

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

PARENT ON BEHALF OF STUDENT,

v.

SAN BERNARDINO CITY UNIFIED SCHOOL DISTRICT.

CASE NO. 2023050849

ORDER FINDING STUDENT PREVAILING PARTY ON ALL ISSUES,
BIFURCATING HEARING AND SETTING ADDITIONAL HEARING
DATES ON REMEDIES, CONTINUING BIFURCATED HEARING, AND
ORDERING IMPARTIAL ASSESSMENT

NOVEMBER 16, 2023

On May 23, 2023, the Office of Administrative Hearings, called OAH, received a due process hearing request from Student, naming San Bernardino City Unified School District, called San Bernardino. On August 15, 2023, OAH granted Student's motion to file an amended complaint. Administrative Law Judge Robert G. Martin heard this matter by videoconference on October 3, 4, 5, 10, 11, 12, and 13, 2023.

Attorney Tania Whiteleather represented Student. Mother attended all hearing days on Student's behalf. Attorneys Karen Gilyard, Carlos Gonzalez, and Ashley Turner represented San Bernardino. Sean McDuffee, teacher on assignment, attended the hearing on San Bernardino's behalf on October 3, 11, 12, and 13, 2023. Ryan Rubio, Ph.D., Assistant Director of Special Education, attended the hearing on San Bernardino's behalf on October 4, 5, and 10, 2023.

At the parties' request the matter was continued to November 2, 2023, for written closing briefs. The record was closed, and the matter was submitted on November 2, 2023.

SUMMARY OF ORDER

This Order finds Student the prevailing party on all issues and bifurcates the hearing and schedules a second hearing for the purpose of determining appropriate remedies. It orders an impartial psychoeducational assessment be conducted, to be paid for by the Office of Administrative Hearings and the California Department of Education. A final decision will be issued after the independent assessment is completed and a hearing regarding remedies is concluded. This matter is continued as of the date of this Order to March 5 and 6, 2024 for the second hearing on remedies.

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ISSUES

At the Prehearing Conference held September 25, 2023, the parties clarified three issues for hearing, with subparts. On the first day of hearing, prior to any testimony, Student withdrew entirely Student's Issue 1, which raised claims concerning Student's 2020-2021 school year. Student's remaining two issues are unchanged, but renumbered as set forth below.

1. Did San Bernadino deny Student a free appropriate public education, called a FAPE, in the 2021-2022 school year, by:
 - a. Failing to address Student's attendance issues?
 - b. Failing to take reasonable steps to determine why Student was not accessing his individualized educational program, called an IEP, and related services, beginning October 6, 2021?
 - c. Failing to address Student's lack of progress on his IEP from October 6, 2021?
 - d. Failing to obtain information on Student's present levels of performance as part of his April 2022 triennial reevaluation?
 - e. Failing to offer Student supports and services necessary for Student to access the educational program and related services offered in his IEP?
 - f. Failing to review Student's June 2022 independent educational evaluation in assistive technology?
 - g. Failing to file a due process hearing request to establish that its April 2022 IEP offered Student a FAPE after Parents declined to consent to the proposed IEP?

2. Did San Bernadino deny Student a FAPE in the 2022-2023 school year, through the filing of Student's amended complaint on August 15, 2023, by:
 - a. Failing to address Student's attendance issues?
 - b. Failing to take reasonable steps to determine why Student was not accessing his individualized educational program, called an IEP, and related services?
 - c. Failing to address Student's lack of progress on his IEP?
 - d. Failing to offer Student supports and services necessary for Student to access the educational program and related services offered in his IEP?
 - e. Failing to timely convene an annual IEP for Student in April 2023?
 - f. Failing to obtain information on Student's present levels of performance for his May 2023 IEP?

JURISDICTION

This hearing was held under the Individuals with Disabilities Education Act, its regulations, and California statutes and regulations. (20 U.S.C. § 1400 et. seq.; 34 C.F.R. § 300.1 (2006) et seq.; Ed. Code, § 56000 et seq.; Cal. Code Regs., tit. 5, § 3000 et seq.)

The main purposes of the Individuals with Disabilities Education Act, referred to as the IDEA, are to ensure:

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

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

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

At the time of hearing, Student was 15 years old and in 10th grade. Student resided within San Bernardino's geographic boundaries at all relevant times. Student was eligible for special education under the categories of autism and speech language impairment under his last consented-to IEP, but had been offered eligibility since October 2020 under the categories of autism and specific learning disability.

STUDENT'S ATTENDANCE HISTORY

This case arises from Student's refusal to attend school beginning in the 2021-2022 school year. Student did not exhibit such a severe attendance problem previously.

San Bernardino found Student eligible for special education while he was in kindergarten in 2014, qualifying under the categories of autism and speech language impairment. Student attended in-person general education classes from kindergarten through most of his sixth-grade 2019-2020 school year, supported by accommodations, and services including pull-out specialized academic instruction, speech and language therapy, and occupational therapy. He missed nine days of school in fourth grade, thirteen days in fifth grade, and eleven days in sixth grade. After San Bernardino suspended in-person instruction in March 2020 due to the COVID pandemic, and implemented virtual instruction for all pupils, Student attended seventh grade in 2020-2021 remotely from home. Student missed 13 days of the 2020-2021 school year.

Student's May 21, 2021, IEP offered placement in an in-person eighth-grade general education class for the 2021-2022 school year, with specialized academic instruction, occupational therapy, language and speech therapy, and counseling also offered in the school setting. However, when in-person instruction resumed in August 2021, Student refused to return to school. He did not attend any classes in the 2021-2022 school year, or in his ninth-grade 2022-2023 school year, or in the extended school years 2022 and 2023, offered in his IEPs.

At the time of hearing, Student had not participated in any educational program since completing seventh grade in June 2021.

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ISSUES 1.a., b., c., AND e.: DID SAN BERNARDINO DENY STUDENT A FAPE IN THE 2021-2022 SCHOOL YEAR BY FAILING TO ADDRESS STUDENT'S ATTENDANCE ISSUES AND LACK OF PROGRESS ON HIS IEP, TAKE REASONABLE STEPS TO DETERMINE WHY STUDENT WAS NOT ACCESSING HIS IEP AND RELATED SERVICES, AND OFFER STUDENT SUPPORTS AND SERVICES NECESSARY FOR STUDENT TO ACCESS HIS IEP AND RELATED SERVICES?

Student contends San Bernardino denied Student a FAPE in the 2021-2022 school year by failing to assess Student to determine why he was refusing to return to in-person instruction, address his attendance issue with his IEP team, and offer him services and supports necessary to allow him to return to school. San Bernardino contends its IEPs for Student for the 2021-2022 school year offered him a FAPE in the least restrictive environment appropriate for Student.

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

In general, a child eligible for special education must be provided access to specialized instruction and related services which are individually designed to provide

educational benefit through an IEP reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances. (*Board of Education of the Hendrick Hudson Central School Dist. v. Rowley* (1982) 458 U.S. 176, 201-204 (*Rowley*); *Andrew F. v. Douglas County School Dist. RE-1* (2017) 580 U.S. 386, 401.)

Educational benefit is not limited to academic needs, but includes the social and emotional needs that affect academic progress, school behavior, and socialization. *County of San Diego v. California Special Education Hearing Office, et al.* (9th Cir. 1996) 93 F.3d 1458, 1467. The student's educational placement must include "educational instruction specially designed to meet the unique needs of the handicapped child, supported by such services as are necessary to permit the child to benefit from the instruction." (*Id.* at p. 1468, quoting *Rowley*, 458 U.S. at 189, 102 S.Ct. at 3042.)

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. (Cal. Code Regs., tit. 5, § 3042, subd. (a).) When determining the educational placement of a child with a disability, the student's IEP team must consider the meaning of the evaluation data and the placement options and consider educating the child in the least restrictive environment. (34 C.F.R. §§ 300.114, 300.118; Ed. Code, § 56342, subd. (b).) The IEP team should remove the child from the regular education environment occurring only when the nature or severity of the student's disabilities is such that education in regular classes with the use of supplementary aides and services could not be achieved satisfactorily. (20 U.S.C. § 1412(a)(5)(A); 34 C.F.R. § 300.114(a)(2); Ed. Code, §§ 56031, 56033.5.) In selecting the least restrictive environment, consideration must be given to any potential harmful effect on the child or the quality of services that he or she needs. (20 U.S.C. § 1412(a)(5)(A); 34 C.F.R. § 300.114(a)(2); Ed. Code, § 56040.1, subd. (a).)

School districts must have available a continuum of program options to meet the instructional and service needs of special education students. (34 C.F.R. § 300.115(a); Ed. Code, § 56360.) The continuum of program options must include, but is not limited to,

- regular education;
- resource specialist programs;
- designated instruction and services;
- special classes;
- nonpublic, non-sectarian schools;
- state special schools;
- specially designed instruction in settings other than classrooms;
- itinerant instruction in settings other than classrooms; and
- instruction using telecommunication in the home, hospitals, or institutions.” (34 C.F.R. § 300.115; Ed. Code, §§ 56360, 56361.)

A school district is only required to consider those placements on the continuum that may be appropriate for the particular child. A school district is not required to discuss all options “so long as alternative options are available.” (*L.S. v. Newark Unified School Dist.* (N.D. Cal. May 22, 2006, No. C 05-03241 JSW) 2006 WL 1390661, at *6.)

A student currently receiving special education must be reevaluated by the school district at the request of the student’s parent or teacher, or whenever the local educational agency determines that the educational or related services needs of the child warrant a reassessment. (20 U.S.C. § 1414(a)(2)(A)(i); 34 C.F.R. § 300.303(a)(1); Ed. Code, § 56381, subd. (a)(1) and (2).) A district must in any event conduct a reevaluation

at least once every three years, unless the parent and the district agree that it is unnecessary. (20 U.S.C. § 1414(a)(2)(B)(ii); 34 C.F.R. § 300.303(b)(2); Ed. Code, §§ 56043, subd. (k), 56381, subd. (a)(2).)

To conduct the reevaluation, the student's IEP team must first review existing assessment data, including information provided by the parents and observations by teachers and service providers. (20 U.S.C. § 1414(c)(1)(A); 34 C.F.R., § 300.305; Ed. Code, § 56381, subd. (b)(1).) Based upon the review, the IEP team must identify any additional information it needs to determine the present levels of academic achievement and related developmental needs of the student, and to decide whether modifications or additions in the student's special education program are needed. (20 U.S.C. § 1414(c)(1)(B); Ed. Code, § 56381, subd. (b)(2).)

The district must perform the particular assessments the IEP team finds necessary to obtain the needed information for its reevaluation. (20 U.S.C. § 1414(c)(2); Ed. Code, § 56381, subd. (c).) Statutes and regulations place no limits on the location where district must perform the assessments. Many cases involve district assessors traveling out of state to assess students in residential treatment centers. (See, e.g., *Consolidated Matters Involving Parents on Behalf of Student and Irvine Unified School Dist.* (2022) OAH Case Nos. 2022050292 and 2022010218 [psychoeducational and educationally-related mental health services assessments conducted on student in Utah]; *Consolidated Matters Involving Parents on Behalf of Student and Glendale Unified School Dist.* (2020) OAH Case Nos. 2020030591 and 2020010712 [educationally-related mental health services assessment conducted in Arizona]). Assessments may also be conducted at the student's home. (See, e.g., *S Parents on Behalf of Student v. Sylvan Union School District* (2017) OAH Case No. 2017020355 [health assessment].)

A district must obtain the parent's consent to conduct an assessment. (20 U.S.C. § 1414(c)(3); Ed. Code, § 56381, subd. (e)(1).) It must provide a written proposed assessment plan and a copy of procedural safeguards to the parent within 15 days of the referral for assessment. (Ed. Code, § 56321(a).) The parent must have a minimum of 15 days from receipt to decide whether to consent to the proposed assessment plan, and the assessment may begin immediately upon receipt of the consent. (Ed. Code, § 56321(b)(4).) The district must then complete the assessment and hold an IEP to review the assessment within 60 days from the date of the receipt of parent's written consent, not counting days between the student's regular school sessions, terms, or days of school vacation in excess of five schooldays. (Ed. Code, § 56344.)

When a district fails to conduct appropriate assessments or to assess a Student in all areas of suspected disability, it commits a procedural violation of the IDEA that may result in a substantive denial of FAPE. (*Park v. Anaheim Union High School Dist.* (9th Cir. 2006) 464 F.3d 1025, 1032-1033; *Orange Unified School Dist. v. C.K.* (C.D. Ca.) 2012 WL 2478389, p.8.)

Not all procedural flaws result in a denial of a FAPE. (A procedural violation of the IDEA causes a denial of a FAPE only if it:

1. impeded the child's right to a free appropriate public education;
2. significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of a FAPE to the student;
or
3. caused a deprivation of educational benefits to the student. (20 U.S.C. § 1415(f)(3)(E)(ii); 34 C.F.R. § 300.513(a)(2); Ed. Code, § 56505, subd. (f)(2) & (j).)

A procedural error results in the denial of an educational opportunity where, absent the error, there is a 'strong likelihood' that alternative educational possibilities for the student 'would have been better considered.'" (*Doug. C. v. Hawaii Depart. of Education* (9th Cir. 2013) 720 F.3d 1038, 1047 (*Doug C.*), quoting concurrence in *M.L. v. Federal Way School Dist.* (9th Cir. 2005) 394 F.3d 634, 657.)

2019: STUDENT'S LAST AGREED-UPON AND IMPLEMENTED IEP, AND LAST IN-PERSON DISTRICT ASSESSMENTS

Although this due process matter concerns the 2021-22 and 2022-23 school years, Student's last agreed-upon and implemented IEP throughout that time period was dated January 22, 2019, from Student's 2018-2019 fifth-grade year. That IEP was not offered in evidence, but testimony and references in admitted exhibits indicate the IEP team found Student eligible for special education based on autism and speech and language impairment, and offered Student placement in a general education classroom, with specialized academic instruction, speech therapy, and counseling, all to be provided at the school site.

In Student's sixth grade 2019-2020 school year, San Bernardino conducted a triennial reevaluation of Student in the fall of 2019. It included in-person district assessments of Student in the areas of psychoeducation, speech and language, and occupational therapy. Student's IEP team convened on March 6, 2020, to review the assessments and develop a new annual IEP, but the IEP was not completed or consented to before further IEP team meetings were paused because of the COVID pandemic.

2020-2021 SCHOOL YEAR: SAN BERNARDINO IEP'S OFFER STUDENT IN-PERSON PLACEMENT AND SERVICES, BUT IMPLEMENTED REMOTELY DUE TO COVID RESTRICTIONS

Student entered middle school for seventh grade in the 2020-2021 school year. In accordance with State mandates during the COVID pandemic, San Bernardino did not offer in-person instruction or related services for the 2020-2021 school year. Instead, San Bernardino implemented Student's IEP through a distance learning model, using online videoconferencing.

San Bernardino convened further IEP team meetings that year to finish developing the IEP begun in March 2020. These IEP team meetings were held virtually, by videoconference on September 29, 2020, October 16, 2020, December 16, 2020, April 7, 2021, April 21, 2021, May 12, 2021, and May 21, 2021. Each IEP offered Student in-person placement and services at his school of residence, which was Chavez Middle School, but noted that the IEP would be implemented through a distance learning model during the then-existing emergency COVID restrictions on in-person instruction.

Throughout the 2020-2021 school year, Student struggled with attention and work completion in the online learning environment. He rarely turned on his camera, preferring to participate only by using the chat function of the videoconferencing software. Within two months of the beginning of the new school year, in September 2020, Parents were concerned about Student's lack of progress on his IEP goals, and an increase in Student's frustration and anxiety.

SEPTEMBER 29, 2020, IEP AND PARENTS' REQUEST FOR EDUCATIONALLY-RELATED MENTAL HEALTH SERVICES ASSESSMENT

Student's September 29, 2020, IEP removed his previous eligibility based on speech-language impairment and offered Student eligibility for special education under the category of autism, only. The subsequent October 16, 2020, IEP and all IEPs after that offered Student secondary eligibility under the category of specific learning disability.

On September 29, 2020, Parents asked San Bernardino to conduct an educationally-related mental health services, or ERMHS, assessment of Student. In response to Parents' request, San Bernardino' prepared an October 12, 2020, assessment plan and prior written notice proposed conducting the assessment using a review of school records and samples of Student's work, rating scales, and remote observation and interviews, to comply with state COVID pandemic restrictions that required San Bernardino to use a distance learning format. San Bernardino noted it would not be able to administer assessments it would otherwise use that were designed to be administered in person. Parents objected to the limitations of the proposed virtual assessment, and requested that San Bernardino fund an in-person independent educationally-related mental health services assessment by a private assessor.

APRIL-MAY 2021 INDEPENDENT ERMHS ASSESSMENT

District agreed on January 29, 2021, to fund independent educational evaluations of Student in the areas of speech and language, occupational therapy, and ERMHS. The evaluations were completed in April 2021. The independent ERMHS evaluation was conducted by licensed clinical and school psychologist Jeanette Morgan, Psy.D.

Dr. Morgan assessed Student in April 2021 and prepared a detailed, 25-page written report that she presented at Student's May 21, 2021, IEP team meeting. In addition to Student's existing autism diagnosis, Dr. Morgan diagnosed Student with social anxiety disorder, and adjustment disorder with mixed anxiety and depressed mood.

The assessment focused on concerns with Student's inattention, work completion, emotional regulation, and self-advocacy, but also identified school attendance as a potential issue for Student. When Dr. Morgan interviewed Student in April 2021, Student said he disliked school and often did not want to go. He said he had become used to attending school from home and did not want to return to in-person instruction. Dr. Morgan was concerned that a year of participating in distance learning in which Student avoided interacting with others by turning off his camera and microphone had likely made his social anxiety disorder worse, and might lead to attendance issues when San Bernardino returned to in-person instruction for the 2021-2022 school year.

Dr. Morgan recommended San Bernardino assess Student's functional behavior and develop a behavior intervention plan for him to address inattention and work completion, "with a plan to address attendance if it proves to be necessary." She recommended San Bernardino be prepared to conduct a further functional behavior assessment of Student to develop a behavior intervention plan to assist Student with attendance issues. She specifically suggested San Bernardino consider the guidance in conducting such assessments provided in Jensen et al., *Functional Behavior Assessment of Absenteeism and Truancy* (2013).

MAY 21, 2021: STUDENT'S ERMHS ASSESSMENT IDENTIFIES HIS SOCIAL ANXIETY DISORDER AND RISK OF SCHOOL REFUSAL

At Student's May 21, 2021, IEP team meeting, near the end of Student's seventh grade 2020-2021 school year, the team reviewed Dr. Morgan's ERMHS assessment. The assessment put San Bernardino on notice that Student was diagnosed with a social anxiety disorder, and was at risk for refusing to attend school when in-person instruction resumed in fall 2021.

Based on Dr. Morgan's evaluation, San Bernardino's May 21, 2021, Addendum IEP revised Student's IEP offer by adding three new social emotional goals, supported by individual ERMHS counseling, to develop Student's skills in engaging in classroom activities, recognizing and expressing his feelings, and using coping strategies to manage stress, frustration or sadness. The IEP also noted Dr. Morgan's recommendation that San Bernardino be prepared to address Student's anxiety and support Student's attendance with a functional behavior assessment and a behavior intervention plan when school returned to in-person instruction.

The May 21, 2021, IEP, and all subsequent IEPs also offered Student in-person extended school year services at a school site. The May 21, 2021, IEP noted extended school year services would be provided virtually during the COVID emergency.

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AUGUST 2021: PARENTS REQUEST A CONTINUED DISTANCE LEARNING PROGRAM FOR STUDENT TO ADDRESS HIS RELUCTANCE TO ATTEND SCHOOL

Student did not participate in virtual extended school year services in 2021. San Bernardino resumed in-person instruction for Student's eighth grade 2021-2022 school year, which began on August 2, 2021. Student's last consented-to January 22, 2019, IEP, and San Bernardino's then-pending May 21, 2021, IEP offer, both offered Student in-person placement and services at his school of residence, Chavez Middle School.

As anticipated in his recent ERMHS assessment, Student resisted returning to in-person schooling. When asked by his Parents to get ready for school, Student sometimes would refuse to get out of bed, complaining of poor sleep and body aches. Other times, his Mother got him dressed and to the door of their home, but he would refuse to leave, saying he was scared to go to school. He would get upset if his Mother kept trying to get him to leave for school, start yelling, and go back to his room. Parents were not able to get Student to attend a single day of in-person instruction in the 2021-2022 school year.

In response to Student's school refusal, Parents sought help from San Bernardino to arrange virtual instruction for Student, similar to the instruction Student received in the prior school year during the COVID pandemic. On August 2, 2021, the first day of classes, Student's advocate, Karen Pagano, emailed San Bernardino's Case Carrier for Student, William Hammontree. She stated she and Parents believed San Bernardino was still offering distance learning as an option, but Parents "had yet to receive instructions for distance learning enrollment." Mother had told Pagano that San Bernardino had

changed its online platform from the prior year, and Student had experienced technical difficulties that day. Pagano asked Hammontree for help accessing Student's distance learning option.

Hammontree arranged an IEP team meeting on August 13, 2021, to discuss Virtual Academy, the distance learning platform San Bernadino was offering all students as an option for the 2021-2022 school year. The meeting focused solely on how Virtual Academy provided instruction, and what Parents would need to do to enroll Student in Virtual Academy. Although Hammontree understood Student had expressed fear of COVID as a reason for his reluctance to go to Chavez, the IEP team did not discuss why Parents sought a distance learning option for Student. The IEP team also did not discuss implementing Dr. Morgan's suggestion to conduct a functional behavior assessment of Student to develop a behavior intervention plan addressing attendance.

At the August 13, 2021, meeting, San Bernadino explained that one Virtual Academy option was a teacher-led online program similar to Student's seventh-grade program. Instruction would be provided by Virtual Academy instructors instead of teachers from Chavez. Student's classmates would be other students enrolled in Virtual Academy, rather than his former classmates at Chavez. The district members of Student's IEP team would change from teachers and staff at Chavez to teachers and staff from the Virtual Academy program. Parents would need to consent to a revised IEP changing Student's service delivery from in-person instruction at his school of residence to virtual instruction through Virtual Academy. Pagano and Parents stated they would discuss whether to proceed with enrollment in Virtual Academy and would notify San Bernadino of their decision.

Pagano subsequently emailed Hammontree requesting a follow-up IEP meeting including teachers from Student's prior school year, to discuss whether they believed Virtual Academy would be an appropriate placement for Student. Pagano also had further questions regarding details of how Student would receive academic instruction and special education services when enrolled in Virtual Academy. She also questioned whether Student would be taught the same curriculum at Virtual Academy as at Chavez. San Bernadino provided Parents the information they requested, accompanied by written input from two of Student's prior-year teachers. The teachers both indicated they did not believe distance learning through Virtual Academy would be an appropriate option for Student. Student had struggled with virtual learning in their classes, and they believed he needed to be physically in a classroom to receive the structure and support he required to be successful,

SEPTEMBER 2021 IEP

District convened a follow-up IEP team meeting on September 1, 2021. Two additional teachers from Student's prior year agreed that Virtual Academy did not offer the structure and support Student needed, and was not a good option for Student. Parents also agreed that Virtual Academy was not an appropriate option for Student. However, Parents did not agree that Student should return to in-person learning at Chavez. Instead, Parents requested that Student be allowed to participate in a Chavez classroom virtually from home, assisted by a one-to-one in-home aide, and using the Zoom videoconferencing application to access a camera and microphone in the live classroom. Parents asserted Student had what they termed a "stay put" right to distance learning provided in this manner, based on his participation in virtual learning the prior school year due to State-mandated COVID restrictions.

SEPTEMBER 2021: SAN BERNARDINO REJECTS PARENTS' PROPOSED DISTANCE LEARNING PROGRAM FOR STUDENT

San Bernardino rejected Parents' proposed virtual learning program for Student. San Bernardino was concerned about violating privacy laws if it used cameras and microphones to live stream the students and staff in all the classrooms attended by Student throughout his school day. San Bernardino also correctly noted that Student's participation in virtual learning in the 2020-2021 school year was not a basis for determining a stay-put placement for Student. Stay put involves the right of a special education student to remain in their last agreed upon and implemented IEP placement while a due process hearing request is pending. (20 U.S.C. § 1415(j); 34 C.F.R. § 300.518(a) (2006); Ed. Code, § 56505 subd. (d).; *Thomas v. Cincinnati Bd. of Educ.* (6th Cir. 1990) 918 F.2d 618, 625.) Even if Parents had filed a due process hearing at that time to make the stay-put provision applicable, Student's distance learning program in 2020-2021 was not an IEP placement, but a State-mandated emergency measure imposed in response to the COVID pandemic. Also, Student's 2020-2021 distance learning program had never included a one-to-one home aide. Finally, the emergency measure was intended as temporary, and expired before the start of the 2021-2022 school year. Temporary placements do not become a student's "stay put" placement. (*Verhoeven v. Brunswick School Committee* (1st Cir. 1999) 207 F.3d 1, 7-8; *Leonard by Leonard v. McKenzie* (D.C. Cir. 1989) 869 F.2d 1558, 1563-64.)

San Bernardino made no revisions to its pending May 21, 2021, FAPE offer to Student. Student did not consent to the May 21, 2021, IEP offer, and Student's operative IEP remained the January 22, 2019, IEP.

OCTOBER 2021 THROUGH JUNE 2022: SAN BERNARDINO SEEKS TO CLARIFY PARENTS' PROPOSALS FOR STUDENT'S EDUCATIONAL PROGRAM, AND OBTAIN CONSENT TO AN IEP PROVIDING STUDENT IN - PERSON INSTRUCTION AND SERVICES

Parents did not accept San Bernardino's rejection of their proposal that Student access a Chavez general education classroom remotely from home. Mother wrote Hammontree on October 6, 2021, insisting that Student was entitled to attend school in that manner because "the last location of [Student's] special education services and supports was at home through Zoom." Mother rejected all San Bernardino's IEPs since the January 22, 2019, IEP on grounds none offered Student a FAPE, but gave consent "to implement all goals and services since that date."

From San Bernardino's perspective, Parents were attempting to consent to services and a means of implementing goals that San Bernardino had never offered, because Student's IEPs had always offered his educational program and services in person at a school site, and Parents were not consenting to have Student go to school. San Bernardino continued to offer Student an in-person educational program and services at Chavez, but did not otherwise seek to implement the goals and services it offered in the May 21, 2021 IEP.

At Parent's request, San Bernardino participated in an alternative dispute resolution session on December 14, 2021. San Bernardino proposed as a resolution that Parents arrange for Student to attend Chavez. In return, San Bernardino would provide Student 21 hours of tutoring by a nonpublic agency "to help mitigate any potential learning loss [Student] may have experienced while in distance learning or

not attending school” for the previous four and a half months. San Bernardino would also provide Student three additional hours of in-school ERMHS counseling, and a one-to-one aide at school to help Student transition back to in-person learning. When Parents did not respond to this offer, San Bernardino reiterated it on January 13, 2022, offering one week less one-to-one aide support, but also offering Parents assistance accessing private health services or assistance that might be available to help Student return to school. Parents also did not respond to this proposal.

Student’s eighth-grade annual IEP was held April 13, 2022. San Bernardino continued to offer Student placement in a general education class at his school of residence, with in-school services and supports, with no significant changes to the previous May 21, 2021, IEP. Parents did not consent to the April 13, 2022, IEP.

ANALYSIS: SAN BERNARDINO DENIED STUDENT A FAPE AS OF SEPTEMBER 1, 2021, BY FAILING TO REVISE ITS FAPE OFFER TO ADDRESS STUDENT’S ATTENDANCE ISSUE, OR SEEK A DETERMINATION THAT STUDENT’S IEP OFFERED HIM A FAPE

School districts are obligated in a number of situations to seek to ensure that students with a disability are provided a FAPE without a request from the parent, and, in some cases, without consent of the parent. Particularly applicable in this case:

- A student’s IEP team must meet whenever the student demonstrates a lack of anticipated progress, and revise the student’s IEP to address the lack of progress towards annual goals and in the general education curriculum, where appropriate. (Ed. Code, §§ 56343(b); 56341(d)(1).)

- If a parent refuses to consent to an IEP component the district determines is necessary to provide a FAPE, the school district must, with reasonable promptness, initiate a due process proceeding seeking a determination that it may implement the IEP without the parent's consent. (Ed. Code, § 56346, subd. (f).)

The purpose of these provisions is to ensure that the educational needs of a disabled child are met as soon as possible. The first requires a district to be vigilant for inadequacies in the child's IEP, and the second requires a district to seek a quick resolution of an impasse between the parents and district members of the IEP team over what is necessary to provide the child a FAPE.

"The reason for this urgency is that it is the child who suffers in the meantime ... The obvious point of § 56346(f) is to minimize the duration of the denial of a FAPE by requiring the school district, if it cannot reach agreement with the child's parents, to initiate the process to adjudicate the dispute." (*I.R. v. Los Angeles Unified School Dist.* (9th Cir. 2015) 805 F.3d 1164, 1170.)

As of September 1, 2021, Student was not attending school at all. Student had already missed 23 school days, and San Bernardino had no reason to believe that he would begin attending school at Chavez without interventions.

This was not a situation where Student was failing to make progress on a single goal. Student's school refusal meant Student was making no progress on his general education curriculum or any of his goals. It was a situation that demanded prompt action.

With an overwhelming probability that Student would continue to fall further behind every day in his progress on goals, and in the general education curriculum, it was not only appropriate, but essential, for San Bernardino to revise Student's IEP to offer a program option addressing Student's non-attendance. After the IEP team concluded on September 1, 2021, that distance learning would not provide Student a FAPE, it needed to search for other alternatives that would allow Student to access his educational program.

San Bernardino was required to have a continuum of program options available to meet the needs of individuals with exceptional needs for special education and related services. (Ed. Code §§ 56360 and 56361.) The May 21, 2021, IEP noted Dr. Morgan's recommendation that San Bernardino be prepared to support Student's attendance with functional behavior assessment and a behavior intervention plan when school returned to in-person instruction. One program option Student's September 1, 2021, IEP team might have considered based on this recommendation would have been to offer Student a temporary placement providing in-home instruction and related services, to allow time to assess Student's functional behavior and develop a behavior intervention plan for transitioning Student back to in-person learning. However, San Bernardino did not propose any changes to the in-person program option of its pending May 21, 2021, FAPE offer.

Alternatively, San Bernardino was required to resolve the impasse with Parents over Student's educational program by promptly initiating a due process proceeding seeking a determination that the May 21, 2021, IEP offered Student a FAPE and San Bernardino could implement it without Parent's consent. If the hearing officer determined the May 21, 2021, IEP did offer Student a FAPE, San Bernardino could implement it and meet Student's needs. If the hearing officer determined the May 21,

2021, IEP did not offer Student a FAPE, San Bernardino would then have to revise the IEP. Either way, the impasse would be broken, and progress made on providing Student an appropriate educational program.

By failing to either revise its May 21, 2021, FAPE offer to Student to address his attendance issues, or promptly initiating a due process proceeding seeking a determination that it could implement the May 21, 2021, IEP without Parent's consent, San Bernardino's denied Student a FAPE in the 2021-2022 school year and 2022 extended school year, from the time of Student's September 1, 2021, IEP team meeting.

Student prevailed on Issues 1. a., b., c., and e.

ISSUE 1.d.: DID SAN BERNARDINO DENY STUDENT A FAPE IN THE 2021-2022 SCHOOL YEAR BY FAILING TO OBTAIN INFORMATION ON STUDENT'S PRESENT LEVELS OF PERFORMANCE AS PART OF HIS APRIL 13, 2022, TRIENNIAL REEVALUATION?

Student contends San Bernardino denied Student a FAPE in the 2021-2022 school year by failing to determine Student's present levels of performance in academics and functional performance to be used to develop Student's April 13, 2022, IEP. San Bernardino contends the district IEP team members included in Student's annual IEP the most recent information they had.

An annual IEP must contain a statement of the individual's present levels of academic achievement and functional performance, including the manner in which the disability of the individual affects his involvement and progress in the regular education curriculum. (20 U.S.C. § 1414(d)(1)(A)(i)(I); 34 C.F.R § 300.320(a)(1); Ed. Code, § 56345,

subd. (a)(1).) The purpose of present levels is to establish a baseline relative to which the teaching staff and IEP team may determine goals and objectives and against which they measure student progress. (*Hood River County School District v. Student* (D. Or., July 1, 2021, No. 3:20-CV-1690-SI) 2021 WL 2711986, at *14, appeal dismissed (9th Cir., June 6, 2022, No. 21-35616) 2022 WL 3073835.) Present levels must be stated in specific terms to inform a revision of the IEP. (*Ibid.*) They provide a roadmap, "so that approaches for ensuring the child's involvement and progress in the general curriculum ... can be identified." (*Ibid.*)

As of his April 13, 2022, IEP, Student had not attended school for 10 months. No information on Student's present levels of performance in academics or functional performance was available, whether from formal assessments, classroom observations, teacher input, or work samples. The most recent information on Student's performance was from March 2021 diagnostic assessments in reading, writing, and math, and from independent educational evaluations in March and April 2021, in the areas of speech and language, occupational therapy, and educationally-related mental health data. The most recent information regarding Student's adaptive living skills and health was collected in 2019.

In the complete absence of any information on Student's present levels of performance, Parents and the other IEP team members could not meaningfully participate in the evaluation of Student's progress, or develop meaningful annual goals for Student. As a result, Student's baselines and annual goals in his April 13, 2022, IEP remained unchanged from those in his May 21, 2021, IEP.

The failure to have data on Student's present levels of performance impeded Student's right to a FAPE, and significantly impeded Parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to Student.

Student prevailed on Issue 1.d.

ISSUE 1.f.: DID SAN BERNARDINO DENY STUDENT A FAPE IN THE 2021-2022 SCHOOL YEAR BY FAILING TO REVIEW STUDENT'S JUNE 2022 INDEPENDENT EDUCATIONAL EVALUATION IN ASSISTIVE TECHNOLOGY?

Student contends San Bernardino denied Student a FAPE by never reviewing an independent assistive technology assessment of Student completed in June 2022. San Bernardino presented no evidence or argument pertaining to this Issue.

A parent may request an independent educational evaluation at public expense if the parent disagrees with an evaluation obtained by the school district. (20 U.S.C. § 1415(b)(1); 34 C.F.R. § 300.502(b)(1); Ed. Code, §§ 56329, subd. (b), 56506, subd. (c).) The school district must respond, without unnecessary delay, by either filing a request for due process hearing to show that its evaluation was appropriate, or provide the requested independent educational evaluation. (34 C.F.R. § 300.502(b)(2); Ed. Code, § 56329, subd. (b) and (c).)

If a parent obtains an independent educational evaluation at public expense, the public agency must consider the independent educational evaluation in any decision made with respect to the provision of FAPE to the child. (34 C.F.R. § 300.502(c).) The law does not establish a specific timeline for when the public agency must convene an IEP team meeting to consider the independent educational evaluation.

In January 2022, San Bernardino agreed to fund an independent assistive technology evaluation of Student by assessor Cindy Cottier. Cottier completed the evaluation in June 2022 and provided an evaluation report to San Bernardino and Parents. Her report noted Student's April 13, 2022, IEP indicated he required assistive technology, but offered no specific forms of assistive technology. Cottier found Student demonstrated difficulty with writing, spelling, and reading comprehension. She recommended he be provided specific assistive technology software for word prediction, text-to-speech conversion, and speech-to-text dictation. Cottier believed use of this software would allow Student to work more efficiently, effectively, and independently, and increase his motivation and interest in completing academic work. Cottier's evaluation was never reviewed by any IEP team.

San Bernardino's failure to consider Cottier's independent assistive technology evaluation was a procedural error. A procedural error results in a denial of educational opportunity where, absent the error, there is a "strong likelihood" that alternative educational possibilities for the student "would have been better considered." (*Doug C., supra*, 720 F.3d at p. 1047.) Here, Student had been found to require assistive technology prior to Cottier's independent evaluation, but was not being provided any. If an IEP team had reviewed Cottier's evaluation, it would have considered her recommendations of specific assistive technology software to assist Student.

The evidence demonstrated the failure to consider Cottier's report denied Student a FAPE by significantly impeding Parents' opportunity for Parent to participate in the decision-making process regarding the provision of Student's FAPE. As a result, the IEP team has never considered any modifications to Student's IEP services based on Cottier's report.

Student proved by a preponderance of the evidence that San Bernardino denied Student a FAPE by failing to timely review the assistive technology independent educational evaluation.

Student prevailed on Issue 1.f.

ISSUE 1.g.: DID SAN BERNARDINO DENY STUDENT A FAPE IN THE 2021-2022 SCHOOL YEAR BY FAILING TO FILE A DUE PROCESS HEARING REQUEST TO ESTABLISH THAT ITS APRIL 2022 IEP OFFERED STUDENT A FAPE AFTER PARENTS DECLINED TO CONSENT TO THE PROPOSED IEP?

Student contends San Bernardino denied him a FAPE by failing to file a due process hearing request to establish that its April 13, 2022, IEP offered Student a FAPE after Parents declined to consent to the proposed IEP. San Bernardino presented no evidence or argument in response to this issue.

The evidence established that Parents refused to consent to San Bernardino's April 13, 2022, IEP and its offer of FAPE to Student. As noted above in the discussion of Issues 1. a., b., c., and e., California Education Code, section 56346, subdivision (f) requires a school district to promptly initiate a due process hearing if a parent refuses to consent to an IEP component the district determines is necessary to provide a FAPE.

San Bernardino committed a procedural violation of section 56346, subdivision (f) by failing to file a due process hearing request when Parents declined to consent to the April 13, 2022, IEP. This procedural violation denied Student a FAPE by delaying resolution of the impasse between San Bernardino and Parents over Student's

educational program. As a result, Student continued to refuse to come to school, which impeded his right to a free appropriate public education and deprived him of educational benefit.

Student prevailed on Issue 1.g.

ISSUES 2.a., b., c., AND d.: DID SAN BERNARDINO DENY STUDENT A FAPE IN THE 2022-2023 SCHOOL YEAR BY FAILING TO ADDRESS STUDENT'S ATTENDANCE ISSUES AND LACK OF PROGRESS ON HIS IEP, TAKE REASONABLE STEPS TO DETERMINE WHY STUDENT WAS NOT ACCESSING HIS IEP AND RELATED SERVICES, AND OFFER STUDENT SUPPORTS AND SERVICES NECESSARY FOR STUDENT TO ACCESS HIS IEP AND RELATED SERVICES?

Student contends San Bernardino denied Student a FAPE in the 2022-2023 school by failing to assess Student to determine why he was refusing to return to in-person instruction, address his attendance issue with his IEP team, and offer him services and supports necessary to allow him to return to school. San Bernardino contends its April 13, 2022, and May 31, 2023. annual IEP's offered Student a FAPE in the least restrictive environment appropriate for Student.

Student matriculated to Arroyo Valley High School, his home high school, for the 2022-2023 school year as a ninth-grade student. San Bernardino, through the April 13, 2022, IEP, continued to offer Student a school-based education program and related services. When classes began in August 2022, Student continued to be absent and did not attend school. Arroyo Valley dropped Student from its attendance roster later that

month based on unexcused absences. There was no attempt to address Student's attendance issues, and, in fact, no communication between Parents and San Bernadino from August 2022 until May 2023. On May 23, 2023, Father wrote San Bernadino requesting an IEP team meeting for Student.

Student's IEP team met on May 31, 2023, to develop a new annual IEP for Student. The May 31, 2023, IEP again offered Student special education and related services in an in-person educational program at Arroyo Valley High School. The IEP team developed three new speech goals addressing Student's intelligibility, and expressive and receptive language skills. Student's other goals remained unchanged from the May 21, 2021, IEP.

As in the prior school year and extended school year, and for the same reasons identified in the discussion of Issues 1.a., b., c., and e, San Bernardino denied Student a FAPE in the 2022-2023 school year and 2023 extended school year, by failing to revise its April 13, 2022 and May 31, 2023 FAPE offers to Student to address his attendance issues, despite Student's complete inability to access the educational program and related services in the IEP.

Student prevailed on Issues 2.a., b., c., and d.

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ISSUE 2.e.: DID SAN BERNARDINO DENY STUDENT A FAPE IN THE 2022-2023 SCHOOL YEAR BY FAILING TO TIMELY CONVENE AN ANNUAL IEP FOR STUDENT IN APRIL 2023?

Student contends San Bernardino denied Student a FAPE in the Student's ninth-grade, 2022-2023 school year, by convening Student's annual IEP late. The evidence showed San Bernardino convened the annual IEP on May 31, 2023, six weeks after the April 13, 2023, due date. San Bernardino did not respond to this issue.

A school district must conduct an IEP team meeting for a special education student at least annually to ensure that the IEP team revises the IEP to address "any lack of expected progress toward the annual goals and in the general education curriculum, where appropriate." (20 U.S.C. § 1414(d)(4)(A); Ed. Code, § 56343, subd. (d).) The parents of a child with a disability must be afforded an opportunity to participate in IEP meetings with respect to the identification, evaluation, and educational placement of the child, and the provision of a FAPE to the child. 34 C.F.R. § 300.501(b).

San Bernardino's failure to convene an IEP for Student before the annual deadline was a procedural violation of the IDEA that denied Student a FAPE. Student's April 13, 2022 IEP was not offering Student a FAPE, and Student as of April 13, 2023 was not attending school, and was making no progress towards his annual goals or in the general education curriculum. San Bernardino's failure to hold a timely annual IEP for

Student in April 2023 extended the duration of the existing denial of FAPE by six weeks, depriving Student of educational benefit during that time. The IEP team should have met timely to address Student's attendance issues and offer him a FAPE.

Student prevailed on Issue 2.e.

ISSUE 2.f.: DID SAN BERNARDINO DENY STUDENT A FAPE IN THE 2022-2023 SCHOOL YEAR BY FAILING TO OBTAIN INFORMATION ON STUDENT'S PRESENT LEVELS OF PERFORMANCE FOR HIS MAY 2023 IEP?

Student contends San Bernardino denied Student a FAPE in the 2022-2023 school year by failing to determine Student's present levels of performance in academics and functional performance to be used to develop Student's May 31, 2023. San Bernardino presented no evidence or argument concerning this issue, other than to aver that it had offered Student a FAPE.

As of his May 31, 2023, IEP, Student had not attended school for two years. As at the time of his previous annual IEP in April 2022, no information on Student's present levels of performance in academics or functional performance was available, whether from formal assessments, classroom observations, teacher input, or work samples. The most recent information on Student's performance was still the information from March 2021 diagnostic assessments in reading, writing, and math, and from independent educational evaluations in March and April 2021, in the areas of speech and language, occupational therapy, and educationally-related mental health data. The most recent information regarding Student's adaptive living skills and health was collected in 2019.

In the continuing absence of any information on Student's present levels of performance, Parents and the other IEP team members could not meaningfully participate in the evaluation of Student's progress, or develop meaningful annual goals for Student. As a result, Student's baselines and annual goals in his May 31, 2023, IEP remained unchanged from those in his May 21, 2021 IEP, except for three revised speech and language goals.

The failure to have data on Student's present levels of performance impeded Student's right to a FAPE, and significantly impeded Parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to Student.

Student prevailed on Issue 2.f.

CONCLUSIONS AND PREVAILING PARTY

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

ISSUE 1, SUBSECTION a:

San Bernardino denied Student a FAPE in the 2021-2022 school year by failing to address Student's attendance issues.

Student prevailed on Issue 1, subsection a.

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ISSUE 1, SUBSECTION b:

San Bernardino denied Student a FAPE in the 2021-2022 school year by failing to address Student's lack of progress on his IEP from October 6, 2021.

Student prevailed on Issue 1, subsection b.

ISSUE 1, SUBSECTION c:

San Bernardino denied Student a FAPE in the 2021-2022 school year by failing to obtain information on Student's present levels of performance as part of his April 2022 triennial reevaluation.

Student prevailed on Issue 1, subsection c.

ISSUE 1, SUBSECTION d:

San Bernardino denied Student a FAPE in the 2021-2022 school year by failing to offer Student supports and services necessary for Student to access the educational program and related services offered in his IEP.

Student prevailed on Issue 1, subsection d.

ISSUE 1, SUBSECTION e:

San Bernardino denied Student a FAPE in the 2021-2022 school year by failing to review Student's June 2022 independent educational evaluation in assistive technology.

Student prevailed on Issue 1, subsection e.

ISSUE 1, SUBSECTION f:

San Bernardino denied Student a FAPE in the 2021-2022 school year by failing to review Student's June 2022 independent educational evaluation in assistive technology.

Student prevailed on Issue 1, subsection f.

ISSUE 1, SUBSECTION g:

San Bernardino denied Student a FAPE in the 2021-2022 school year by failing to file a due process hearing request to establish that its April 2022 IEP offered Student a FAPE after Parents declined to consent to the proposed IEP.

Student prevailed on Issue 1, subsection g.

ISSUE 2, SUBSECTION a:

San Bernardino denied Student a FAPE in the 2022-2023 school year by failing to address Student's attendance issues.

Student prevailed on Issue 2, subsection a.

ISSUE 2, SUBSECTION b:

San Bernardino denied Student a FAPE in the 2022-2023 school year by failing to take reasonable steps to determine why Student was not accessing his individualized educational program, called an IEP, and related services.

Student prevailed on Issue 2, subsection b.

ISSUE 2, SUBSECTION c:

San Bernardino denied Student a FAPE in the 2022-2023 school year by failing to address Student's lack of progress on his IEP.

Student prevailed on Issue 2, subsection c.

ISSUE 2, SUBSECTION d:

San Bernardino denied Student a FAPE in the 2022-2023 school year by failing to offer Student supports and services necessary for Student to access the educational program and related services offered in his IEP.

Student prevailed on Issue 2, subsection d.

ISSUE 2, SUBSECTION e:

San Bernardino denied Student a FAPE in the 2022-2023 school year by failing to timely convene an annual IEP for Student in April 2023.

Student prevailed on Issue 2, subsection e.

ISSUE 2, SUBSECTION f:

San Bernardino denied Student a FAPE in the 2022-2023 school year by failing to obtain information on Student's present levels of performance for his May 2023 IEP.

Student prevailed on Issue 2, subsection f.

REMEDIES

Courts have broad equitable powers to remedy the failure of a school district to provide a FAPE to a disabled child. (20 U.S.C. § 1415(i)(1)(C)(iii); Ed. Code, § 56505, subd. (g); see *School Committee of the Town of Burlington, Massachusetts v. Dept. of Education* (1985) 471 U.S. 359, 369 [105 S.Ct. 1996, 85 L.Ed.2d 385] (*Burlington*).) This broad equitable authority extends to an ALJ who hears and decides a special education administrative due process matter. (*Forest Grove, supra*, 557 U.S. 230, 244, n. 11.)

When a school district fails to provide a FAPE to a student with a disability, the student is entitled to relief that is “appropriate” in light of the purposes of the IDEA. (*Burlington, supra*, 471 U.S. at p. 369-371.) Parents may be entitled to reimbursement for the costs of placement or services that they have independently obtained for their child when the school district has failed to provide a FAPE. (*Id.*; *Student W. v. Puyallup School District* (9th Cir. 1994) 31 F. 3d 1489, 1496 (*Puyallup*).) A school district also may be ordered to provide compensatory education or additional services to a student who has been denied a FAPE. (*Id.* at p. 1496.) 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 pp. 1496-1497.) The conduct of both parties must be reviewed and considered to determine whether equitable relief is appropriate. (*Id.* at p. 1496.) 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. District of Columbia (Reid)* (D.D.C. Cir. 2005) 401 F.3d 516, 524, citing *Puyallup, supra*, 31 F.3d at 1497.) The award must be

fact-specific and be “reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place.” (*Reid*, supra, 401 F.3d 516 at] 524.)

REMEDY FOR FAPE DENIALS AND FAILURE TO PROVIDE STUDENT ANY EDUCATIONAL BENEFIT FROM AUGUST 2021 TO THE FILING OF THE AMENDED COMPLAINT IN AUGUST 2023.

San Bernardino argued, in its closing brief, that Student should not be awarded any compensatory education because Student provided no evidence of the type, amount, duration or need or duration of the compensatory services to be provided. While San Bernardino is correct that the lack of current assessment information makes it difficult to determine appropriate compensatory education, the Student should not be penalized because San Bernardino did not conduct assessments of Student to determine the effects of not attending school at all for over two years.

The lack of current assessment data regarding Student’s needs is attributable primarily to San Bernardino, which refused to offer Student assessments unless he came to school. San Bernardino’s failure to assess Student made it impossible for Parent to understand Student’s needs, present levels of performance, or needed services. The purposes of the IDEA are not served by requiring parents to fund private assessments, in the absence of district assessments, in order to prevail at hearing.

In this case, a comprehensive psychoeducational assessment is essential to arriving at a compensatory education remedy. Student was already struggling academically in distance learning in the 2020-2021 school year, and may need to have large amounts of compensatory education coordinated with his regular education

program. A recent, comprehensive psychoeducational assessment is needed to arrive at a compensatory education remedy that will help, rather than overwhelm, Student. The hearing officer may order that an impartial assessment, including an independent educational assessment, of the pupil be conducted for purposes of the hearing and continue the hearing until the assessment had been completed. (Ed. Code § 56505.1 subd. (e).) The cost of any assessment ordered under this subdivision shall be at public expense pursuant to subsection (d) of Section 300.502 of title 34 of the Code of Federal regulations and included in the contract between the department and the organization or entity conducting the hearing. (*Ibid.*)

Testimony at hearing indicated that San Bernardino is already in the process of conducting an educationally-related mental health services assessment and a functional behavior assessment of Student. These assessments need not be duplicated, but should be completed promptly, be discussed at an IEP team meeting, and shall be uploaded to Case Center as evidence for the upcoming hearing regarding remedies.

A psychoeducational assessor will be selected as follows:

- Within 15 days of the date of these orders, Student's attorney will provide San Bernardino's attorney the names of three assessors qualified to conduct a comprehensive psychoeducational assessment of Student.
- Within five days of receiving Student's list of potential assessors, San Bernardino must select at least one of the assessors to perform the assessment, and San Bernardino's attorney must advise Student's attorney of the assessor selected.

- Student's attorney shall inform OAH via written notice the name and contact information for the assessor no later than December 15, 2023.

The Office of Administrative Hearings and California Department of Education will pay for the psychoeducational assessment, which will include the assessment, observations of Student should the assessor request to do so, the generation of a report with recommendations for specific compensatory services for Student, and attendance of the assessor at the hearing regarding the compensatory services. This report shall be completed no later than February 1, 2024.

HEARING CONTINUANCE

A due process hearing must be conducted, and a decision rendered within 45 days of receipt of the due process notice, unless an extension is granted for good cause. (34 C.F.R. § 300.515(a) & (c) (2006); Ed. Code, §§ 56502, subd. (f), 56505, subd. (f)(3); Cal. Code Regs., tit. 1, § 1020.) As a result, continuances are disfavored. Good cause may include

- the unavailability of a party, counsel, or an essential witness due to death, illness or other excusable circumstances;
- substitution of an attorney when the substitution is required in the interests of justice; a party's excused inability to obtain essential testimony or other material evidence despite diligent efforts; or
- another significant, unanticipated change in the status of the case as a result of which the case is not ready for hearing. (Ed. Code, § 56505, subd. (f)(3); Cal. Rules of Court, rule 3.1332(c).)

OAH considers all relevant facts and circumstances, including

- the proximity of the hearing date;
- previous continuances or delays;
- the length of continuance requested;
- the availability of other means to address the problem giving rise to the request;
- prejudice to a party or witness as a result of a continuance;
- the impact of granting a continuance on other pending hearings;
- whether trial counsel is engaged in another trial;
- whether the parties have stipulated to a continuance;
- whether the interests of justice are served by the continuance or imposing conditions on the continuance; and
- any other relevant fact or circumstance. (Cal. Rules of Court, rule 3.1332(d).)

Here, good cause exists to continue the hearing of this matter to allow time to complete and consider the impartial psychoeducational evaluation of Student necessary for determining an appropriate remedy. The request for continuance is granted for good cause. The case shall proceed as follows:

The case is continued to March 5 and 6, 2024 for a second hearing regarding the type and amount of compensatory services that should be awarded to Student based upon San Bernardino's denial of FAPE to Student in this matter. The prehearing conference for the remedy portion of this hearing will take place on February 23, 2024 at 1:00 p.m.

At least five business days before the prehearing conference, OAH will upload a copy of the psychoeducational assessment into the Case Center folder for this case, and San Bernardino will upload its educationally-related mental health services and functional behavior assessments of Student.

At the second hearing, the ALJ and the parties will be able to question the assessors, and the parties may put on limited additional evidence and witnesses regarding compensatory education. The scope of the evidence allowed, and the number and identity of any witnesses will be determined at the prehearing conference.

ORDER

1. Student will participate in an impartial psychoeducational assessment, and currently-scheduled district assessments in the areas of educationally-related mental health, and functional behavior. The psychoeducational assessment will be at public expense. The assessment will be comprehensive and include assessment, observation (if the assessor determines it necessary), preparation of a written report that will contain service recommendations, and participation in the upcoming hearing on remedies. No IEP meeting prior to the continued hearing will be required to discuss the psychoeducational report. Within 15 days of the conclusion of the remedies hearing, the parties shall meet in an IEP to review the assessment.

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2. The psychoeducational assessor will be selected as follows:
3. Within 15 days of the date of this decision, Student's attorney will provide San Bernardino's attorney the names of three assessors qualified to conduct a comprehensive psychoeducational assessment of Student.
4. Within five days of receiving Student's list of potential assessors, San Bernardino must select one of the assessors to perform the assessment, and San Bernardino's attorney must advise Student's attorney of the assessor selected.
5. Student will file a notice of the choice of assessor with OAH, including the assessor's name and contact information, within three business days of receiving notice from San Bernardino of its selection.
6. The Office of Administrative Hearings and the California Department of Education will pay for the psychoeducational assessment, which will include the assessment, observations of Student should the assessor request to do so, the generation of a report with recommendations for specific compensatory services for Student, and attendance of the assessors at the hearing regarding the compensatory services.
7. This case is continued to March 5 and 6, 2024 for a second hearing regarding the type and amount of compensatory services that should be awarded to Student based upon San Bernardino's denial of FAPE to Student in this matter.

8. The Prehearing conference for the second hearing will be on February 23, 2024, at 1:00 p.m. The hearing will take place on March 5 and 6, 2024.
9. At least five business days before the prehearing conference, OAH will upload a copy of the psychoeducational assessment into the Case Center folder for this case, and San Bernardino will upload its educationally-related mental health services and functional behavior assessments of Student.
10. At the second hearing, the ALJ and the parties will be able to question the assessors and the parties may put on limited evidence and witnesses regarding compensatory education. The scope of the evidence allowed and the number and identity of any witnesses will be determined at the prehearing conference.
11. If Student does not present himself for the assessments, or does not complete the assessments without good cause, Student shall forfeit any remedies under the IDEA for compensatory education for any denial of FAPE. If Student cannot attend any of the assessment sessions, Student will send a written motion to OAH requesting to change assessment dates and good cause will be required.

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12. San Bernardino will provide the psychoeducational assessor with a complete copy of Student's educational records and this Decision not later than five business days after the assessor is selected. Parent will provide the psychoeducational assessor copies of any other relevant documents he wishes the assessor to review no later than five business days after the assessor is selected.
13. Both parties will receive copies of the assessments at least five days prior to the prehearing conference.
14. Following the second hearing, OAH will issue a decision on all remedies, including the remedy with respect to Issue 1., subsection f, based on San Bernardino's failure to review the independent educational evaluation of Student.

RIGHT TO APPEAL THIS DECISION

This is not the final administrative decision in this matter. The final decision will consist of these orders and the decision regarding remedies together. Pursuant to Education Code section 56505, subdivision (k), any party may appeal the final Decision to a court of competent jurisdiction within 90 days of receipt of the remedies Decision.

Robert G. Martin
Administrative Law Judge
Office of Administrative Hearings