

BEFORE THE  
OFFICE OF ADMINISTRATIVE HEARINGS  
STATE OF CALIFORNIA

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CASE NO. 2021120137  
CASE NO. 2022010483

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THE CONSOLIDATED MATTERS INVOLVING  
  
PARENTS ON BEHALF OF STUDENT, AND  
  
WHITTIER UNION HIGH SCHOOL DISTRICT.

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DECISION

MAY 12, 2022

On December 3, 2021, Parents on behalf of Student filed with the Office of Administrative Hearings, referred to as OAH, a due process hearing request in OAH case number 2021120137, naming Whittier Union High School District, called Whittier. On December 17, 2022, OAH granted the parties' due process hearing continuance request.

On January 19, 2022, Whittier filed a due process hearing request in OAH case number 2022010483, naming Student. On January 31, 2022, OAH granted the parties'

motion to consolidate OAH case numbers 2021120137 and 2022010483 and set the due process hearing in the consolidated matters to the dates set in OAH case number 2021120137.

Administrative Law Judge Cynthia Fritz, called ALJ, heard this matter by videoconference on March 15, 16, 17, and 18, 2022.

Attorney Pamela Daves represented Student. Parent attended all hearing days. Attorney Darin Barber represented Whittier. Whittier Special Education Director Dr. Anthony Truong attended all hearing days.

At the parties' request, OAH continued the matter to April 4, 2022, for written closing briefs. On April 4, 2022, the record closed, and the matter was submitted for decision on April 4, 2022.

## ISSUES

On March 11, 2022, Student filed a request to clarify the issues as set forth in the March 7, 2022 Prehearing Conference Order. At hearing, the issues were clarified and rephrased following discussion with the parties and reorganized and renumbered for clarity. The administrative law judge has authority to renumber and redefine a party's issues, so long as no substantive changes are made. (*J.W. v. Fresno Unified Sch. Dist.* (9th Cir. 2010) 626 F.3d 431, 442-443.)

### STUDENT'S ISSUES:

1. Did Whittier deny Student a free appropriate public education, called FAPE, by failing to timely assess Student in psychoeducation and speech and language, within 60 days of Parent's consent to the February 19, 2020 assessment plan?

2. Did Whittier deny Student a FAPE when it:
  - a. failed to conduct legally compliant psychoeducation and speech and language assessments pursuant to the February 2020 assessment plan; and
  - b. conducted a transition assessment pursuant to an unsigned August 2020 assessment plan?
3. Did Whittier deny Student a FAPE when it failed to assess in the areas of occupational therapy and assistive technology from December 3, 2019, to December 3, 2021?
4. Did Whittier deny Student a FAPE from December 3, 2019, through the end of the 2019-2020 school year by failing to:
  - a. offer appropriate services and supports in the areas of reading, writing, math, speech and language, social emotional, and transition;
  - b. offer an appropriate placement; specifically, a non-public school;
  - c. materially implement Student's January 16, 2020 individual education program, called IEP, beginning March 2020;
  - d. provide timely prior written notice to Parent's February 3, 2020 request for in-home tutoring and counseling services?
5. Did Whittier deny Student a FAPE from the 2020-2021 school year through December 3, 2021, by failing to:
  - a. offer appropriate services and supports in the areas of reading, writing, math, speech, and language, social-emotional, and transition;
  - b. offer an appropriate placement, specifically a non-public school;

- c. materially implement Student's January 16, 2020, and November 12, 2020 IEPs, including amendments;
- d. provide timely prior written notice to Parent's February 3, 2020 request for in-home tutoring and counseling services?

### WHITTIER'S ISSUES:

1. Is Whittier's November 12, 2020 psychoeducational assessment of Student, contained in the multidisciplinary evaluation, legally compliant such that Student is not entitled to an independent education evaluation at public expense?
2. Is Whittier's November 12, 2020 speech and language assessment of Student, contained in the multidisciplinary evaluation, legally compliant such that Student is not entitled to an independent education evaluation at public expense?

### JURISDICTION

This hearing was held under the Individuals with Disabilities Education Act, called IDEA, 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 IDEA are to ensure:

- all children with disabilities have available to them a FAPE that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living, and

- the rights of children with disabilities and their parents are protected. (20 U.S.C. § 1400(d)(1); See Ed. Code, § 56000, subd. (a).)

The IDEA affords parents and local educational agencies the procedural protection of an impartial due process hearing with respect to any matter relating to the identification, assessment, or educational placement of the child, or the provision of a FAPE to the child. (20 U.S.C. § 1415(b)(6) & (f); 34 C.F.R. § 300.511 (2006); 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.Ed2d 387]; and see 20 U.S.C. § 1415(i)(2)(C)(iii).) In this consolidated matter, Student bore the burden of proof on Student's issues, and Whittier bore the burden of proof on its 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 a high school junior at the time of hearing. Student resided with Parent within Whittier's geographic boundaries at all relevant times. On February 15, 2012, Student qualified for special education under the category of specific learning disability and was subsequently found eligible under the categories of other health impairment and speech and language. Student entered Whittier in August 2019 as a student eligible for special education under the categories of specific learning disability and other health impairment.

WHITTIER ISSUES 1 AND 2 AND STUDENT ISSUES 1, 2(A), AND 2(B): ARE WHITTIER'S NOVEMBER 2020 PSYCHOEDUCATION AND SPEECH AND LANGUAGE ASSESSMENTS LEGALLY COMPLIANT, AND DID WHITTIER DENY STUDENT A FAPE WHEN IT FAILED TO CONDUCT LEGALLY COMPLIANT AND TIMELY PSYCHOEDUCATION AND SPEECH AND LANGUAGE ASSESSMENTS?

Whittier asserts that its psychoeducation and speech and language assessments were legally compliant such that Student is not entitled to independent educational evaluations at public expense. Student maintains Whittier's psychoeducation and speech and language assessments were untimely and had other defects rendering them legally non-compliant.

After a school district determines a child is eligible for special education by way of assessments, it must perform reassessments. The IDEA provides for reevaluations, referred to as reassessments in California law, to be conducted no more frequently than once a year, but at least once every three years, unless the parent and the agency agree that it is unnecessary. (20 U.S.C. § 1414(a)(2)(B); 34 C.F.R. § 300.303(b) (2006); Ed. Code, §§ 56043, subd. (k), 56381, subd. (a)(2).) The district must also conduct a reassessment if it determines that the educational or related service needs of the child warrant a reassessment. (20 U.S.C. § 1414(a)(2)(A)(i); 34 C.F.R. § 300.303(a)(1) (2006); Ed. Code, § 56381, subd. (a)(1).)

A reassessment of a student requires parental consent. (20 U.S.C. § 1414(c)(3); 34 C.F.R. § 300.300(c)(1) (2008); Ed. Code, § 56381, subd. (f)(1).) Specifically, the parent must be given a proposed assessment plan, in writing, within 15 days of the

assessment referral, along with a notice of IDEA and Education Code procedural rights. (Ed. Code, §56321, subd. (a).) The school district must give parents 15 days to review, sign, and return the proposed assessment plan, and may begin the assessment upon receipt of parental consent. (Ed. Code, § 56321, subd. (a).)

Once parental consent is obtained, the assessment must be completed, and an IEP team meeting convened to discuss the results within 60 days of the school district's receipt of a parent's written consent to the assessment plan, not counting days between the pupil's regular school session, terms, or days of school vacation in excess of five schooldays. (20 U.S.C. § 1414(a)(1)(C); Ed. Code, §§ 56344, subd. (a), 56043, subd. (f)(1).)

Here, Whittier failed to timely assess Student in psychoeducation and speech and language. On February 14, 2020, Whittier presented Parent with an assessment plan in the areas of academic achievement, health, intellectual development, language and speech communication development, social emotional and behavior, and adaptive behavior. Parent consented to the assessment plan on February 19, 2020.

In March 2020, the Centers for Disease Control and Prevention recommended local educational agencies close school campuses due to the outbreak of a new coronavirus disease, called COVID-19. On March 13, 2020, Governor Newsom issued an executive order closing California school campuses in response to the COVID-19 pandemic. The order provided local educational agencies continue to receive state funding during school closures so they can continue educating students to the extent feasible through, among other things, distance learning.

Whittier shut down its schools on March 13, 2020, through March 29, 2021, due to the COVID-19 pandemic, and resumed classes on March 30, 2020, using a distance learning format.

Effective March 17, 2020, through July 1, 2020, California emergency legislation, suspended timelines regarding the commencement of the assessment process in developing an assessment plan while a student's school was closed. (Statutes 2020, chapter 3, section 8 and chapter 110, section 56.) However, while California provided school districts with protection regarding the start of the assessment process as to developing and presenting parents with an assessment plan, California law made no changes to Education Code section 56043, subdivision (f), which governs the timeline for school districts to complete an assessment after parent's consent to assessment plan, and to present the assessment data at an IEP team meeting. Further, the United States Department of Education did not waive legal requirements for assessments during COVID 19 school closures and distance learning. (California Department of Education Special Education Guidance for COVID-19, September 30, 2020.)

The March 21, 2020 United States Department of Education Supplemental Fact Sheet, Addressing the Risk of COVID in Preschool, Elementary and Secondary Schools While Serving Children with Disabilities, reiterated that IDEA deadlines still applied throughout the pandemic. It advised school districts: "[a]s a general principle, during this unprecedented national emergency, public agencies are encouraged to work with parents to reach mutually agreeable extensions of time, as appropriate."

Whittier knew it could not complete timely psychoeducation and speech and language assessments but did not request an extension of time from Parent to



complete the assessments. Since no extension was sought, Whittier should have completed the assessments by May 6, 2020. Whittier completed the assessments on November 12, 2020. Whittier conceded to the untimeliness at hearing but asserted COVID-19 precluded it from assessing Student any earlier. The law surrounding COVID-19 did not give any leeway for completing assessments that had been consented to before school closures. Thus, Whittier's assessments failed to meet the legal requisites because they had not been completed within 60 days of the date it received Parent's written consent to the assessment plan.

Accordingly, Whittier failed to prove by a preponderance of the evidence that its psychoeducation and speech and language assessments were legally compliant such that Student is not entitled to independent education evaluations.

Student alleges as independent issues that the failure to timely complete the assessments and other assessment defects were FAPE denials depriving Student educational benefit and significantly impeded Parent's ability to meaningfully participate in the IEP decision-making process. Whittier asserts that the untimeliness neither caused Student harm nor denied Student a FAPE.

The failure to conduct a timely assessment is a procedural violation of the IDEA. (*Park, ex rel. Park v. Anaheim Union High Sch. Dist.* (9th Cir. 2006) 464 F.3d, 1025, pp.1032-1033 (*Park*). As established, Whittier failed to timely complete speech and language and psychoeducation assessments, thus constituting a procedural error.

A procedural violation does not automatically require a finding that a FAPE was denied. A procedural violation results in a FAPE denial only if the violation: impeded the child's right to a FAPE; significantly impeded the parent's opportunity to

participate in the decision-making process; or caused a deprivation of educational benefits. (20 U.S.C. § 1415(f)(3)(E)(ii); see Ed. Code, § 56505, subd. (f)(2); see *W.G. v. Board of Trustees of Target Range School Dist. No. 23* (9th Cir. 1992) 960 F.2d 1479, 1484.)

Here, the delay in completing the psychoeducation and speech and language assessments denied Student educational benefit. The assessments should have been completed and an IEP team meeting held by May 6, 2020. Instead, Whittier completed the assessments and held the IEP team meeting November 12, 2020, over six months later. The purpose of the assessments was to address Parent's February 2020 concerns regarding requests for in-home tutoring and counseling, and to complete Student's triennial reevaluation. At the November 2020 IEP team meeting, Whittier offered new goals based in part on the assessment data. If Student had received this offer in May 2020, Whittier could have offered new goals earlier and worked with Student earlier on the new goals and delivered the services tied to the new goals instead of the old ones. This deprived Student educational benefit.

Further, if Whittier had completed timely assessments and held the IEP team meeting in May 2020, Parent could have participated in the IEP decision-making process months earlier and had Parent's concerns addressed. The parents of a disabled child must be afforded an opportunity to participate in meetings with respect to the identification, evaluation, and educational placement of the child, and the provision of a FAPE. (34 C.F.R. § 300.501(b) (2006); Ed. Code, § 56304, subd. (a).)

Among the most important procedural safeguards are those that protect the parent's right to be involved in the development of their child's educational plan. (*Doug C. v. Hawaii Dept. of Educ.* (9th Cir. 2013) 720 F.3d 1038, 1043-1044.) The IEP

team shall consider the concerns of the parent for enhancing the student's education and information on the student's needs provided to or by the parent. (20 U.S.C. § 1414(d)(3)(A) & (d)(4)(A)(ii); 34 C.F.R. § 300.324(a)(1)(ii) & (b)(1)(ii)(C) (2017); Ed. Code, §56341.1, subds. (a)(2), (d)(3) & (f).)

The delay here was more than six months, which was significant because Whittier believed the assessment results were needed to address Parent's concerns. Thus, Whittier significantly impeded Parent's ability to participate in the decision-making process. For these reasons, the untimely assessments denied Student a FAPE.

Student attacked the legal compliance of the psychoeducation and speech and language assessments on numerous grounds including the timeliness as discussed above. There is no need to reach the other bases upon which Student challenged the assessments because Student already established a FAPE denial based on the assessment timing. However, Student also argued that the assessments failed to appropriately identify Student's academic and speech and language needs. An analysis determining if Whittier accurately identified Student's needs, including the legal compliance of the assessments only from this perspective, will be discussed in Issue 4(a).

Accordingly, Student proved by a preponderance of the evidence that Whittier's psychoeducation and speech and language assessments were legally non-complaint. Further, Whittier denied Student FAPE for its failure to timely complete the psychoeducation and speech and language assessments within 60 days of

Parent's consent to the February 2020 assessment plan thus impeding Parent's ability to participate in the IEP decision-making process and denying Student educational benefit.

## ISSUE 2B: DID WHITTIER DENY STUDENT A FAPE WHEN IT CONDUCTED A TRANSITION ASSESSMENT WITHOUT RECEIVING PARENT'S CONSENT TO THE ASSESSMENT PLAN?

Student contends that Whittier conducted a transition assessment without receiving Parent's signed consent to the assessment plan. Whittier maintains that Parent agreed to the transition assessment orally and through implied consent, and thus was proper in conducting it.

The school district must obtain parental consent before conducting an evaluation. (20 U.S.C. § 1414(c)(3); 34 C.F.R. § 300.300(c)(1) (2008).) The parent must be given a proposed assessment plan, in writing, within 15 days of the assessment referral, along with a notice of IDEA and Education Code procedural rights. (Ed. Code, §56321, subd. (a).) The school district may begin the assessment upon receipt of parental consent. (Ed. Code, § 56321, subd. (c)(4).) For each student, beginning with the first IEP to be in effect when the student is 16, the IEP must include a statement of the student's transition service needs. (20 U.S.C. § 1414(d)(1)(A)(i)(VIII).)

Student proved that Whittier failed to receive Parent's written consent to the assessment plan. On August 26, 2020, Whittier presented an assessment plan to Parent for post-secondary transition. Whittier followed up by email and telephone to obtain parental consent. On September 14, 2020, Shawna Hernandez, Student's case manager and teacher, informed Norma Yap, Whittier's vocational planning

technician, that Parent gave verbal consent to begin the transition assessment and would sign the assessment plan that week. Yap relied on the representation and proceeded with the transition assessment, including sending texts to Parent about the assessment. At no time did Parent express any concern over the process to Yap or at the subsequent November 2020 IEP team meeting. However, Parent did not sign the assessment plan or return the parent survey that Yap requested Parent complete. Parent explained at hearing that Parent had second thoughts and wanted to confer with counsel before signing the assessment plan.

Whittier had not received a signed transition assessment plan and failed to produce one at hearing. Additionally, no witness testified to seeing a consented-to assessment plan and Student established that Parent did not sign one. Thus, Whittier failed to obtain the required written parental consent for the transition assessment.

The failure of an IEP team to comply with the requirements for transition planning is a procedural violation of the IDEA. (*Board of Education v. Ross* (7th Cir. 2007) 486 F.3d 267, 276.) Without a signed assessment plan, Student proved Whittier conducted Student's transition assessment without written parental consent, establishing the critical threshold procedural protections were not provided, thus significantly impeding parent's ability to participate in the IEP decision-making process. Accordingly, Student proved by a preponderance of the evidence that Whittier denied Student a FAPE when it conducted a transition assessment without Parent's signed consent to the assessment plan.

### ISSUE 3: DID WHITTIER DENY STUDENT A FAPE WHEN IT FAILED TO ASSESS IN OCCUPATIONAL THERAPY AND ASSISTIVE TECHNOLOGY FROM DECEMBER 3, 2019, TO DECEMBER 3, 2021?

#### OCCUPATIONAL THERAPY

Student contends Whittier was aware Student had occupational therapy needs, specifically fine motor skill deficits, and failed to assess in that area. Student maintains Whittier's 2020 multidisciplinary evaluation report noted two of Student's teachers, S. Hernandez and Justin Rhoades, described Student's difficulty with pen to paper tasks. Student also asserts that Student informed Whittier about the difficulty with typing in November 2020. Because of these comments, Student argues, Whittier was on notice of Student's fine motor deficits and was required to assess in occupational therapy. Whittier argues it was not required to assess Student in occupational therapy because it was not aware of any occupational therapy concerns during the timeframe at issue that required assessment that were not already addressed through IEP accommodations.

A school district must assess in all areas of suspected disability. (20 U.S.C. § 1414(b)(3)(B).) A school district's failure to conduct appropriate assessments or to assess in all areas of suspected disability may constitute a procedural violation, resulting in a denial of a FAPE. (*Park, supra*, 464 F.3d at pp. 1031-1033.) A disability is "suspected," and a child must be assessed, when the district is on notice that the child has displayed symptoms of that particular disability or disorder. (*Timothy O. v. Paso Robles Unified Sch. Dist.* (9th Cir. 2016) 822 F.3d 1105, 1119.) A reassessment

must be conducted if a school district determines that the educational or related service needs of a student warrant reassessment. (Ed. Code, §56381, subd. (a)(1).)

Student failed to show that Whittier should have assessed in occupational therapy during the relevant time period. Student entered Whittier in August 2019 and Whittier did not assess Student for occupational therapy at any time before the hearing. Dr. Flores' 2017 psychoeducation assessment report noted that Student was assessed in occupational therapy by Gallagher Pediatric Therapy in February 2017. Occupational therapy services were not recommended at that time by Gallagher Pediatric Therapy, but it suggested accommodations. In 2017, Dr. Flores recommended Student receive occupational therapy services for penmanship. Student's school district at that time offered Student a speech-to-text accommodation. Student received the speech-to-text accommodation while at Whittier.

Whittier was not on notice of a suspected disability in occupational therapy during the relevant time period that required an assessment. Rhoades and S. Hernandez persuasively testified at hearing that they did not request or believe Student needed an occupational therapy assessment. Additionally, comments in both the January and November 2020 IEP team meetings noted no concerns with gross and fine motor development, however; it described the offered speech-to-text accommodation to assist in longer written assignments.

Further, none of Student's teachers, Whittier staff, Parent, or anyone raised concerns that Student needed additional services, accommodations, or supports for occupational therapy, or required an occupational therapy assessment, for the time period at issue. Dr. Flores, Student's sole expert, neither opined at hearing that

Student had a suspected disability in occupational therapy, nor recommended occupational therapy services which Dr. Flores had previously done in 2017. Dr. Flores also did not request that Whittier conduct an occupational therapy assessment. Student failed to present an occupational therapist at hearing or any other witness or documents to support the position that Student had occupational therapy needs that required Whittier to assess Student in occupational therapy during the relevant time period.

Accordingly, Student failed to prove by the preponderance of the evidence that Whittier denied Student a FAPE by failing to assess in occupational therapy from December 3, 2019, through December 3, 2021.

## ASSISTIVE TECHNOLOGY

Student contends that Student's January and November 2020 IEPs state that Student required assistive technology, yet, Whittier has never assessed Student in this area to determine the effectiveness of the offered accommodations or considered other options to address Student's academic deficits. Further, Whittier knew Student did not like to use the speech to text program. Thus, Student argues, Whittier should have initiated an assistive technology assessment in November 2020 to determine if other assistive technology devices, services, or accommodations were warranted. Whittier maintains that Student did not show a need for any further assistive technology services or accommodations, and Student was appropriately accommodated to address Student's deficits.

Student presented no witness with expertise in assistive technology or any other witness to establish that Student required an assistive technology assessment or had other assistive technology needs during the relevant time period. Dr. Flores



neither recommended an assistive technology assessment in Dr. Flores' prior 2013 or 2017 private psychoeducational assessment reports. Rather, Flores supported Student's use of assistive technology accommodations to complement classroom-based instruction.

Whittier was aware during the time period at issue that Dr. Flores had recommended printed outlines, tape recording, and computerized instructional software as assistive technology accommodations. Whittier offered Student a chrome book; calculator; speech-to-text or reading test and quiz questions and items directly to Student; and providing copies of notes, highlighted text or where to find information in texts, models, study guides, and study aides. Dr. Flores' additional assistive technology accommodation recommendations as stated at the hearing and in a 2022 private psychoeducation assessment report did not put Whittier on notice of any additional assistive technology concerns during the operative time period. Student informed Whittier that Student did not like to use the speech to text program in November 2020, but no evidence was presented that Student was unable to use it or that the application was ineffective. Thus, Student's assistive technology needs were being met at that time.

Further, none of Student's teachers, Whittier staff, Parent, or anyone raised concerns that Student had any additional assistive technology needs, informed Whittier of any assistive technology concerns, or requested that Whittier conduct an assistive technology assessment through the relevant time period. In addition, no documentary evidence supported the contention that anyone informed Whittier of any assistive technology needs of Student or requested an assistive technology assessment during the statutory time period. Thus, Whittier did not have notice of a suspected disability in this area at that time.

Accordingly, Student failed to prove by a preponderance of the evidence that Whittier denied Student a FAPE by failing to assess in assistive technology from December 3, 2019, to December 3, 2021.

ISSUE 4A AND 5A: DID WHITTIER DENY STUDENT A FAPE WHEN IT FAILED TO OFFER APPROPRIATE SERVICES IN READING, WRITING, MATH, SPEECH AND LANGUAGE, SOCIAL-EMOTIONAL, AND TRANSITION, FROM DECEMBER 3, 2019, TO DECEMBER 3, 2021?

A FAPE means special education and related services that are available to an eligible child that meets state educational standards at no charge to the parent or guardian. (20 U.S.C. § 1401(9); 34 C.F.R. § 300.17 (2006).) Parents and school personnel develop an IEP for an eligible student based upon state law and the IDEA. (20 U.S.C. §§ 1401(14), 1414(d)(1); and see Ed. Code, §§ 56031, 56032, 56341, 56345, subd. (a), and 56363 subd. (a); 34 C.F.R. §§ 300.320 (2007), 300.321 (2006), and 300.501 (2006).)

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

In resolving the question of whether a school district has offered a FAPE, the focus is on the adequacy of the school district's proposed program. (*Gregory K. v.*

*Longview Sch. Dist.* (9th Cir. 1987) 811 F.2d 1307, 1314.) For a school district's offer of special education services to a disabled pupil to constitute a FAPE under the IDEA, a school district's offer must be designed to meet the student's unique needs, comport with the student's IEP, and be reasonably calculated to provide the student with some educational benefit in the least restrictive environment. (*Ibid.*)

Whether a student was offered or denied a FAPE is determined by looking to what was reasonable at the time the IEP was developed, not in hindsight. (*Adams v. State of Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149, citing *Fuhrmann v. East Hanover Bd. of Education* (3rd Cir. 1993) 993 F.2d 1031, 1041.)

When Student entered Whittier in August 2019, Whittier knew Student had

- low intellectual ability;
- average nonverbal intelligence,
- attention deficit hyperactivity disorder;
- auditory and phonological processing disorders with deficits in oral comprehension,
- listening comprehension,
- basic reading skills,
- reading fluency,
- reading comprehension,
- math calculations, and attention;
- a language disorder; and
- executive functioning deficits.

## READING, WRITING, AND MATH SERVICES

Student failed to show that Whittier's service offers for reading, writing, and math were inappropriate from December 3, 2019 through January 15, 2020. On September 25, 2019, Whittier convened an IEP team meeting to address Parent's concerns related to Student's general education global studies class. Whittier considered Parent's concerns, teacher input, and Student's academic ability and performance at that time. Whittier agreed Student's below grade-level reading and comprehension skills made the general education global studies class difficult and agreed to drop the class and add an additional special education reading and writing class to enhance Student's skills. It amended its service offer to reflect this change, and Parent consented to it. Thus, Whittier's offer to Student at the start of the relevant time period, December 3, 2019, was 200 minutes daily of group specialized academic instruction that included 50 minutes each in modified language arts, math, and reading and writing, with accommodations.

Whittier promptly addressed Parent's concern in September 2019 and agreed that Student required more intensive support by adding an additional reading and writing class to meet Student's unique needs at the time. No other evidence was presented that Whittier was on notice of other academic concerns. Student argues that Whittier should have added a goal for the reading and writing class so that progress could be monitored. At that time, Student had a writing and a reading goal with the ability to monitor progress. Additionally, the failure to offer appropriate goals is not an issue in this matter and no determination will be made regarding this assertion. Here, Whittier increased its service offer for both reading and writing once it was placed on notice of additional Student academic needs.

Dr. Flores generally opined that Whittier should have offered individual one-to-one specialized academic instruction to Student while at Whittier, but the testimony was unpersuasive. Dr. Flores had neither conducted nor completed the private psychoeducation assessment until 2022, failed to observe Student at Whittier or talk with any Whittier teachers or staff at any time, and was not knowledgeable about Whittier's placement and services. Further, Dr. Flores had no contact with Parent or Student during the relevant time period. Thus, Dr. Flores' testimony in this area was given less weight. Therefore, Student failed to prove that Whittier denied Student a FAPE by failing to offer appropriate reading, writing, and math services from December 3, 2019, through January 15, 2020.

Student failed to show that Whittier's service offer for reading, writing, and math denied Student a FAPE from January 16, 2020 through November 11, 2020. For Student's first semester in high school, Student received a D plus in reading and writing, a D in English, and an F in math. Whittier promptly held an IEP team meeting on January 16, 2020 and discussed Parent's concerns, teacher input, a review of Student's progress on goals, present levels of performance, and functioning. Student's writing goal was met, and Student made progress but had not met the reading and math goals. The teacher reports demonstrated that Student struggled in reading comprehension and basic math skills and performed better on multiple choice questions. Whittier offered new goals including algebra concepts, written expression, and reading comprehension. Parent had concerns with Student's perceived lack of academic progress. Whittier increased Student's special education participation for an additional academic enrichment class to address Student's academic struggles. The academic enrichment class assisted with math, reading, and writing. Whittier's service offer changed to 250 minutes of daily group specialized

academic instruction, which included 50 minutes each of language arts, math, reading and writing, and academic enrichment. Parent consented to the offer with the exception of requesting among other things, one-to-one in-home individual academic tutoring.

Student asserts that Whittier should have developed a reading fluency goal, offered one-to-one academic tutoring, and accommodations to address Student's processing, attention, and executive functioning to enable Student to access school at that time. Whittier had numerous accommodations in place to address Student's processing, attention, and executive functioning issues, and intensified special education services in reading, writing, and math with an additional academic enrichment class. The argument regarding an additional goal will not be addressed in this decision as the issue Student raised was regarding services. Thus, Whittier properly addressed and adjusted Student's academic services to meet Student's academic needs with the information it had at the time in January 2020.

Additionally, Whittier shut down its schools on March 13, 2020 through March 29, 2020, due to the COVID-19 pandemic, and resumed school on March 30, 2020, through a distance learning model and moved to a pass/no pass grading system through the end of the 2019-2020 school year. Student presented no evidence during that time of any concerns from Parent, Student, Whittier teachers or staff, or anyone regarding any academic struggles in reading, writing and math for Student, except Parent's request for in-home individual tutoring. Whittier addressed this with an increase in Student's group specialized academic instruction. Student passed all classes in the second semester of the 2019-2020 school year. Thus, Whittier was not on notice of any academic issues that would require it to further intensify Student's academic services at that time.

Student failed to attend the 2020 extended school year that Whittier had offered which included 330 daily minutes of group specialized academic instruction. No evidence was presented that Parent gave any notice as to the reason for Student's lack of participation. At the start of the 2020-2021 school, Whittier continued to conduct school in a full-time distance learning format. No evidence was presented that Whittier was on notice of any additional reading, writing, or math struggles of Student through November 11, 2021, except for Parent's belief that Student was not making progress. This was unsupported by the evidence at that time. Accordingly, Student failed to prove that Whittier denied Student a FAPE by failing to offer appropriate services in reading, writing, and math through November 11, 2020.

Student failed to establish that Whittier's offers of reading, writing, and math services from November 12, 2020 through March 4, 2021 denied Student a FAPE. On November 12, 2020, Whittier held an IEP team meeting to review assessments and offer a FAPE. Whittier assessed Student in psychoeducation from February 2020 through November 12, 2020. A student must be assessed in all areas related to a suspected disability. (20 U.S.C. § 1414(b)(3)(B); Ed. Code, § 56320, subd. (f).) The assessments must be sufficiently comprehensive and tailored to evaluate specific areas of educational need. (20 U.S.C. § 1414(b)(3)(C); Ed. Code, § 56320, subd. (c).) A district must use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the child, including information provided by the parent that may assist in determining whether the student is eligible for special education, and what the content of the program should

be. (20 U.S.C. § 1414(b)(2)(A); 34 C.F.R. § 300.304(b)(1) (2006).) An assessment tool must provide relevant information that directly assists persons in determining a child's educational needs. (34 C.F.R. § 300.304(c)(7) (2006).)

Whittier's psychoeducation assessment included

- cognition,
- processing,
- academics,
- social emotional and behavior, and
- behavior testing.

Whittier chose licensed and credentialed educational school psychologist Emilie Wilson, who holds a master's degree in counseling, with six years' experience conducting psychoeducation assessments. Wilson was qualified to conduct the assessments based on Wilson's experience, knowledge, and training. Wilson gathered relevant functional, developmental, and behavioral information in preparing for the assessments including teacher and Parent input and interviewed Student in-person and virtually. Wilson's description of the testing and its validity was measured, knowledgeable, and thoughtful and therefore given great weight.

Wilson observed Student virtually in history class for 30 minutes in November 2020. While Student criticized the virtual observation, no evidence was presented that the observation was inadequate. Dr. Flores did not criticize the appropriateness of the virtual observation and Wilson maintained all aspects of the assessment were valid and appropriate, including the observation. Wilson adequately observed Student's behavior while in the classroom including that Student had the ability to assess the virtual classroom and use the camera. Wilson



observed that Student required some prompting to give detailed answers and to find the spot in the book to read out loud, read fluently with assistance with one word, and appeared to lose attention at one point. Wilson did not have technical difficulty and adequately heard the teacher, class, and Student's responses. Wilson gathered pertinent information during the observation to assist in determining Student's educational needs.

Wilson selected technically sound tools that assessed Student's cognitive, social emotional, attention, and adaptive behavior, and all tests conformed with instructions and protocols, generated results reflecting Student's current abilities, and were tailored to measure Student's abilities in these areas. Wilson determined Student's full-scale intelligence quotient score was 72, placing Student in the very low to low range of intellectual functioning. Wilson found weaknesses in processing speed, attention processing, and cognitive ability of association. Wilson's results were consistent with Student's previous and subsequent cognitive testing. Student's nonverbal intelligence score was 92 and qualified as average. This result was consistent with Student's nonverbal intelligence scores from Dr. Flores' testing in 2013, 2017, and 2022, also determining Student's non-verbal intelligence in the average range. Wilson's testing properly identified Student's cognitive abilities at that time.

S. Hernandez, a Whittier special education teacher with a master's degree in special education and a credential in mild-moderate special education with 25 years of special education school experience, was Student's case manager and special day class math teacher. S. Hernandez conducted the academic assessment portion of the

multidisciplinary evaluation. S. Hernandez was knowledgeable of Student's suspected disabilities, and qualified, trained, and competent to perform the academic evaluation.

S. Hernandez reviewed Student's records, teacher reports, prior assessments, consulted with other assessors, spoke with Parent and Student, and virtually administered the i-Ready assessment. S. Hernandez also had regular contact and direct observations of Student as Student's case manager and teacher.

S. Hernandez assessed Student virtually using the i-Ready test to measure Student's academic level and skills achievement. The i-Ready test is a diagnostic computer adaptive test that matches the difficulty of questions to each student's ability in math and English. It measured Student's

- vocabulary,
- literature comprehension,
- informational text comprehension,
- algebra and algebraic thinking, and
- geometry.

S. Hernandez conducted it in conformance with instructions and protocols, and generated results that reflected Student's current abilities. The assessment was tailored to measure Student's academic abilities in these areas.

Student's results showed a third-grade level in vocabulary, literature comprehension, and informational text comprehension, a fourth-grade level in geometry, and a fifth-grade level in algebra and algebraic thinking. Based on the assessment testing, observations, interviews, teacher reports, and review of records,

S. Hernandez established that Student had weaknesses in reading, writing, and math. The results were consistent with Student's prior and post academic assessments, and accurately identified Student's academic needs at that time.

Both Parent and Student expressed concerns with Student's learning ability in the distance learning format. At that time, Whittier returned to letter grades for the 2020-2021 school year. Student had progressed on the written expression, reading comprehension, and algebra concepts for the January 2020 goals, and offered new goals in the same areas based on the assessment data, Parent and teacher input, observations, Student's present levels of performance, current functioning, and offered 250 minutes daily of group specialized academic instruction which included 50 minutes each of modified language arts, math, reading and writing, and academic enrichment. The service offer was tied to the new goals and Student present levels of functioning. Whittier also offered Student a distance learning plan, including specialized academic instruction for four periods in math, social studies, science, and English. Parent did not consent to this offer. Based upon the assessment and the information gathered from records, observations, and Parent and teacher input, an appropriate program could be developed to address Student's academic needs.

Student completed first semester sophomore year with all passing grades and an increase in Student's grade point average from freshman year. No information was presented that Student was struggling academically the beginning of Student's second semester sophomore year. Thus, Student failed to demonstrate that Student required additional reading, writing, and math services in spite of Student's challenge with distance learning. Thus, Student failed to show that Whittier should have offered additional and different reading, writing, and math services from November 12, 2020, through March 4, 2021.

Student failed to demonstrate Whittier should have offered additional or different reading, writing, or math services from March 5, 2021, through December 3, 2021. In March 2021, Parent expressed concerns with Student's academic progress. Whittier promptly held IEP team meetings on March 5 and 10, 2021, and considered Parent's concerns, teacher input, and Student's current functioning and present levels of performance. Whittier agreed with Parent that further academic services were needed to address Student's needs at that time, and offered Student four hours weekly, two days per week after school, of individual in-person at school specialized academic instruction from a credentialed special education teacher or trained instructional aide, with transportation. The specialized academic instruction addressed reading, writing, and math. Thus, Whittier recognized the additional academic needs of Student at that time and substantially increased Student's specialized academic instruction offer. However, Parent did not agree to it until April 13, 2021.

By the end of 2020-2021 school year, Student's grades decreased considerably, although passing all classes. Through no fault of its own, Whittier had been unable to provide the additional services offered in March until over one month later when Parent provided consent. However, at this point, Whittier was on notice that Student required more academic services during distance learning. Student's lower grades and known academic struggles during distance learning at that time required Whittier to offer more academic services. Whittier had offered 330 minutes of daily group academic specialized academic instruction for the 2021 extended school year, but Student failed to attend.

At the start of the 2021-2022 school year, Whittier went back to school in person, and held an IEP team meeting on September 3, 2021 for Student. Parent

explained that Student did not attend extended school years because Parent believed Student should be given a break and Student would not make progress during the summer, especially given the distance learning format. However, Student did not attempt the specialized academic instruction extended school year services.

To address Student's academic struggles during distance learning, Whittier offered Student compensatory education, five hours per week, one hour each day after school of individual specialized academic instruction conducted by a credentialed special education teacher or a trained instructional aide. The specialized academic instruction addressed reading, writing, and math. Student participated in the after-school specialized academic instruction beginning September 7, 2021.

After-acquired evidence may shed light on the objective reasonableness of a school district's actions at the time the school district rendered its decision. (*E.M. v. Pajaro Valley Unified Sch. Dist.* (9th Cir. 2011) 652 F.3d. 999,1006.) At the end of 2021, after Student's first semester junior year, student's grades increased considerably and Student found success while returning to school in-person and receiving daily individual specialized academic instruction, supporting the proposition that the additional services met Student's needs that time and any regression during distance learning. Student failed to show that Student needed additional or different specialized academic instruction that was not offered by Whittier from March 5, 2021, through December 3 2021. And Parent failed to take advantage of some of the offered services by failing to timely consent to the services or did not allow Student to participate in them.

Throughout the time period at issue, Whittier held prompt IEP team meetings to address Parent's concerns and Student's academic needs, and continually increased Student's specialized academic instruction services in reading, writing, and math to meet Student's changing academic needs. Student mostly had success through this time period. However, Whittier continued to increase services and once Student's grades decreased significantly, Whittier offered further individualized specialized academic instruction that was successful. Accordingly, Student failed to establish by the preponderance of the evidence that Whittier denied Student a FAPE by failing to offer appropriate academic services in reading, writing, and math from September 3, 2019, through December 3, 2021.

## SPEECH AND LANGUAGE SERVICES

Student contends that Whittier should have offered individual speech and language services instead of group services due to Student's significant needs in attention, auditory processing, executive functioning, and academics. Further, as addressed above in Issue 2(a), Student maintains Whittier's November 2020 speech and language assessment was legally non-compliant and failed to provide the critical information necessary to develop an appropriate speech and language service offer to Student. Whittier maintains that it offered appropriate speech and language services throughout the timeframe at issue based on the information that it had at the time.

While Student established a FAPE denial based on Whittier's untimely speech and language assessment, Student failed to prove that Whittier's speech services were inappropriate from December 3, 2019 to January 15, 2020. Whittier was aware upon Student's entry into the school district that Student had demonstrated needs in

speech and language based on Student's prior 2018 speech and language assessment and current speech semantics goal. Student has received speech and language services with Whittier since August 2019.

Student was offered 30 minutes weekly of group speech and language services upon entry into Whittier through the time of the January 16, 2020 IEP team meeting. The offered speech and language services tied to Student's present levels of performance and speech goal. No evidence was presented that the goal was inappropriate, unambiguous, or that Student had additional speech and language needs at that time. Student met this goal by the January 2020 IEP team meeting, evidencing the effectiveness of the group speech and language services. Thus, Student failed to establish Whittier's speech services were inappropriate through January 15, 2020.

Student failed to prove that Whittier's speech services from January 16, 2020, through November 11, 2020 were inappropriate. On January 16, 2020, the IEP team developed a new expressive language goal related to generating narratives and offered the same level of service, 30 minutes weekly of group speech and language services. The service amount directly connected to Student's present levels of performance and proposed goal. No documentary or witness evidence established that the goal was inappropriate, unambitious, or that Student had additional speech and language needs. Student made progress toward the goal and met this goal by the November 2020 IEP team meeting, despite Student failing to attend a number of speech and language therapy sessions during distance learning. Thus, from January 16, 2020, through November 11, 2020, Whittier offered appropriate speech and language services to Student.

On November 12, 2020, Whittier held an IEP team meeting to review Student's speech and language assessment and offer a FAPE. Student argues the speech and language assessment was unreliable and failed to correctly determine Student's speech and language needs, thus could not offer appropriate speech and language services. However, Student failed to prove that Whittier's speech and language services from November 12, 2020, to December 3, 2021 were inappropriate.

Violet Hernandez, Whittier's California credentialed speech and language pathologist, with a bachelor's and master's in communication disorders, and over 33 years of experience, conducted Student's speech and language assessment included in the November 12, 2020 multidisciplinary evaluation. V. Hernandez was one of Student's speech and language pathologists during the time period at issue. V. Hernandez was appropriately qualified and trained to conduct the assessment and opine as to Student's functioning in speech and language.

V. Hernandez reviewed records and teacher reports, consulted with the other assessors, conducted Student and Parent interviews and a 40-minute virtual Student observation, administered standardized and informal assessments, and took a language sample in preparation for the assessment.

V. Hernandez observed Student virtually for 40 minutes in Student's science class in November 2020. Although Student argued in Student's closing brief that the observation was unreliable, no evidence was presented, including Dr. Flores' testimony, expressing concern over the observation. The observation elicited information helpful in determining Student's speech and language needs.

V. Hernandez informally assessed Student's articulation, voice, fluency, and oral motor skills through conversation and informal observation. V. Hernandez



found Student was fully intelligible to familiar and unfamiliar listeners, used appropriate volume, and the quality and rate of speech was normal. Student presented with appropriate oral mechanism structure and functioning. V. Hernandez administered an informal problem-solving test. V. Hernandez had no concerns in the area of social language and pragmatics based on this evaluation and found Student could listen to social scenarios and determine the proper problem-solving response 90 percent of the time. V. Hernandez found no concerns in these areas or the need for formal or further testing which was consistent with prior testing.

V. Hernandez administered the Clinical Evaluation of Language Fundamentals Fifth Edition to Student, which is designed to measure Student's language and communication skills. V. Hernandez established the guidelines and protocols were followed. V. Hernandez found weaknesses in both expressive and receptive language. In addition, the testing results were consistent with prior testing in this area.

V. Hernandez conducted a language sample. The language sample results in the report showed Student was able to generate complete sentences on a topic of choosing. Student maintained topic and shared enough background information when cued to share backstory before the narrative, and shared complete personal narrative stories 75 percent of the time but included some irrelevant information. V. Hernandez convincingly explained that based on all the tools used to assess Student, the overall findings were an accurate portrayal of Student's speech and language needs at the time. Student presented no evidence or witness, including a speech and language pathologist, to contradict V. Hernandez' testimony.

On November 11, 2020, the IEP team offered a new expressive and receptive language goal based upon the information gleaned from the speech and language assessment, parent and teacher input, observations, and present levels of performance, and Student's current functioning and continued to offer 30 minutes of group speech and language services. The service offer was tied to Student's speech and language goals based upon Student's functioning levels and needs. No documentary or witness evidence established that the goal was inappropriate or unambitious.

Further, Dr. Flores generally believed all of Student's services should be individual not group services, however, as already stated, this opinion was unpersuasive. It was supported by no other witness except Parent, who had no expertise in speech and language; thus, Parent's opinion was given less weight in this area as well. V. Hernandez who had the most training, experience, and knowledge at hearing of speech and language services, and Student's speech and language needs, did not endorse additional or different speech and language services for Student during the relevant time period. Thus, Student failed to establish that Whittier failed to provide appropriate speech and language services from December 3, 2019, through December 3, 2021.

According, Student failed to prove by the preponderance of the evidence that Whittier failed to provide appropriate speech and language services from December 3, 2019, to December 3, 2021.

## SOCIAL EMOTIONAL SERVICES

Student asserts that Whittier denied Student a FAPE by failing to offer counseling services to address Student's self-esteem, depression, and lack of

confidence. Whittier maintains that Student showed no signs of social emotional issues such that Student had a need in this area that required services.

Student failed to prove that Whittier should have offered counseling services through January 15, 2020. On February 5, 2019, Student's previous middle school district held an IEP team meeting. The IEP team, including Parent, had no concerns in the areas of behavior and social-emotional, and did not offer counseling services to Student. Student presented no evidence from the time Student entered Whittier in August 2019 through the January 16, 2020 IEP team meeting that Student had any behavior or social emotional issues requiring counseling services, or that Whittier had notice of any social emotional concerns. Conversely, Student had many friends, including new friends, and was adjusting well to high school. Student was observed having appropriate interactions and was not a behavioral problem at school. Teachers described Student as well-behaved in class. No teacher raised concerns regarding social emotional issues of Student. Thus, Student failed to demonstrate that Whittier should have offered Student social emotional services through January 15, 2020.

Student failed to show that Student required counseling services through November 12, 2020. On January 16, 2020, Whittier held an IEP team meeting. Parent did not raise social emotional concerns at the IEP team meeting or before, and none were noted by teachers, IEP team members, or in the IEP notes. At that time, no social emotional services were offered to Student. However, on February 3, 2020, Parent requested counseling services to address Student's self-esteem issues, and soon after Whittier offered to assess Student in that area.

Wilson conducted the social emotional testing from March through November 2020 by interviewing Student, Parent, teacher reports, observations, and testing. Wilson administered the Behavior Assessment System for Children, Third Edition, which tests for emotional and behavior disorders and requires completion of rating scales. Student, Parent, two of Student's current teachers rated Student. Student's scores showed no clinically significant rating on any index score across all raters. A clinically significant rating may warrant formal treatment. The information elicited showed that Student did not have needs that required services at that time.

Student criticized the testing because the ratings were gathered before COVID-19 and thus, Student asserted, unreliable because it did not capture Student's social emotional functioning throughout the time period. However, Wilson conducted a second interview of Student on November 5, 2020, that showed no social-emotional concerns. Thus, Whittier's testing provided accurate social emotional behavior to assist in determining Student's needs. Further, during this time period, no evidence or witnesses presented, including Whittier's teachers, staff, or service providers endorsed social emotional concerns of Student from February 2020 through November 2020. Thus, Student failed to show that Student required counseling services or other social emotional services through November 11, 2020.

Student failed to show that Student required social-emotional services from November 12, 2020, through December 3, 2021. Parent believed Student had depression issues that warranted services at the time of the November 12, 2020 IEP, but the testing and other evidence failed to support this contention. No teacher or IEP team member expressed concerns with social emotional functioning. Dr. Flores

did not diagnose Student with depression. While Dr. Flores endorsed psychotherapy services for Student, Dr. Flores had no contact with Student, Parent, or any Whittier staff during the relevant time period, thus diminishing Dr. Flores' opinion.

After the November 2020 meeting, Whittier held two IEP team meetings in March 2021 to discuss Parent's concerns. Parent raised concerns regarding Student's lack of academic progress and requested academic tutoring but no social emotional concerns. No teacher or IEP team member expressed any concerns with Student's social emotional well-being at that time, and Student had no concerning behaviors during school.

Whittier held an IEP team meeting in September 2021. Parent shared concerns regarding Student's academic progress, distance learning, and lack of confidence. Whittier offered to conduct further social emotional testing to address Parent's concerns and sent Parent an assessment plan. Parent, however, declined the offer and did not present any evidence to support this contention. No teacher or IEP team members shared Parent's concern in this area or endorsed social emotional concerns. Thus, Student failed to show that Student required counseling or other social emotional services from November 12, 2020, through December 3, 2021.

Accordingly, Student failed to prove by a preponderance of the evidence that Whittier denied Student a FAPE for failing to offer social emotional services to Student from December 3, 2019, through December 3, 2021.

## TRANSITION SERVICES.

Student asserts that the transition plan offered to Student was generic and not based on Student's unique needs thus denying Student a FAPE because it could not

have offered appropriate services. Whittier maintains that it was required to offer transition services no earlier than November 12, 2020 based upon Student's birthday. Further, once Whittier offered transition services to Student, the services were appropriate for Student based upon Student's unique needs.

Beginning no later than the first IEP to be in effect when the student is 16 years of age, or younger if determined appropriate by the IEP team, and updated annually thereafter, the IEP must include appropriate measurable postsecondary goals based upon age-appropriate transition assessments related to training, education, employment, and where appropriate, independent living skills; and the transition services, including courses of study, needed to assist the pupil in reaching those goals. (20 U.S.C. § 1414 (d)(1)(A)(i)(VIII); Ed. Code, §§ 56345, subd. (a)(8); 56043, subd. (g)(1).)

"Transition services" are defined in the IDEA as a coordinated set of activities designed within a results-oriented process, focused on improving the academic and functional achievement to facilitate movement from school to post-school activities, such as

- postsecondary education,
- vocational education,
- integrated employment,
- including supported employment,
- continuing and adult education,
- adult services,
- independent living, or
- community participation.

Transition services are to be based upon individual needs, considering individual strengths, preferences, and interests. Transition services include instruction, related services, community experiences, development of employment and other post-school adult living objectives. If appropriate, transition services include acquisition of daily living skills and provision of a functional vocational evaluation. (20 U.S.C. § 1401(34); 34 C.F.R. § 300.43(b) (2006); Ed. Code, § 56345.1, subd. (a).)

The analysis of whether a FAPE was offered is not altered if "transition services" are at issue. (*J.L. v. Mercer Island Sch. Dist.* (9th Cir. 2010) 592 F.3d 938.) Transition services like special education and related services, are sufficient when a student is offered a FAPE under *Rowley*. (*J.L. v. Mercer Island Sch. Dist.*, *supra*, 592 F.3d 938.)

Student failed to show that Whittier was required to offer transition services from December 3, 2019, to November 11, 2020. Student's birthday is July 15, 2005, and Student turned 16-years-old on July 15, 2021. Student's November 12, 2020 IEP was the effective IEP at the time of Student's 16th birthday. Student failed to show that transition services were required before then.

Student also failed to establish that the transition services offered on November 12, 2020 were inappropriate. The November 12, 2020 IEP included a transition plan. The plan was designed to consider post-secondary goals and Student's needs for transition services. Yap, Whittier's vocational planning technician with an associate of arts degree in communications, conducted Student's transition assessment before developing the transition plan, although unconsented to by

Parent. Yap had over three years' experience as Whittier's job placement development specialist, and two years' experience as Whittier's vocational planning technician. Yap was qualified to conduct the assessment.

Student completed a vocational and career interest inventory and a self-directed search. The results gave Student preferences and a list of career options. The IEP team drafted two transition goals for training or education and employment and offered Student 60 minutes monthly of vocational and career assessment, counseling, and guidance, and 60 minutes monthly of career awareness services. Student asserts that the transition services were inadequate.

Student criticized the plan for being generic and not meeting Student's unique needs in this area. However, the evidence showed that the services were based on the information gathered from the Student interview and assessments. Additionally, the goals and related services were tied to the underlying assessment data, and no criticism was made by Student of the veracity or reliability of the specific assessment data, including Student's career interests.

Further, although contested by Student, Parent received a copy of the draft transition plan on November 11, 2020, and the IEP team reviewed the transition assessment at the IEP team meeting including Student's vocation, career, and educational goals as corroborated by the November 2020 IEP document. The IEP team, including Parent, had the ability to discuss and make changes to the services at that time, as the transition plan and services were not finalized until the time of the IEP team meeting and FAPE offer to Student.



Student believed the services were inappropriate. However, Dr. Flores opined that Student should receive a transitional goal that offered vocational counseling services to assist in career plans, supporting the appropriateness of Whittier's transition service offer to Student, as it had the same goal and offered services. Thus, Student failed to present any evidence establishing the inappropriateness of the services. Accordingly, Student failed to show by the preponderance of the evidence that Whittier failed to offer appropriate transition services from December 3, 2019, through December 3, 2021.

#### ISSUE 4B AND 5B: DID WHITTIER DENY STUDENT A FAPE WHEN IT FAILED TO OFFER AN APPROPRIATE PLACEMENT, SPECIFICALLY A NON-PUBLIC SCHOOL, FROM DECEMBER 3, 2019, TO DECEMBER 3, 2021?

Student contends that Whittier should have offered a non-public school because Student required one-to-one attention, a multisensory approach to learning, redirection, repetition, and a quiet classroom with a low student to teacher ratio. Whittier maintains that it offered Student an appropriate placement in the least restrictive environment when it placed Student in a mild moderate special day class and general education classes so Student could receive special education services in a small classroom environment and also have access to typical peers. Whittier further argues that Student made progress, earned passing grades, and benefitted educationally from Whittier's placement offers.

In determining the educational placement of a disabled child, a school district must ensure that:

1. the placement decision is made by a group of persons, including the parents, and other persons knowledgeable about the child, who consider the meaning of the evaluation data, and the placement options, and considers the requirement that children be educated in the least restrictive environment;
2. placement is determined annually, is based on the child's IEP and is as close as possible to the child's home;
3. unless the IEP specifies otherwise, the child attends the school that the child would attend if non-disabled;
4. in selecting the least restrictive environment, consideration is given to any potential harmful effect on the child or on the quality of services that the child needs; and
5. a child with a disability is not removed from education in age-appropriate regular classrooms solely because of needed modifications in the general education curriculum.

(34 C.F.R. § 300.116 (2006).)

Each public agency must ensure that a continuum of alternative placements is available to meet the needs of disabled children for special education and related services and it include the alternative placements and make provision for supplementary services. (34 C.F.R. § 300.115 (2017).) The continuum of program

options includes but is not limited to regular education; resource specialist programs; designated instruction and services; special classes, and non-public school. (Ed. Code, § 56361.)

If the school district's program was designed to address the student's unique educational needs, was reasonably calculated to provide the student with some educational benefit, comported with the student's IEP, and was in the least restrictive environment, then the school district provided a FAPE, even if the student's parents preferred another program, and even if the parents' preferred program would have resulted in greater educational benefit. (*Gregory K. v. Longview Sch. Dist.*, *supra*, 811 F.2d at 1313-1314.) To provide the least restrictive environment, school districts must ensure to the maximum extent appropriate that disabled children are educated with non-disabled peers, and special classes or separate schooling occur only if the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily. (20 U.S.C. § 1412(a)(5)(A); 34 C.F.R. 300.114 (a) (2006); Ed. Code, § 56031.)

To determine whether a special education student could be satisfactorily educated in a regular education environment, the Ninth Circuit Court of Appeals has balanced the following factors:

1. the educational benefits of placement in a regular classroom supplemented with appropriate aids and services, as compared to that in a special education classroom;
2. the non-academic benefits of interaction with non-disabled children;

3. the effect the student has on the teacher and children in the regular class; and
4. the costs of mainstreaming the student in a regular classroom.

(*Sacramento City Unified Sch. Dist. v. Rachel H.* (9th Cir. 1994) 14 F.3d 1398, 1404 (*Rachel H.*) [adopting factors identified in *Daniel R. v. State Board of Ed.* (5th Cir. 1989) 874 F.2d 1036, 1048-1050].

A specific educational placement is that unique combination of facilities, personnel, location, or equipment necessary to provide instructional services to an individual with exceptional needs, as specified in the IEP, in any one or a combination of public, private, home and hospital, or residential settings. (Cal. Code Regs., tit. 5, § 3042, subd. (a).)

Student failed to show that Whittier's FAPE placement offers were inappropriate from December 3, 2019, through December 3, 2021. The operative placement on December 3, 2019 was 200 minutes daily of group specialized academic instruction in a mild moderate special day class for language arts, math, science, and reading and writing, with a modified curriculum and accommodations; and mainstreaming into the general education setting for physical education, business, lunch, and breaks. Parent consented to the offer and did not request a non-public school. For the fall 2019 semester, Student earned a B grade in physical education, a C in science, D's in English, business, reading and writing, and an F in math. Student made some progress during the first semester of the 2019-2020 school year. Student passed all but one class and met one IEP goal and made progress on all other goals.

On January 16, 2020, Whittier conducted an IEP team meeting. Parent fully participated by sharing concerns and comments and Whittier considered a variety of placements including a non-public school. To address Student's academic struggles, the IEP team recommended increasing Student's special day class participation for an additional academic enrichment class. It offered Student 250 minutes daily of group specialized academic instruction in a mild moderate special day class for language arts, math, science, reading and writing, and academic enrichment, with a modified curriculum and accommodations; mainstreaming for physical education, lunch, and breaks; and extended school year services. Student would spend 49 percent of the time in a general education setting and 51 percent out of the time outside of general education. A non-public school was not recommended because Whittier's IEP team members agreed that Student did not need to be separated from general education peers and the opportunities for general education participation. Parent consented to the offer with exception and requested in addition to the offer that Student receive in-home tutoring and counseling services but did not request a non-public school.

By March 30, 2020, Whittier switched to distance learning and Student continued to receive classes in a virtual mild moderate special education day classroom setting or a virtual general education classroom. Student passed all classes during distance learning second semester of the 2019-2020 school year showing some progress during that time.

Student remained in the distance learning mild moderate special day and general education classrooms for the 2020-2021 school year. On November 12, 2020, Whittier held an IEP team meeting with Parent in attendance to review assessments and offer Student a FAPE. Student met some goals and made progress on all other goals. Parent contributed comments, concerns, and feedback

throughout the IEP team meeting. Whittier considered other placements for Student including a non-public school but rejected it because Whittier IEP members believed Student did not need to be separated from typical peers and lose opportunities to participate in the general education curriculum. Whittier's placement offer remained the same with 250 minutes of daily group specialized academic instruction in a mild moderate special day class for language arts, math, science, reading and writing, and academic enrichment, with a modified curriculum and accommodations; and mainstreaming in a general education setting for physical education, lunch, and breaks.

Thus, throughout the relevant time period at issue, Student was offered placement in a mild moderate special day class for group specialized academic instruction ranging from 200 to 250 minutes daily, with general education mainstreaming for the remainder of the school day. Whittier's mild moderate special day classes throughout the time period generally consisted of a small student to teacher ratio of around 10-15 students with one credentialed special education teacher and at least one instructional aide. Whittier's mild moderate special day classes allowed for direct small group instruction with a low student to teacher ratio, individualized attention, accommodations, and the ability to allow for an alternative school curriculum.

Student functioned cognitively at a third to fourth grade level. No Whittier witness disputed that Student's intellectual profile would render a placement offer in a mild to moderate special day class with general education mainstreaming inappropriate at any time during the relevant time period. Dr. Flores and Parent asserted Student required a non-public school for high school, but the testimony was unpersuasive. In support of this contention, Dr. Flores testified that a non-public

school was the appropriate placement because of the small student to teacher ratio, individualized attention, multisensory approach, and the lack of academic progress Student made in Whittier's placement. Dr. Flores opined that one to six teacher to student ratio was the maximum for Student's placement and Student needed aide support, but Dr. Flores did not specify the type of aide and if Student needed an individual aide or aide support in the classroom environment such as Student already received in Whittier's placement.

Dr. Flores' opinion was further flawed because it involved the analysis of a single placement, a non-public school, and did not consider any Whittier placements or any other alternatives. Dr. Flores testimony appeared unsupported because Dr. Flores had less data than Whittier had at the time the FAPE offers were given to Student. Dr. Flores had no contact with Student during the time period at issue, failed to observe Student at Whittier, and spent a maximum of six days with Student over a nine-year period. Dr. Flores made no attempt to gather information regarding the Whittier placements offered to Student from 2019 through 2021, or interview any Whittier staff, teachers, or service providers for their opinions regarding Student's placement needs. Dr. Flores relied on Parents' accounts, review of the records, testing, and limited interaction with Student. Dr. Flores had only a peripheral familiarity with Student and Student's educational needs, and no understanding of Whittier's programs or placement options. Thus, while a qualified expert, Dr. Flores' opinion was unpersuasive on this point due to Dr. Flores' lack of knowledge of Student and Whittier at that time.

Further, Dr. Flores' opinion that Student failed to make progress was unsupported by the evidence. Based on Student's cognitive ability and overall functioning, Student made progress, met some IEP goals, progressed on goals,

passed all classes but one which was retaken and passed, and was on time to graduate. Further, Student's goals could be appropriately implemented in this placement, and Student received educational benefit while receiving specialized academic instruction in a small school environment while also having access to typical peers. While Dr. Flores preferred to focus on Student's non-verbal intelligence score for the proposition that Student was cognitively average and thus no progress was made, and thus a more restrictive environment required, this opinion is unsupported by the law. Assessors cannot rely on only one testing instrument to determine Student's needs. (Ed. Code, § 56320, subd. (e); see also 20 U.S.C. § 1414(b)(2)(B); 34 C.F.R. § 300.304(b)(2) (2006).) Thus, Dr. Flores' contention that Student did not make progress was unpersuasive.

Here, Whittier continually addressed Parent's concerns and Student's unique needs with increases in Student's special day class participation by adding a reading and writing class and later academic enrichment classes, and individual specialized academic instruction after school. With the added time in the special day class and additional specialized academic instruction, Student's grades significantly increased showing that Student gained educational benefit and made progress in this placement.

The evidence also failed to support non-public school as the least restrictive environment. The IDEA expresses a clear policy preference for inclusion with non-disabled students to the maximum extent appropriate as an aspiration for all children with special needs. (See 20 U.S.C. § 1412(a)(5)(A); 34 C.F.R. §§ 300.114 (2006) & 300.116 (2006.); Ed. Code, § 56031.) To place Student in a restrictive non-public school without any access to typical peers is unreasonable and not compliant with Whittier's legal obligation when a less restrictive alternative is appropriate and



available. Considering the *Rachel H.* factors, Student passed all of Student's general education classes throughout the relevant time period. The ability for Student to mainstream allowing socialization and the opportunity for Student to interact with and model neurotypical peers in conjunction with receiving specialized academic instruction in a small, structured classroom with a modified curriculum far outweighed Dr. Flores' recommendation of a non-public school with no neurotypical peer interaction. No evidence was presented that Student was disruptive in any general education class with teachers or students. In fact, Whittier witnesses found Student to be polite, kind, respectful, generous, hard-working, and a pleasure to have in class and around other students. A non-public school would deprive Student these mainstreaming opportunities. Because no one offered evidence of the mainstreaming costs, Student failed to show that this factor impacted the *Rachel H.* analysis.

Although Dr. Flores' believed a non-public school was the least restrictive environment, Dr. Flores made no attempt to present any of the *Rachel H* factors as Dr. Flores had no knowledge of Whittier's programs, or Student's interaction and behavior at school. Thus, on balance, the testimony of Student's teachers drafting and implementing the goals, services, accommodations, and supports who had more experience with Student and agreed the least restrictive environment was a mild moderate special day class coupled with general education participation, was entitled to more weight than that of a retained expert who evaluated Student years before and after the fact.

Moreover, Dr. Flores' endorsement of a non-public school with a small student to teacher ratio and individual instruction was similar to and aligned with the structure of Whittier's mild moderate special day class. And Dr. Flores'

accommodation recommendations in the 2017 report were analogous to the accommodations Whittier offered Student. While Dr. Flores had additional accommodation recommendations at hearing and in a 2022 assessment report, Whittier had no notice of these at the time the placement offers were made. Accordingly, Student failed to prove that the least restrictive environment for Student was a non-public school.

Student's education in general education classes coupled with specialized academic instruction in a mild to moderate special day class with the use of supplementary services, accommodations, and supports, could be achieved satisfactorily, and was reasonably calculated to meet Student's needs and provide Student some education benefit at all applicable times, with the information known at the time. Accordingly, Student failed to prove by a preponderance of the evidence that Whittier failed to offer an appropriate placement, specifically non-public school, from December 3, 2019, through December 3, 2021.

**ISSUE 4C AND 5C: DID WHITTIER DENY STUDENT A FAPE WHEN IT FAILED TO MATERIALLY IMPLEMENT STUDENT'S JANUARY 16, 2020, AND NOVEMBER 12, 2020 IEPS AND AMENDMENTS FROM MARCH 2020 THROUGH DECEMBER 3, 2021?**

Student contends that Whittier failed to implement Student's specialized academic instruction and speech and languages services from March 2020 through December 3, 2021 during the COVID-19 pandemic. Whittier maintains that it fully implemented Student's specialized academic instruction and speech and language services during all applicable times.

When a school district does not perform exactly as called for by the IEP, the district does not violate the IDEA unless it is shown to have materially failed to implement the child's IEP. (*Van Duyn v. Baker Sch Dist. 5J* (9th Cir. 2007) 502 F.3d 811, 815.) The materiality standard does not require that the child suffer demonstrable educational harm to prevail. (*Id.*) Implementation failures are not procedural errors. (*Id., at p. 819.*) The Ninth Circuit held that state contract law does not apply to the IEP interpretation and only material failures to implement constitute IDEA violations. (*Ibid.*)

On March 12, 2020, the U.S. Department of Education, called the US DOE, advised that if a district closed its schools to slow or stop the spread of COVID-19 and did not provide educational services to the general student population, it was not required to provide services to students with disabilities during that same time period. (Questions and Answers on Providing Services to Children with Disabilities During the Coronavirus Disease 2019 Outbreak at p. 2, Answer A-1 (U.S. Dept. of Education, March 2020).) If educational opportunities were provided to the general population during a school closure, then the school district would need to ensure that students with disabilities received a FAPE at that time. (*Ibid.*) Local educational agencies must continue to implement a student's IEP during distance learning. (California Department of Education Guidance for Covid-19, September 30, 2020.)

On March 19, 2020, due to the rapid spread of COVID-19 throughout California, Governor Newsom mandated that all individuals living in California stay home, except as needed to maintain continuity of operations in federal critical infrastructure sectors. (Governor's Exec. Order No. N-33-20 (March 19, 2020).) On March 21, 2020, the US DOE issued supplemental guidance, stating school districts must provide a FAPE to students with disabilities during the COVID-19 pandemic.

(Supplemental Fact Sheet Addressing the Risk of COVID-19 in Preschool, Elementary and Secondary Schools While Serving Children with Disabilities (March 21, 2020, Office of Civil Rights and OSEP) at p. 2.) It noted that FAPE may include, as appropriate, services provided through distance instruction provided virtually, online, or telephonically. (*Id.*, at pp. 1-2.) If there were inevitable delays in providing services, it directed IEP teams to make individualized determinations of whether and to what extent compensatory services were due when schools resumed normal operation. (*Ibid.*) On March 30, 2020, the California Department of Education, called the CDE, issued guidance encouraging school districts to use distance technology to meet its obligations under the IDEA. (California Department of Education Guidance (March 30, 2020).)

## STUDENT SHOWED THAT WHITTIER FAILED TO IMPLEMENT STUDENT'S IEP FROM MARCH 30, 2020 THROUGH THE END OF THE 2019-2020 SCHOOL YEAR

Student's operative IEP was the January 16, 2020 IEP. Student was entitled to 250 minutes daily of specialized academic instruction which specified one class each of group language arts, math, reading and writing, science, and academic enrichment, and 30 minutes weekly of group speech and language services. For extended school year, Student should have received 330 minutes daily of group academic instruction and 20 minutes weekly of speech and language services.

### SPECIALIZED ACADEMIC INSTRUCTION

Whittier failed to implement Student's specialized academic instruction from March 30, 2020, through the end of the 2019-2020 school year. Both Rhodes,

Student's English language arts teacher, and S. Hernandez, Student's math teacher, set up Zoom class meetings only twice a week. For instance, Rhodes required students to attend two, one hour Zoom sessions per week, with only 30 minutes of each session directed at Student's class. Then, students could continue with non-mandatory asynchronous learning and stay on the Zoom meeting to ask questions if needed. S. Hernandez had a similar format for Student's math class during this time period. Thus, Whittier failed to materially implement Student's specialized academic instruction for English language arts and math. Accordingly, Student proved by the preponderance of the evidence that Whittier failed to materially implement Student group specialized academic instruction in English language arts and math from March 30, 2020, through June 3, 2020.

#### SPEECH AND LANGUAGE

Student showed that Whittier failed to materially implement Student's speech and language services from March 30, 2020 through the 2020 extended school year. From March 30, 2020, through the end of the 2019-2020 school year, Student should have received nine 30-minute sessions of group speech and language for the regular school year and was provided four sessions. Whittier also failed to provide two group speech and language sessions during extended school year per the January 16, 2020 IEP. This amounted to Whittier failing to provide approximately 35 percent of Student's speech and language services once distance learning began through 2020 extended school year. Thus, Whittier failed to materially implement Student's speech and language services.

Student argued that the failure was more extensive because Student could not access speech and language services during distance learning. Parent asserted that

Student required prompting during distance learning to attend speech and language services and maintained that Whittier failed to provide prompts, and thus Student rarely attended the speech and language sessions amounting to a material failure to implement them. Dr. Flores supported Parent's proposition opining that Student's executive functioning deficits required Whittier to accommodate Student during distance learning and prompt Student to attend speech and language services.

Here, both V. Hernandez and Peggy Garcia, the speech and language pathologist assistant, regularly emailed the day of the service and called Student and Parent as reminders about Student's speech and language services throughout distance learning. The documentary evidence corroborated their testimony, and their testimony complemented each other. Thus, their testimony was credible and given great weight on this issue. Conversely, Parent's rendition was vague, including that Parent never received the emails, and unsupported by other witness testimony, thus, given less weight. Therefore, Whittier accommodated Student's executive functioning deficits for the speech and language services and appropriately prompted Student to attend them.

Thus, while the evidence supported by a preponderance of the evidence that Whittier failed to materially implement Student's speech and language services from March 30, 2020 through 2020 extended school year, it did not support the failure to the extent Student asserted. Accordingly, Student showed by a preponderance of the evidence that Whittier failed to materially implement Student's speech and language services from March 30, 2020 through 2020 extended school year.

## WHITTIER FAILED TO IMPLEMENT STUDENT'S IEP DURING THE 2020-2021 SCHOOL YEAR

During this time period, the operative IEP continued to be the January 16, 2020 IEP. Student argued that the operative IEP changed in April 2021 when Parent consented to the November 12, 2020 IEP but the evidence failed to support this contention. Parent failed to consent to the November 2020 IEP at any time. In April 2021, Parent consented to the additional specialized academic instruction offered to Student on March 5 and 10, 2021. Thus, the operative IEP for the entirety of the 2020-2021 school year, through extended school year was the January 16, 2020 IEP, with the consented-to amendments.

### SPECIALIZED ACADEMIC INSTRUCTION

From August 12, 2020, the first day of Student's sophomore year, through the end of the school year included extended school year services, Whittier continued on the distance learning format. Whittier utilized a three by nine schedule. Student was enrolled in 330 minutes per day of synchronous and asynchronous group specialized academic instruction during quarter one and three of the 2020-2021 school year, and 260 minutes per day of group specialized academic instruction of synchronous and asynchronous for quarters two and four. Although Student did not receive the group specialized academic instruction in each subject daily, Student received the requisite specialized academic instruction minutes during this time period.

Student, however, proved that Whittier failed to provide the reading and writing class that was offered on January 16, 2020. At the beginning of the 2020-

2021 school year, Whittier dropped Student's reading and writing class and added a modified history class. Thus, Whittier failed to materially implement Student's IEP in group specialized academic instruction for reading and writing.

On March 5 and 10, 2021, Whittier offered four additional hours, 240 minutes of in-person specialized academic instruction. Parent consented to it on April 13, 2022. Student failed to establish that Whittier did not provide the additional specialized academic instruction, or the 2021 extended school year group specialized academic instruction. Thus, Student proved that Whittier failed to implement Student's specialized academic instruction in reading and writing only from August 12, 2020, through June 3, 2021.

#### SPEECH AND LANGUAGE

Student was entitled to 30 minutes of group speech and language services for the 2020-2021 regular school year, and 20 minutes group speech and language services for extended school year as stated in the January 16, 2020 IEP.

Student established that Whittier failed to materially implement Student group speech and language services from August 12, 2020 through 2021 extended school year. Whittier provided Student 33 out of the 38 speech and language sessions during the regular 2020-2021 school year and no sessions during extended school year. This amounts to Whittier failing to provide Student approximately 19 percent of the speech and language services for the 2020-2021 school year and constituted a material failure to implement Student's speech and language services during that time period. Accordingly, Student established by the preponderance of the evidence



that Whittier failed to materially implement Student's speech and language IEP services during the 2020-2021 school year and extended school year.

STUDENT FAILED TO SHOW THAT WHITTIER DID NOT MATERIALLY IMPLEMENT STUDENT'S IEP FROM AUGUST 2021 THROUGH DECEMBER 3, 2021

#### SPECIALIZED ACADEMIC INSTRUCTION

Student failed to establish that Whittier did not materially implement Student's IEP from August 2021 through December 3, 2021. Student's operative IEP continued to be the January 16, 2020 IEP with amendments during this time period. All Whittier students went back to school in person for the 2021-2022 school year. No evidence was presented that Whittier failed to provide Student's group specialized academic instruction in language arts, math, academic enrichment, or science. Student also received group specialized academic instruction in modified history for the 2021-2022 school year. Thus, Student received the requisite 250 daily minutes of group specialized academic instruction. Further, Student failed to establish that Whittier did not provide the additional specialized academic instruction consented to in April 2021.

Student argues, however, since Student was no longer receiving the specialized academic instruction in reading and writing as specified in the January 2020 IEP, Whittier materially failed to implement Student's specialized academic instruction.

Here, Student was no longer receiving the specialized academic instruction specifically for reading and writing but received the required 250 minutes daily of

specialized academic instruction. Further, in September 2021, Whittier offered Student five hours of individual specialized academic instruction after school as compensatory education. This offset Whittier's failure to specifically provide specialized academic instruction in reading and writing coupled with the fact that Student was receiving the required 250 minutes of daily specialized academic instruction. Thus, Student failed to prove that Whittier did not materially implement Student's specialized academic instruction for the 2021-2022 school year through December 3, 2021.

#### SPEECH AND LANGUAGE

Student failed to show that Whittier did not implement Student's speech and language services for the 2021-2022 school year through December 3, 2021. Student received speech and language services as stated in the January 16, 2020 IEP. Accordingly, Student did not prove that Whittier failed to materially implement Student's speech and language services during the 2021-2022 school year through December 3, 2021.

#### ISSUE 4D AND 5D: DID WHITTIER DENY STUDENT A FAPE WHEN IT FAILED TO PROVIDE TIMELY PRIOR WRITTEN NOTICE TO PARENT'S FEBRUARY 2020 REQUESTS FOR IN-HOME TUTORING AND COUNSELING SERVICES? 2021?

Student contends that Whittier failed to provide timely prior written notice to Parent when Parent requested in-home tutoring services and counseling services in February 2020. Student argues that the failure to provide prior written notice impeded Parent's ability to make decisions about Student's services as Parent did not

know if Whittier was willing to grant these requests. Whittier maintains that it was not required to provide prior written notice and if required, it provided it on February 14, 2020, in the form of a letter and assessment plan for academics and social emotional testing. Whittier argues if its response was insufficient, it did not rise to a FAPE denial.

Prior written notice must be given by the public agency to the parents of an individual with exceptional needs “upon initial referral for assessment, and a reasonable time before the public agency proposes to initiate or change, or refuses to initiate or change, the identification, evaluation, or educational placement of the pupil, or the provision of a free appropriate public education to the child.” (Ed. Code, § 56500.4, subd. (a); *see also* 20 U.S.C. § 1415(b)(3), (4) & (c)(1); 34 C.F.R. § 300.503 (2006).)

The notice must contain: a description of the action refused by the agency; an explanation for the refusal, along with a description of each evaluation procedure, assessment, record, or report the agency used as a basis for the refusal; a statement that the parents of the disabled child are entitled to procedural safeguards, with the means by which the parents can obtain a copy of those procedural safeguards; sources of assistance for parents to contact; a description of other options that the IEP team considered, with the reasons those options were rejected, and a description of the factors relevant to the agency’s refusal. (20 U.S.C. § 1415(c)(1); 34 C.F.R. § 300.503(b) (2006); Ed. Code, §56500.4.)

The notice must be given in “a reasonable time before” the district actually changes the student’s placement or the provision of FAPE to the student. (34 C.F.R. § 300.503(a) (2006).) This is to ensure that the parents have enough time to assess

the change and voice their objections and otherwise respond before the change takes effect. (*C.H. v. Cape Henlopen Sch. Dist.* (3rd Cir. 2010) 606 F.3d 59, 70.)

When a failure to give proper prior written notice does not actually impair parental knowledge or participation, the violation is not a substantive harm under the IDEA. (*Ibid.*)

On February 3, 2020, Parent consented to the January 16, 2020 IEP with exception and hand wrote on the IEP signature page that Student should receive in-home tutoring services, and counseling services two times per week from a school counselor. Parent also requested that a response to the requests be provided in writing and attached to the January 2020 IEP. The request was received by Whittier the same day.

Student showed that Whittier failed to respond with a legally compliant prior written notice. Whittier responded within a reasonable time, February 14, 2020, by letter, stating it was responding to the requests written on the IEP signature page. At that time, Whittier neither rejected nor accepted Parent's requests, and instead offered an assessment plan for academics and social-emotional testing. The response failed to meet the requirements for prior written notice as it failed to contain many of the legally required elements including a statement that parents can obtain a copy of the procedural safeguards, sources of assistance for parents to contact, a description of what options were considered, and reasons the options were rejected.

However, an IEP may serve to provide prior written notice if it contains all of the information required under 34 Code of Federal Regulation part 300.503. (Office of Special Education Programs, Letter to Lieberman (August 15, 2008) 52 IDELR 18;

71 Fed. Reg. 46450, 46691 (Aug. 14, 2006).) Here, the November 12, 2020 IEP document provided the information required for prior written notice. It offered procedural safeguards to Parent which included resources to contact for assistance. The IEP document described: a review of the academic and social-emotional assessments; Student's functioning; present levels of performance; goals; notes describing Parent's concerns, and a description of other relevant factors. Whittier failed to offer in-home tutoring or counseling services, giving notice of Whittier's decision. Thus, Whittier supplied Parent with a legally compliant prior written notice on November 12, 2020, but not within a reasonable amount of time from the February 3, 2020 request. Accordingly, Whittier's failure to provide a timely prior written notice constituted a procedural violation.

Student failed to show that the procedural violation denied Student a FAPE. No evidence was presented, and no witness endorsed Student receiving in-home tutoring services at any time, including Dr. Flores. Additionally, Student failed to prove that counseling services were required as discussed above. Further, Parent continued to advocate for these services at various times during the relevant time period, showing that Parent understood the refusal and continued to participate in the IEP decision-making process. Accordingly, Student failed to show that a delay in the prior written notice response impeded Parent's ability to participate in the IEP decision-making process, denied Student an educational benefit, or a FAPE.

Accordingly, Student failed to prove by a preponderance of the evidence that Whittier denied Student a FAPE when it failed to provide timely prior written notice to Parent's February 3, 2020 requests for counseling and in-home tutoring services.

## CONCLUSIONS AND PREVAILING PARTY

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

### STUDENT ISSUE 1:

Whittier denied Student a FAPE from May 6, 2020, through November 11, 2020 by failing to timely assess Student in psychoeducation and speech and language.

Student prevailed on Student Issue 1.

### STUDENT ISSUE 2(A):

Whittier denied Student a FAPE by failing to conduct legally compliant psychoeducation and speech and language assessments under the February 2020 assessment plan.

Student prevailed on Student Issue 2(a).

### STUDENT ISSUE 2(B):

Whittier denied Student a FAPE by conducting a transition assessment without parental consent pursuant to an unsigned August 2020 assessment.

Student prevailed on Student Issue 2(b).

### STUDENT ISSUE 3:

Whittier did not deny Student a FAPE when it failed to assess Student in occupational therapy and assistive technology from December 3, 2019, through December 3, 2021.

Whittier prevailed on Student Issue 3.

### STUDENT ISSUE 4(A):

Whittier did not deny Student a FAPE by failing to offer appropriate services and supports in reading, writing, math, speech and language, social emotional, and transition from December 3, 2019, through the end of the 2019-2020 school year.

Whittier prevailed on Student Issue 4(a).

### STUDENT ISSUE 4(B):

Whittier did not deny Student a FAPE when it denied Student an appropriate placement, specifically a non-public school, from December 3, 2019, through the end of the 2019-2020 school year.

Whittier prevailed on Student Issue 4(b).

### STUDENT ISSUE 4(C):

Whittier denied Student a FAPE when it failed to implement Student's January 16, 2020 IEP from March 30, 2020 through the end of the 2019-2020 school year.

Student prevailed on Student Issue 4(c).

#### STUDENT ISSUE 4(D):

Whittier did not deny Student a FAPE by failing to timely provide prior written notice to Parent's February 3, 2020 request for in-home tutoring and counseling services.

Whittier prevailed on Student Issue 4(d).

#### STUDENT ISSUE 5(A):

Whittier did not deny Student a FAPE by failing to offer appropriate services and supports in reading, writing, math, speech and language, social emotional, and transition from the beginning of the 2020-2021 school year through December 3, 2021.

Whittier prevailed on Student Issue 5(a).

#### STUDENT ISSUE 5(B):

Whittier did not deny Student a FAPE when it denied Student an appropriate placement, specifically a non-public school, from the beginning of the 2020-2021 school year through December 3, 2021.

Whittier prevailed on Student Issue 5(b).



## STUDENT ISSUE 5(C):

Whittier denied Student a FAPE when it failed to implement Student's January 16, 2020 IEP and amendments from the beginning of the 2020-2021 school year through the end of the 2020-2021 school year.

Student prevailed on Student Issue 5(c).

Student Issue 5(d): Whittier did not deny Student a FAPE by failing to timely provide prior written notice to Parent's February 3, 2020 request for in-home tutoring and counseling services. Whittier prevailed on Student Issue 5(d).

## WHITTIER ISSUE 1:

Whittier failed to prove that its November 12, 2020 psychoeducation assessment of Student was legally compliant, due to the failure to timely complete the assessment.

Student prevailed on Whittier Issue 1.

## WHITTIER ISSUE 2:

Whittier failed to prove that its November 12, 2020 speech and language assessment of Student was legally compliant, due to the failure to timely complete the assessment.

Student prevailed on Whittier Issue 2.

## REMEDIES

Student prevailed on Student's Issues 1, 2(a), 2(b), 4(c), and 5(c). Whittier did not prevail on either of its issues. As remedies, Student requested

- Whittier fund an independent psychoeducation assessment or reimburse Parent for Dr. Flores' assessment,
- fund independent speech and language and transition assessments with assessors of Parent's choice,
- conduct occupational therapy and assistive technology assessments or fund independent assessments,
- provide prospective weekly one-to-one speech and language and counseling,
- fund 240 hours of one-to-one specialized academic instruction through Lindamood Bell or a nonpublic agency of Parent's choice, and
- fund 40 hours of speech and language services through a nonpublic agency of Parent's choice.

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

As to Student Issues 1, and 2(a), Student established Whittier failed to conduct a timely and legally compliant psychoeducation assessment. Student requested

reimbursement for Dr. Flores' private psychoeducation assessment or an independent psychoeducation assessment at public expense. Parent sought out a private assessor, Dr. Flores, who conducted a psychoeducation assessment of Student. Although the assessment was not completed until 2022, reimbursement of Dr. Flores' assessment is appropriate, instead of ordering a new independent psychoeducation assessment for Whittier's failure to timely conduct a psychoeducation assessment. Student failed to provide documentation as to the assessment cost; however, Parent estimated it at \$4300. As an equitable remedy for Whittier's failure to conduct a timely psychoeducation assessment, Whittier will reimburse Parent for Dr. Flores' private psychoeducation assessment.

Student requested an independent speech and language evaluation at Whittier's expense with an assessor of Parent's choice. An independent evaluation at public expense may be awarded as an equitable remedy if necessary to grant appropriate relief to a party. (Los Angeles Unified Sch. Dist. v. D. L. (C.D. Cal. 2008) 548 F.Supp.2d 815, 822-823.) An independent educational evaluation is an evaluation conducted by a qualified examiner not employed by the public agency responsible for the education of the student in question. (34 C.F.R. § 300.502 (a)(3)(i) (2006).) If an independent educational evaluation is at public expense, the criteria under which the evaluation is obtained, including the location of the evaluation and the qualifications of the examiner, must be the same as the criteria the public agency uses when it initiates an evaluation, to the extent those criteria are consistent with the parent's right to an independent educational evaluation. (34 C.F.R. § 300.502(e)(1) (2006).) Except for these criteria, the public agency may not impose conditions or timelines related to obtaining the independent educational evaluation at public expense. (34 C.F.R. § 300.502(e)(2) (2006).)

Student proved that Whittier failed to conduct a timely and legally compliant speech and language assessment. Accordingly, Student is entitled to an independent speech and language educational evaluation at Whittier's expense. Student failed to submit any evidence that addressed the costs of an independent speech and language assessment. Ultimately, the undersigned relied upon the equitable judicial discretion to craft an appropriate remedy. The independent evaluation must be in accordance with Whittier's assessor qualification, location, and price criteria for independent speech and language evaluations, as long as Whittier's criteria does not interfere with Parent's right to obtain the evaluation. Whittier must also fund the assessor's participation at the IEP team meeting during which the assessment will be reviewed.

As to Student Issue 2(b), Student requested an independent transition evaluation at Whittier's expense and proved that Whittier conducted a transition assessment without parental consent. Accordingly, Student is entitled to an independent transition evaluation at Whittier's expense. Student failed to submit any evidence that addressed the costs of an independent transition assessment. Ultimately, the undersigned relied upon the equitable judicial discretion to craft an appropriate remedy. The independent evaluation must be in accordance with Whittier's assessor qualification, location, and price criteria for independent transition evaluations, as long as Whittier criteria does not interfere with Parent's right to obtain the evaluation. Whittier must also fund the assessor's participation at the IEP team meeting during which the assessment will be reviewed.

Student prevailed on Student's Issues 4(c) and 5(c). Student requested 240 hours of compensatory education in specialized academic instruction and 40 hours in speech and language, and prospective relief. An administrative law judge can award

compensatory education as a form of equitable relief. (*Park, supra*, 464 F.3d at p. 1033.) School districts may be ordered to provide compensatory education or additional services to a student who has been denied a FAPE. (*Ibid.; Parents of Student W. v. Puyallup Sch. Dist., No. 3* (9th Cir. 1994) 31 F.3d 1489, 1496.) These are equitable remedies that courts may employ to craft “appropriate relief” for a party. An award of compensatory education need not provide a “day-for-day compensation.” (*Id.* at p. 1497.) The conduct of both parties must be reviewed and considered to determine whether equitable relief is appropriate. (*Id.* at p. 1496.) Compensatory education is a prospective award of educational services designed to catch-up the student to where the student should have been absent the denial of a FAPE. (*Brennan v. Regional Sch. Dist. No. 1* (D. Conn. 2008) 531 F.Supp.2d 245, 265.) 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 ex rel. Reid v. Dist. of Columbia* (D.D.C. Cir. 2005) 401 F.3d 516, 524.) The award must be fact-specific and “reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place.” (*Ibid.*)

Student failed to submit any evidence that addressed compensatory education including amounts and duration. Ultimately, the undersigned relied upon the equitable judicial discretion to craft an appropriate compensatory education remedy.

As to Student's Issues 4(c) and 5(c), it was determined that Student was denied a FAPE from March 30, 2020 through the end of the 2019-2020 school year, June 3, 2020, for failing to materially implement Student's math and language arts specialized academic instruction, and from August through June 3, 2021 by failing to material implement Student's reading and writing class.

Student received approximately 60 minutes weekly of language arts and math from March 30, 2020, through June 3, 2020. Whittier was required to provide 250 minutes of group specialized academic instruction in both math and language arts. Student should have received approximately 90 more minutes weekly of both group language arts and math specialized academic instruction. This amounts to approximately 12 hours each of group specialized academic instruction missed from March 30, 2020, through June 3, 2020.

Whittier failed to provide any reading and writing group specialized academic instruction to Student from August 12, 2020, through June 3, 2020. Whittier was required to provide 250 minutes weekly of group specialized academic instruction in this area. Student should have received approximately 9500 minutes of group specialized academic instruction from August 12, 2020, through April 10, 2021. This amounts to approximately 158 hours missed of group specialized academic instruction during this time period. Thus, this will be considered when determining compensatory education.

The ALJ also considered that Whittier provided the requisite amount of specialized academic instruction during this time but not specifically in reading and writing and later offered an additional five hours weekly of individualized specialized academic instruction as compensatory education. Further, one-to-one specialized academic instruction will be awarded, not group academic instruction, and the amount will be reduced taking these issues into consideration. Accordingly, Whittier is ordered to provide 109 hours of one-to-one specialized academic instruction for Whittier's failure to materially implement Student's specialized academic instruction in Student Issues 4 (c) and 5(c).

Student showed that Whittier failed to materially implement Student's speech and language services from March 30, 2020, through 2020 extended school year. Whittier was required to provide 30 minutes weekly of group speech and language services from March 30, 2020, through June 3, 2020. Whittier failed to provide approximately three hours of the group speech and language services during that time period. Whittier also failed to provide approximately four hours of group speech and language for the 2020-2021 school year through 2021 extended school year. The failure to provide these services amounted to a material failure to implement Student's January 16, 2020 IEP as to speech and language.

One-to-one specialized academic instruction will be awarded, not group academic instruction, and the amount will be reduced taking into consideration the difference between one-to-one versus group instruction. Accordingly, Whittier is ordered to provide four hours of one-to-one speech and language services for Whittier's failure to materially implement Student's speech and language services in Student Issues 4 (c) and 5(c).

All of Student's other requests for relief were carefully considered and are denied. Whittier's requests for relief are denied.

## ORDER

1. Whittier must reimburse Parent for Dr. Flores' psychoeducation report. Within 30 days of this Decision, Parent must provide Whittier proof of payment of Dr. Flores' psychoeducation assessment. Parent will receive reimbursement based upon proof of payment. Whittier must reimburse Parent within 45 calendar days of receiving proof of payment.

2. Student is entitled to obtain an independent educational evaluation in the areas of speech and language and transition.
  - a. Whittier must fund the independent speech and language and transition evaluations of Student in accordance with Whittier's assessor qualification, location, and price criteria for independent speech and language evaluations, as long as Whittier's criteria does not interfere with Parent's right to obtain the evaluation.
  - b. Whittier must fund up to two hours for the assessors to prepare for and attend, in-person or virtually, an IEP team meeting to present the evaluation findings, at the assessor's usual hourly rate, as long as such rate does not exceed the typical hourly rate for such assessments in the professional community, and must also reimburse for mileage at the Federal internal revenue service business reimbursement rate.
  - c. Whittier must convene an IEP team meeting within 15 days of receipt of the independent educational evaluations, to consider the results of the reports, unless Whittier and Parent agree to a different timeline.
3. Whittier must fund 109 hours of direct, individual, in-person, specialized academic instruction for Student provided by a certified nonpublic agency of Parent's choice. Whittier must establish direct payment to any certified nonpublic agency selected by Parent. All hours will be available to be used until May 15, 2023 and will thereafter be deemed forfeited.
4. Whittier must fund four hours of direct, individual, in-person, speech and language therapy for Student provided by a certified nonpublic



agency of Parent's choice. Whittier must establish direct payment to any certified nonpublic agency selected by Parent. All hours will be available to be used until May 15, 2023 and will thereafter be deemed forfeited.

## RIGHT TO APPEAL THIS DECISION

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

Cynthia Fritz

Administrative Law Judge

Office of Administrative Hearings