive PE class per week, but could not recall if Student attended these Zooms. Davis also provided weekly asynchronous activities and office hours for parents. No evidence was introduced that Student accessed them. Brown provided 40-minute synchronous speech and language group sessions per week. Brown also made available weekly synchronous individual speech sessions. But Encinitas's offer of specialized academic instruction and related services, as set forth in the December 2019 IEP, was not adequate to offer Student a FAPE during distance learning.

In evaluating an IEP, it is not appropriate to critique it with the benefit of hindsight. Rather, it must be evaluated to determine whether the goals and methods proposed were reasonably calculated to ensure that the child would receive educational benefit. An IEP is "a snapshot, not a retrospective." (*Anchorage School District v. M.P.* (9th Cir. 2012) 689 F. 3d 1047, 1057, citing *Adams v. State of Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149.) It must be evaluated in terms of what was objectively reasonable when the IEP was developed. (*Adams v. State of Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149.)

Student established that by the beginning of the 2020-2021 school year, from August 17 through September 18, 2020, Encinitas was on notice that the December IEP was not adequate to meet Student's needs during the days of distance learning. Student established that Student could not access distance learning on her own, and that Parents were ill-equipped to help her do so on a constant basis. Encinitas's provision of an in-home provided some benefit to Student, but it did not provide Student with enough in-person support to meet her needs so she could appropriately access her education. Student continued to struggle with inattention during the times

of distance learning during the days and times that she did not have an in-home aide. Further, Encinitas's offer of an in-home aide was not an enforceable amendment to the IEP. The operative IEP was not reasonably calculated to provide Student a FAPE during distance learning from August 17, 2020, to September 18, 2020. Student established that Encinitas failed to offer or provide adequate supports and services during this time period.

HYBRID LEARNING FROM SEPTEMBER 21, 2020, THROUGH APRIL 12, 2021

Beginning September 21, 2020, Student transitioned to a "hybrid" class and attended school in-person for four full days per week, Monday through Thursday. Fridays were minimum, distance learning days. The December 2019 IEP was still the operative IEP at the beginning of this time period. Encinitas offered a new IEP in December of 2020, and the minutes offered for each service were the same as those offered in the December 2019 IEP: the December 2020 IEP offered Student

- 1,255 minutes a week of specialized academic instruction,
- 1,800 minutes a year of small group speech and language service,
- 900 minutes a year of small group occupational therapy service, and
- 1,800 minutes a year of group adaptive PE.

The IEP also offered 300 minutes a year of consultation between the occupational therapist and staff.

Student received speech language, occupational therapy, and adaptive PE services in-person during this time period. Student thrived in in-person adaptive PE. Saake described Student as a "rock star" in adaptive PE, and Davis agreed with this

characterization. Because Student received her services in-person during this time period, Student's allegation that Encinitas failed to offer or provide adequate services during distance learning does not apply here.

Student did not have the benefit of an in-home aide to help her access distance learning on Fridays during this period of hybrid learning, but Student did not establish how one minimum day of distance learning per week affected her ability to make progress in the educational program. Progress reports on Student goals made in November 2020, indicate that Student was making progress on, if not meeting, all the goals in her IEP. On balance, Student was able to receive educational benefit and make overall progress in the program during hybrid learning. (*Rowley*, at p. 201; *Endrew F.*, at p. 988.)

Student did not meet her burden to establish that the IEP offers in place from September 21, 2020, to April 12, 2021, failed to offer or provide appropriate supports during hybrid learning to meet Student's needs in specialized academic instruction, occupational therapy, adaptive PE, or speech and language. Student returned to full time in-person instruction beginning April 12, 2021, and Student's issues only pertain to distance learning. Student makes no other distance learning-related allegation for the remainder of the claim period.

ISSUE 3: DID ENCINITAS FAIL TO OFFER AND PROVIDE ADEQUATE DISTANCE LEARNING SUPPORTS AND SERVICES FOR STUDENT TO MAKE EDUCATIONAL PROGRESS DURING PERIODS OF QUARANTINE IN JANUARY AND FEBRUARY 2022?

Student contends that Encinitas failed to offer adequate supports and services during Student's periods of at-home quarantine, depriving her of educational progress. Encinitas contends that it was not obligated to offer any distance learning for any absence lasting 10 days or less, but that Encinitas nevertheless did provide Student with adequate distance learning supports and services during the quarantines. Encinitas also contends that Parents had a duty to mitigate any alleged learning loss by availing Student of tutoring services Encinitas offered.

Encinitas required Student to quarantine at home for four days in January 2022 due to Student's classroom exposure to COVID-19. Later, Encinitas required Student to quarantine at home for six days in late January and early February 2022 due to another COVID-19 exposure. When Student was home, Student had access to her district-issued iPad. Student also had hard copy folders with work and instructions geared toward each of the goals in her IEP. Encinitas provided Student with materials for hands on activities to do at home. Saake offered online or phone coaching for families to facilitate at-home learning. During the first quarantine, Saake also scheduled synchronous Zoom class circle time.

Student's then-operative IEP was dated December 2021. The minutes offered for each service mirrored the number of minutes offered in the December 2019 and 2020 IEPs, but with some variation in how the services were to be delivered. The December 2021 IEP offered Student

- 1,255 minutes a week of specialized academic instruction,
- 1,800 minutes a year of whole group and small group speech and language service,
- 900 minutes a year of direct occupational therapy service, and
- 1,800 minutes a year of group adaptive PE.

The IEP also offered 300 minutes a year of consultation between the occupational therapist and staff.

When Student's quarantine was over, Encinitas offered Student additional tutoring to mitigate any learning loss that Student may have experienced due to the quarantines. This offer was made outside of and in addition to the services offered in Student's then-operative IEP. Specifically, on February 25, 2022, Encinitas offered Student 10 hours of tutoring support with Verbal Behavior Associates on Student's IEP goals. Encinitas's offer averaged one hour of tutoring per day missed due to quarantine. Parents did not avail Student of this offer; it was Parents' opinion that the offer was inadequate to address Student's needs.

Encinitas borrows from IDEA provisions governing disciplinary manifestation determinations and general provisions regarding emergency circumstances to argue

that it did not have an obligation to provide Student with any instruction for absences of 10 days or less. Encinitas also contends that Parents had an obligation to mitigate Student's learning loss, if any, by availing her of Encinitas's tutoring offer.

But more preliminary is the threshold burden analysis of whether, as the filing party, Student established its claim. (*Schaffer v. Weast* (2005) 546 U.S. 49, 62.) Student provided no evidence that Student failed to progress in the educational program, even considering the 10 aggregate days of quarantine. Student failed to prove the December 2021 IEP offer in place during January and the first week of February 2022 did not meet Student's needs.

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:

Encinitas failed to offer or provide adequate supports for the 2020 extended school year and the distance learning portion of the 2020-2021 school year from August 17, 2020, to September 18, 2020. Student did not establish that Encinitas failed to offer or provide adequate supports during the hybrid learning period from September 21, 2020, to April 12, 2021.

Student partially prevailed on Issue 1. Encinitas partially prevailed on Issue 1.

ISSUE 2:

Encinitas failed to offer or provide adequate services, namely, specialized academic instruction, occupational therapy, speech language therapy, and adaptive PE, for the 2020 extended school year and the distance learning portion of the 2020-2021 school year from August 17, 2020, to September 18, 2020. Student did not establish that Encinitas failed to offer or provide adequate services during the hybrid learning period from September 21, 2020, to April 12, 2021.

Student partially prevailed on Issue 2. Encinitas partially prevailed on Issue 2.

ISSUE 3:

Student did not establish Encinitas failed to offer or provide adequate supports or services to Student during periods of quarantine.

Encinitas prevailed on Issue 3.

REMEDIES

Administrative Law Judges have broad latitude to fashion appropriate equitable remedies for the denial of a FAPE. (*School Comm. of Burlington v. Department of Educ.* (1985) 471 U.S. 359, 370 [105 S. Ct. 1996, 85 L. Ed. 2d 385 (*Burlington*)]; *Parents of Student W. v. Puyallup School Dist., No. 3* (9th Cir. 1994) 31 F.3d 1489, 1496 (*Puyallap*)). In remedying a FAPE denial, the student is entitled to relief that is "appropriate" in light of the purposes of the IDEA, specifically providing Student with a FAPE which emphasizes special education and related services to meet Student's unique needs. (20 U.S.C. § 1415(i)(2)(C)(iii); 34 C.F.R. § 300.516(c)(3); *Burlington*, at p. 374.)

School districts may be ordered to provide compensatory education or additional services to a student who has been denied a FAPE. (*Puyallup*, at p. 1496.) The authority to order such relief extends to hearing officers. (*Forest Grove Sch. Dist. v. T.A.* (2009) 557 U.S. 230, 243-244, fn. 11 [129 S.Ct. 2484].) These are equitable remedies that courts and hearing officers may employ to craft "appropriate relief" for a party. (*Puyallup*, at p. 1496.) An award of compensatory education need not provide "day-for-day compensation." (*Id.* at p.1497.) An award to compensate for past violations must rely on an individualized assessment, just as an IEP focuses on the individual student's needs. (*Reid v. District of Columbia* (D.C. Cir. 2005) 401 F.3d 516, 524.) The award must be fact specific. (*Ibid.*)

Student established Encinitas failed to offer and provide her appropriate distance learning support for the 2020 extended school year and up to September 18, 2020, so she could access her specialized academic instruction, occupational therapy, adaptive physical education, and speech and language.

Student seeks 5,020 minutes of specialized academic instruction, 120 minutes of speech, 60 minutes of occupational therapy, and 120 minutes of adaptive PE. Student relies on a minute-by-minute calculation, asserting that Encinitas should be responsible for compensating the entirety of instructional and service minutes as set forth in Student's IEPs, because of Encinitas's failure to provide any supports or services that would have allowed Student to access extended school year through distance learning.

There is no obligation to provide a day-for-day compensation for time missed; appropriate relief is relief designed to ensure that the student is appropriately educated within the meaning of the IDEA. (*Puyallup*, at p. 1497.) A qualitative analysis is more appropriate here. This Order takes into account Student's young age, the nature of

Student's disability and Student's struggles with attention, and the number of hours likely to compensate Student for the denial of supports and services during the time Student was denied a FAPE, without being oppressive to Student.

Considering all relevant factors, Student is awarded

- 26 hours of in-person compensatory specialized academic instruction,
- eight hours of in-person compensatory occupational therapy,
- eight hours of in-person compensatory speech and language services, and
- eight hours of in-person compensatory adaptive PE.

The next determination is which entity, Encinitas or a non-public agency, should provide the compensatory services. Here, Student did not make a particular request for a compensatory service provider. Additionally, the evidence established that once Student returned to school-based services, she made educational progress. Encinitas service providers can also utilize the same curriculum and methodologies implemented that have proven successful with Student. Accordingly, the compensatory services ordered can be provided by Encinitas. They must be provided outside of the regular school day and in addition to Student's IEP offered services. The ordered compensatory services can be provided during the regular school year and extended school year. Encinitas shall work with Parents to find a mutually agreeable schedule for the ordered compensatory services. The compensatory services must be completed by the end of the 2023-2024 regular school year.

Student seeks reimbursement for monies paid to "Sara M.", a caregiver Parents hired to sit with Student during periods of distance learning. Sara M. did not testify, and Parents did not testify to Sara M.'s credentials or qualifications. The dates and times of

Sara M.'s services to Student were unclear. But more importantly, Student did not establish that these services were educationally related. By Student's own admission in Student's closing brief, the caregiver was not trained or equipped to help Student attend to virtual lessons. Student did not attribute any educational progress to Sara M.'s services. Student's request for reimbursement for caregiver expenses is denied.

Student also seeks reimbursement for tuition and travel to the Nemo Clinic, a rehabilitation center in Ukraine in September of 2021. However, Student failed to establish how this remedy pertained to Encinitas's failure to offer adequate IEPs to meet Student's needs during distance learning, which concluded before Student's time at the Nemo clinic. This request is denied.

ORDER

1. Encinitas shall provide Student with 26 hours of district-provided, in-person compensatory specialized academic instruction; eight hours of district-provided, in-person compensatory occupational therapy, eight hours of district-provided, in-person compensatory speech and language services, and eight hours of district-provided, in-person compensatory adaptive PE;
2. The compensatory services must be provided by the end of the 2023-2024 regular school year;
3. All other requests for relief are denied.

RIGHT TO APPEAL THIS DECISION

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

CLAIRE YAZIGI

Administrative Law Judge

Office of Administrative Hearings