

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

PARENTS ON BEHALF OF STUDENT,

v.

SADDLEBACK VALLEY UNIFIED SCHOOL
DISTRICT.

OAH Case No. 2018090473

DECISION

Parents on behalf of Student filed a due process hearing request (complaint) with the Office of Administrative Hearings, State of California, on September 13, 2018, naming Saddleback Valley Unified School District.¹ The matter was continued for good cause on September 28, 2018.

Administrative Law Judge Chris Butchko heard this matter in Mission Viejo, California, on January 23-25 and 29, 2019.

Timothy A. Adams, Attorney at Law, represented Student, assisted by Lauren-Ashley Caron, Attorney at Law. Parents attended all days of hearing.

Dan Harbottle, Attorney at Law, represented Saddleback Valley Unified School

¹ Saddleback Valley filed its response to Student's complaint on September 24, 2018, which permitted the hearing to go forward. (*M.C. v. Antelope Valley Unified Sch. Dist.* (9th Cir.) 858 F.3d 1189, 1199-1200 (*Antelope Valley*).

District. Diane Clark, Director of Special Education, attended all days of hearing on behalf of Saddleback Valley. Patricia Hammond attended the second day of hearing

A continuance was granted for the parties to file written closing arguments and the record remained open until February 12, 2019. Upon timely receipt of the written closing arguments, the record was closed and the matter was submitted for decision.

ISSUES²

Issue: Did Saddleback Valley's May 31, 2018 individualized education program deny Student a free appropriate public education by failing to:

- a. include appropriate goals for Student in social/emotional functioning, reading/writing, and gross and fine motor skills;³
- b. provide appropriate accommodations and modifications to meet Student's needs in social/emotional functioning, reading/writing, and gross and fine motor skills;
- c. offer appropriate related services for Student's needs in social/emotional functioning, reading/writing, and gross and fine motor skills; or
- d. offer an appropriate placement for Student which included interventions and individualized strategies to address his academic deficits, including one on one instruction in reading?

² The issues have been rephrased and reorganized for clarity. The ALJ has authority to redefine a party's issues, so long as no substantive changes are made. (*J.W. v. Fresno Unified School Dist.* (9th Cir. 2010) 626 F.3d 431, 442-443.)

³ Student withdrew at hearing all issues relating to the lack of speech and language goals, accommodations, modifications, and related services which were present in the prehearing conference order and his due process hearing request.

As remedy, Student sought reimbursement to Parents for tuition and the cost of travel for attendance at the Johnson Academy, reimbursement to Parents for the costs of private occupational therapy and a subscription to a reading program, and prospective funding for placement at a non-public school, including related services and transportation.

SUMMARY OF DECISION

Student did not establish that Saddleback Valley denied him a free appropriate public education through procedural violations of the Individuals with Disabilities Education Improvement Act or by failure to provide required accommodations, modifications, or related services. Similarly, Student did not establish that his placement was inappropriate or inadequate to meet his needs.

FACTUAL FINDINGS

BACKGROUND

1. At the time of hearing, Student was 8 years old. For the 2018-2019 school year, he was unilaterally placed by Parent in the Johnson Academy, a private school run by Cathy Johnson, after Parents disagreed with Saddleback Valley's offer of FAPE presented at the May 31, 2018 IEP team meeting. Student attended non-public school, the Prentice School, during the 2017-2018 school year under a settlement agreement with Saddleback Valley resolving a previous action between the parties.

2. Student has been eligible for special education services since 2013. Student attended special day classes in preschool, but was placed in a general education classroom for kindergarten. Student was initially eligible for special education services under Speech and Language Impairment, but has progressed beyond the need for such support. He was diagnosed with a sensory processing disorder at four years of age and he also has a degree of hypotonia, causing low muscle strength and poor co-ordination.

3. Student is currently eligible for special education and related services under the categories of Specific Learning Disability and Other Health Impairment. His learning disability is described as “a processing deficit in the area of attention,” and a diagnosis of Attention Deficit Hyperactivity Disorder is reported as his health impairment.

4. Student had difficulty with letters and sounds in kindergarten, and Parent was shocked that Saddleback Valley proposed placement for him in a special day class for first grade. Parent could not picture Student in an SDC and removed him from public school and placed him at Prentice for first grade in the 2016-2017 school year.

5. As a result of this dispute over placement, Parents filed the prior action on Student’s behalf on February 23, 2017, which was settled on May 26, 2017. Under the agreement, Student was classified as a parentally-placed private school student. The parties agreed that an IEP team meeting would be held on or before May 30, 2018, to develop an offer of FAPE for the 2018-2019 school year.

6. As part of the settlement, Parents waived all educational claims through August 19, 2018, except for any claims relating to Saddleback Valley’s offer of FAPE from the May 2018 IEP team meeting. Student returned to Prentice for second grade.

2017-2018: STUDENT’S SECOND GRADE YEAR

7. Student continued to have academic difficulties at Prentice. He remained behind grade level, particularly in reading and writing. He struggled to keep up, and Parent saw that he would become frustrated with schoolwork and would just “shut down.”

Reading Difficulties

8. Parents continued to be concerned by Student’s difficulties with reading, and contacted Dr. Perry Passaro in early 2018. Dr. Passaro is a licensed clinical and

educational psychologist and a diplomate in Cognitive Therapy. He began work as a school psychologist in 1992 and has worked for school districts in Santa Ana, Buena Park, and Placentia, among others. Since approximately 2007 he has had a private practice with concentration on cognitive behavioral therapy for both children and adults. Dr. Passaro treats anxiety disorders, depression, and obsessive-compulsive disorders, and does therapy with high-functioning individuals with autism spectrum disorders. Approximately a quarter of Dr. Passaro's practice consists of performing psychoeducational, educationally-related mental health, and threat assessments of students.

9. Parents retained Dr. Passaro to do an informal evaluation of Student. Dr. Passaro directed Dr. Kayley Shilakes, his associate, to conduct standardized testing of Student. Dr. Shilakes administered the Feifer Assessment of Reading and the Tests of Achievement from the Woodcock Johnson, fourth edition. The Woodcock Johnson test was not scored.

10. Dr. Passaro estimated that Student's total index score from the testing would be in the bottom one percent. Student's most serious deficiency was in phonology, although his reading fluency and comprehension was also of concern. Dr. Shilakes noted in her Test Session Observations Checklist that Student "appeared at ease and comfortable" but was "fidgety or restless at times." She did not check the boxes indicating that Student was tense or anxious.

11. Dr. Passaro did not write an assessment report and did not conduct a complete psychoeducational assessment. He was asked by Parents only to make a recommendation about Student's needs and not to conduct a full assessment. Dr. Passaro summarized his educational assessment of Student in a February 23, 2018 letter, which was shared with Saddleback Valley prior to the May 2018 IEP team meeting.

12. The letter reads in full:

This letter is written in regard to the educational assessment of [Student] recently completed at our office. As a result of the evaluation I strongly recommend that you seek to supplement the current small-group Orton-Gillingham intervention being employed at Prentice School with individualized Lindamood-Bell strategies as an appropriate and necessary intervention for his severe academic deficits.

I hope this information is helpful in any further decision-making. Please do not hesitate to contact me if I can be of any further assistance.

13. Dr. Passaro recommended adding Lindamood-Bell instruction to Student's program not because he had a professional reason that it would be particularly effective, but because the Orton-Gillingham intervention was not successful and some students are able to benefit from the combination of services. Dr. Passaro is not a reading specialist. Dr. Passaro's letter did not mention anxiety. Dr. Passaro did not see Student again or conduct any further inquiry before the May 2018 IEP team meeting.

14. Parents acted upon Dr. Passaro's recommendations and took Student to Lindamood-Bell on February 26, 2018, to have his reading levels assessed. Lindamood-Bell's assessment indicated that Student was in need of immediate intervention at Lindamood-Bell. Parents began an intensive course of reading instruction for Student at Lindamood-Bell.

15. The Lindamood-Bell assessment results were inconsistent. Student's results from the Word Opposites module from the Detroit Tests of Learning Aptitude put him above his chronological age, but the Gray Oral Reading Tests, 4th Edition, Form A, put

him below the first grade level in reading rate, accuracy, fluency, and comprehension. Similarly, on the Wide Range Achievement Test, 4th Edition, Form Blue, his word reading and spelling scores placed him at kindergarten equivalency. Other tests, such as the Peabody Picture Vocabulary Test, 4th Edition, Form A, and the Woodcock Reading Mastery Tests, 3rd Edition, Form A, put him slightly more than a year behind his chronological age.

16. Lindamood-Bell's testing results are not reliable. The testing is done for programmatic purposes rather than as an educational skill level evaluation. The testing is not administered with the rigor required by the test publishers, and the testing results bear disclaimers such as "measure administered for instructional planning purposes" and note that some testing was not completed.⁴

17. The testing results were summarized in a letter that recommended that Student should have an initial period of reading instruction in the Seeing Stars phonemic awareness program and the Visualizing and Verbalizing program for reading comprehension. The initial instruction period would take place for four hours per day, five days per week for eight to 10 weeks. The letter further noted that Student might also benefit from the "differentiated curriculum and content with the support of sensory-cognitive instruction and language" at the Lindamood-Bell Academy, an accredited private school.

18. Lindamood-Bell is both a commercial enterprise and a teaching methodology. Part of its business model is franchising teaching locations and part is

⁴ Lindamood-Bell administered further testing in June of 2018 to show that Student had made some degree of progress, but Dr. Passaro believed that the retesting was invalidated because the same instruments and, in some cases, the same testing forms, were used without sufficient passage of time.

training educators. To be hired at Lindamood-Bell, a candidate must have at least a high school diploma and must pass a test to demonstrate strength in literacy skills. Training for work at Lindamood-Bell requires a week-long workshop to learn to deliver instruction in Seeing Stars and Visualizing and Verbalizing. Lindamood-Bell also does continuing oversight and education by experienced staff of new trainees for as long as a year to ensure continued fidelity to the methodology. In a similar fashion, the company trains public and private school teachers to deliver instruction according to Lindamood-Bell principles and provides materials for them to use in teaching. Instruction based upon Lindamood-Bell principles and programs can be delivered by non-employees of Lindamood-Bell.

Sensory Issues

19. Parents were concerned that Student's academic difficulties might be worsened by sensory input issues and decided to have him evaluated for occupational therapy. Student had received occupational therapy services from Karen Buky, doing business as Butterfly Therapies, from January 2014 through June 2016. Ms. Buky is a licensed Occupational Therapist. She received a bachelor of science in Occupational Therapy degree magna cum laude from Pacific University in Forest Grove, Oregon. She has worked as an occupational therapist for San Bernardino County schools, the Desert Mountain Special Education Local Plan Area, Saddleback Valley, and Laguna Beach. She opened Butterfly Therapies in 2008 and currently has one associate. Her resume reports slightly less than 20 years of practice as an occupational therapist.

20. Ms. Buky had evaluated Student for occupational therapy when he was two years of age. Parents contacted her to evaluate Student again, which she did through testing in January of 2018. Ms. Buky administered the Bruininks-Oseretsky Test of Motor Proficiency: Second Edition, the Behavior Assessment System for Children, Second Edition (BASC-2), the Developmental Assessment of Young Children: Second

Edition, the Sensory Processing Measure: Home Form, and a Functional Listening Questionnaire.

21. Ms. Buky was qualified to administer the BASC-2, but not to interpret it or diagnose from its results. She used it to measure Student's progress. The BASC-2 was supplanted by a Third Edition in 2015 and is no longer a clinically reliable instrument. Similarly, the Developmental Assessment of Young Children is only normed for subjects up to five years of age, so its use with Student is also unreliable.

22. The evaluation found that Student had multiple sensory issues and global delays in development. Ms. Buky found that Student had below average fine motor precision, poor proprioception, self-care and daily living deficits, difficulty modulating his alertness, and was anxious at times. Parent reported on the BASC-2 that Student was in the clinically significant range for anxiety. Ms. Buky found that Student did not get defiant, but would "shut down" when frustrated.

23. The assessment report recommended occupational therapy services one time per week, but did not specify a number of minutes per week or the length of a service session, to address Student's issues so he could improve his functional skills and self-regulation. At hearing, Ms. Buky explained that her actual recommendation would have been for two therapy sessions per week, but she considered such a recommendation as beyond Parent's means and therefore futile.

24. Ms. Buky's assessment report included recommended goals for Student in gross and fine motor functioning, sensory processing, self-regulation, and self-care. The report suggested 25 occupational therapy goals in five areas of functioning. One goal was for him to independently tie his shoes and another was for him to copy text with appropriate letter sizing, formation, and margin use. Other goals were for Student to stay on-task for a 30-minute activity, climb a ladder, and maintain a supine flexion position for 25 seconds. Some goals, such as having Student do three chores per week

at home or pick out clothing appropriate to weather and occasion, or to not display fear when riding an escalator, were not appropriate for a school setting.

25. In addition, Ms. Buky made a recommendation for Student's educational placement. She recommended that Student be placed in a small group educational setting with a low student-teacher ratio, have accommodations to support his sensory needs and learning style, and be given specialized education to target and remediate his learning delays. Parents did not invite Ms. Buky to the May 2018 IEP team meeting, but her report was provided to the IEP team.

Psychiatric Recommendation

26. Student had been seeing Dr. Esther Park, a private psychiatrist, since April 2017 during his first year at Prentice and he was diagnosed by her with anxiety in March 2018. Dr. Park provided a letter with that diagnosis dated March 5, 2018, which was given to Saddleback Valley's school psychologist prior to the May 2018 IEP team meeting. Dr. Parks reported that Student suffered from ADHD, an "Unspecified Anxiety Disorder," dyslexia, "learning disorders," and sensory processing issues. She noted that Student had received medication trials that had resulted in "intolerable adverse effects."

27. Dr. Park's letter stated that Student could not be placed in a mainstream classroom and would not be able to attain average academic achievement in a regular classroom setting. She noted that Student had gotten "noticeable benefits" from the lower student/teacher ratio and dyslexia-focused teaching techniques at Prentice School, and that his anxiety was lower than it had been at public school. Her letter reported that it was "strongly predicted" that his disorders would be worsened and his further recovery minimal if he returned to a regular school setting. Dr. Park did not testify at hearing.

THE MAY 2018 IEP TEAM MEETING

28. The 2017-2018 school year was the second year that Student had been parentally placed at Prentice. Saddleback Valley staff had not seen Student since he left public school after kindergarten.

Preparation By Saddleback Valley For The IEP Team Meeting

29. On April 16, 2018, school psychologist Danielle Ross, educational therapist Maria Nacar, and occupational therapist Shelly Berg went to Prentice to observe Student and gather information from staff. The group conducted approximately one hour of observation during their visit.

30. Ms. Ross has worked as an educational psychologist for Saddleback Valley since completing her internship in August of 2015. Ms. Ross had spoken to Parent several times and exchanged emails with her prior to the observation. Ms. Ross knew from document review that Student had been diagnosed with ADHD, dyslexia, and anxiety. Ms. Ross knew from her conversations with Parent that Student was being treated by a psychiatrist for ADHD and anxiety. Ms. Ross did not ask Parent for permission to speak with Student's treating psychiatrist because she did not see a need to consult.

31. The classroom observation at Prentice took place in a class with one teacher and six or seven students. One group worked with the teacher, while two or three others worked in a small group. Students would transition between the small group and the larger group in a rotation. Staff observed Student in math class, which was an area of academic strength for him. Student needed prompting and redirection during work, but he had no behavioral issues.

32. Ms. Ross spoke with the teacher at Prentice about Student's socialization and behavior. The teacher said that Student needed prompting for focus and movement

breaks to help him maintain attention. However, Student was happy, social, and had no emotional issues. The teacher did not report any behavioral meltdowns or other such concerns to Ms. Ross and told her that his behavior and social/emotional functioning was not an area of concern. His areas of concern were focus, attention, and organization. Student's teacher attended the IEP team meeting but did not testify at hearing.

33. Ms. Nacar is a teacher certified to deliver special education instruction to students with mild to moderate impairment. She has approximately 20 years' experience. She now works as an adaptive physical education specialist for Saddleback Valley. She observed Student in class, in an individual activity, and during transition to and in recess. Ms. Nacar prefers to observe an entire day to get a full picture of a student, but believes she can get a sufficient understanding with a briefer observation if she has access to background information. Ms. Nacar did not speak with Parents prior to the IEP team meeting.

34. Ms. Berg is a licensed and registered occupational therapist with over 20 years' experience. She had given Student occupational therapy services in preschool and kindergarten. She worked with him on fine motor skills, visual motor integration, bilateral coordination, and muscle tone and strength.

35. Ms. Berg observed Student at Prentice and reviewed his work samples there, including a folder of material and examples posted on the classroom walls. She spoke briefly with the occupational therapist at Prentice, but did not observe Student at recess or in physical education class. Ms. Berg was told that Student was independent with fasteners but could not tie his shoes. His main issues were with fine motor control, specifically handwriting, and maintaining alertness. There were no mobility or gross motor impairments.

36. Ms. Berg knew that Ms. Buky provided Student occupational therapy services at the time of the Prentice observation, but did not consult with her. She read

Ms. Buky's occupational therapy assessment report prior to the IEP team meeting. Ms. Berg was acquainted with Ms. Buky, and believed she could call her if she had any questions about Ms. Buky's report. The Prentice occupational therapist consulted with Ms. Buky while Student was at Prentice. The Prentice occupational therapist did not testify at hearing.

The IEP Team Meeting

37. Pursuant to the May 26, 2017 settlement agreement, Saddleback Valley convened an IEP team meeting on May 31, 2018. The meeting was held with the school employees present and Parents, a representative of Lindamood-Bell, Student's teacher and an administrator from Prentice, and Dr. Passaro attending by conference call. Parents were accompanied by their legal counsel. The meeting was held with the parties in separate locations at the request of Parents' counsel.

38. Attending on behalf of Saddleback Valley were program specialist Mary Anderson, a general education teacher, a reading specialist, legal counsel, Ms. Ross, Ms. Berg, and Ms. Nacar.

39. The team reviewed the observations of Student at Prentice and discussed his progress on his previous goals. Parents did not agree with the team's assessment of Student's present levels of performance, but did not raise any specific concerns or ask questions. The present levels were developed with input from Student's teacher at Prentice and new annual goals were composed.

GOALS

40. The IEP team members created eight goals for Student for the period from May 2018 – 2019. Six of the goals were in academic areas and two were for occupational therapy needs.

41. Student's first academic goal was to stay on-task and with appropriate

posture and behavior during a 15-minute activity with no more than three verbal prompts. Two short-term objectives were proposed for the goal, with mileposts in November of staying on task with no more than five prompts in a 30-minute activity and in March of needing no more than four in 20 minutes. The goal addressed Student's need to be redirected by visual and verbal prompts at least seven times in 30 minutes.

42. The second academic goal was in writing, which was to have him able to focus on a writing topic and respond to questions and suggestions by adding five details to strengthen his writing over three trials with 80 percent accuracy. The November and March short-term objectives were to add three and then four details with 70 percent and 75 percent accuracy. The goal addressed Student's difficulty in adding details in writing and loss of focus and will to participate.

43. Student's organization skills were addressed in the next academic goal, which would be met by him keeping his belongings in organized locations 80 percent of the time on four of five days. Progress toward the goals would be shown by having his belongings properly stowed 50 percent of the time by November and 65 percent by March on four of five observed days. Student's need for organization was reflected in the fact that his belongings were only organized 40 percent of the time.

44. The fourth academic goal was to have Student read 100 high frequency words at a second-grade level with 75 percent accuracy in three of four trials. Student's November interim goal was to read from a 20-word list with 50 percent accuracy, and, by March, progress to 70 percent accuracy on a list of 50 words. This goal contains an error, requiring Student to read 100 words from a list of 50 words. The goal addressed Student's need to advance from 95 percent accuracy on lists of pre-primer and first grade word lists.

45. Reading comprehension was the focus of the fifth academic goal, which sought to have Student respond to five who/what/when/where questions from a

second-grade level story read aloud with 70 percent accuracy in four consecutive trials. The November progress mark was to respond to three who/what when questions with 50 percent accuracy in four consecutive trials, and to respond with 50 percent accuracy to five who/what/when/where questions in three consecutive trials by March. Student could answer simple who/what questions from an orally-read story with visuals and prompting 80 percent of the time.

46. Student's first occupational therapy goal was to copy two five-to-six word sentences from near point with improved letter formation and sizing and line orientation with 80 percent accuracy with no more than two verbal prompts over three sessions. Student's November goal was to demonstrate improved letter formation on the same terms, and by March to demonstrate improved line orientation. The purpose of the goal was to address Student's difficulties with visual motor skills and handwriting.

47. The other occupational therapy goal was for Student to independently tie his shoes, with mileposts of doing so with moderate and then minimal assistance. This goal addressed his needs in visual-motor integration and fine motor skills, as he could not tie his shoelaces.

48. The last goal was in academics, calling for Student to read from a list of 10 to 15 words with common long vowel sounds with 85 percent accuracy in two of three trials. No interim progress goals were reported for this goal. The purpose of this goal was for Student to progress from reading consonant/vowel/consonant words to reading words with long vowel sounds.

49. No goals were set in social/emotional functioning. Parents had no suggestions for or criticisms of the goals. The IEP team meeting report noted that Student was friendly and sociable, respectful to staff, and followed classroom routines. His Prentice teacher did not report concerns about his social/emotional functioning or behavior and stated that he had no difficulty navigating the campus. No request for or

discussion of physical therapy took place at the meeting. Parents did not ask for changes to the goals or for additional goals.

STUDENT'S HEALTH ISSUES

50. Parent told the IEP team about Student's hypotonia, food allergies, and current medication. Parent informed the team that Student was recently diagnosed with excessive pronation in his feet, which made it difficult to walk normally. Although his podiatrist had recommended physical therapy two times per week, the family was trying to get by with stretching exercises because they could not afford the additional therapy. Student was recommended to wear inserts in his shoes when doing strenuous activity. Parent said the pronation did not affect his ability to participate in physical education class. The pronation was not severe enough to affect Student's ability to navigate the school.

51. Parent told the team that Student had recently stopped taking a medication for ADHD because it had ceased being effective and had adverse effects. Starting in the spring, Student would react to frustration in new ways. He would cry in class or climb under a table. Parent stated that Student would have these meltdown "episodes" every week or two. She stated that his classroom teacher was concerned by these episodes, but told Parent she could handle them.

RECOMMENDATIONS FROM LINDAMOOD-BELL

52. A representative of Lindamood-Bell addressed the IEP team and told them that Student had made progress in his reading ability, but would benefit from further attendance at Lindamood-Bell. He recommended that Student continue taking the Seeing Stars and Visualizing/Verbalizing programs offered by Lindamood-Bell. Dr. Passaro stated that the Orton-Gillingham instruction used at Prentice was not working

and supported the recommendation to use the Lindamood-Bell programs to support Student's reading.

ACCOMMODATIONS

53. The IEP team found that Student had special need for help with his reading and writing skills, his ability to sustain attention, and his fine motor abilities. The team did not find that modifications to the general education programming were necessary for Student. Despite the fact that he was delayed in his achievement, his intellectual ability was sufficient to progress in the general education curriculum.

54. The offer of FAPE included a significant number of accommodations. The IEP team proposed that Student be provided with visual and verbal cueing, that he be given books on tape, text-to-speech, speech-to-text, and have passages read aloud to him, that he have additional time as needed on writing assignments, that directions be simplified for him and repeated to him, that "sensory strategies" be embedded in his school day, that previously-learned material would be reviewed with him to aid retention, and that he be given preferential seating in class.

55. The accommodations were explained to Parents. Student's teacher at Prentice told the team that Student did not need fidget devices. Ms. Berg suggested a number of additional strategies to maintain Student's alertness level during class, but Parents declined to employ them because they might be distracting. The Prentice teacher noted that she employed movement breaks with Student to keep him involved in class. Parents did not ask questions about the accommodations or ask for additional accommodations.

PLACEMENT AND SERVICES

56. Saddleback Valley did not offer continued placement at Prentice. Instead, they proposed that Student be placed in a co-taught collaborative class at Del Lago

Elementary School, one of Saddleback Valley's public schools. Saddleback Valley members of the IEP team explained the co-taught collaborative class to Parents.

57. The class combined a general education classroom with special education services. Approximately 20 to 25 general education students and six special education students would be in the class. The class is co-taught with a general education teacher in the front leading the lesson, and a special education teacher in the rear working with the special education students. The special education students would work on the standard curriculum and access support from the special education teacher as needed. Ms. Nacar believes that co-taught classes are a means of managing the anxiety that special education students feel in a general education setting and that they are effective for exposing special education students to typically-developing peers.

58. As part of its IEP offer, Saddleback Valley would provide Student with a full-time one-to-one aide to help him with his attention and focus issues. To support Student's reading and writing, Student would get 45 minutes per day of reading intervention in a small group or individually. The methodology was not specified in the IEP team meeting report, but Parents were told by the reading specialist attending the meeting that Student's reading instructor would be trained in both Orton-Gillingham and Lindamood-Bell techniques. Student's instructor would be sent for a week-long training in Orton-Gillingham. Further, the reading specialist trains Saddleback Valley's teachers in Lindamood-Bell techniques and would train and continue to supervise the instructor. Those assurances were not written into the IEP team meeting report.

59. The IEP offer included 30 minutes per week of occupational therapy and 30 minutes per week of consultation between Student's teachers and the occupational therapist. Student was also offered extended school year services of 90 minutes daily in a district reading clinic and 60 minutes of group occupational therapy. The offer of occupational therapy during the extended school year did not specify the frequency or

type of service, listing it as "Any other frequency or as needed."

60. To support Student's transition back to public school, the IEP offer included a transition plan that provided for Student to tour the school campus and classroom and meet with the school psychologist. In addition, Student would be "front-loaded" with the school schedule, and, if possible, the classroom's schedule.

61. Parents did not request additional services or changes to the offer of services. Parents did not accept the IEP offer. Their counsel asked that they be given an opportunity to observe the co-taught classroom. Ms. Ross agreed to arrange an observation, which took place on June 11, 2018.

PARENTS' OBSERVATION OF THE CO-TAUGHT CLASS

62. Parent observed the class at Del Lago with Dr. Jamie Lesser, an associate psychologist in Dr. Passaro's office. They watched small group instruction in Language Arts and met the teachers. The observation took place during the last week of school before summer break and lasted approximately 50 minutes.

63. Parent did not like the proposed placement. Parent thought the class was too chaotic. Parent believed that Student would be too distracted in the class to learn. Parent was worried that Student might use his aide as a crutch and become dependent, and Parent did not know what the qualifications or training of the aide would be.

64. At the request of Parents, Dr. Passaro drafted an "educational consultation" letter dated June 30, 2018, based upon Dr. Lesser's observation. The letter noted that the students in the third grade class at year-end were reading at a level "far beyond" Student's current ability as a second-grade student. In addition, he calculated that the class had an overall 13:1 student to teacher ratio, which Dr. Passaro believed was not appropriate. In the letter Dr. Passaro recommended no more than a 4:1 ratio, and preferred a one-to-one ratio, for reading instruction. It further stated that two and one half to three hours of reading intervention per day was the correct amount of

intervention to be given to students reading more than two years below grade level.

65. Dr. Passaro's letter also incorrectly stated that there was no transition plan in Student's IEP, and that an appropriate transition plan would involve multiple progressive exposures to the new school and incorporate cognitive and behavioral therapy elements. In addition, the letter expressed concern that Saddleback Valley would delay delivering the Lindamood-Bell based reading intervention to Student or would fail to have it delivered by a person who had taken the required training in Seeing Stars and Visualizing and Verbalizing. Dr. Passaro's letter was prepared well after the IEP team meeting and was not available to the team.

UNILATERAL PARENTAL PLACEMENT AT JOHNSON ACADEMY

66. Parents decided that Student had not made sufficient progress in his two years at Prentice. They removed him from Prentice and enrolled him in the Johnson Academy for Therapeutic Learning for the 2018-2019 school year. Johnson Academy is run by Catherine Johnson, a speech and language pathologist who studied reading instruction methodologies to assist her own child with dyslexia. She holds bachelor's and master's degrees in Communication Disorders from California State University, Fullerton.

67. Ms. Johnson is certified by the Center for Effective Reading Instruction as a Structured Literacy Teacher. She has taken two-day training courses in Seeing Stars and Visualizing and Verbalizing from Lindamood-Bell, a three-day course on the predecessor Lindamood Phoneme Sequencing technique, and attended sessions on the Rave-O Reading Program at Tufts University. Ms. Johnson's resume lists her current occupation as "Dyslexia Expert." Ms. Johnson holds a California teaching credential for special day instruction, but it was not clear whether Ms. Johnson would be teaching Student. Ms. Johnson does not require that teachers at her school have a teaching credential.

68. The Johnson Academy has a maximum student-teacher ratio of 6:1. It is

not accredited as a private school, is not a certified non-public school, and is part of the Community Home Education Program administered by the Orange County Department of Education. The Johnson Academy teaches the California state standards curriculum. Although it is part of a homeschooling program, it does have instructors and a physical location.

69. While attending the Johnson Academy in the 2018-2019 school year, Student suffered a serious fit of anxiety, which Parents and Ms. Johnson attributed to intrusive evaluative testing conducted by Saddleback Valley in preparation for Student's next IEP. Because they believed the testing had greatly upset Student, Parents withdrew consent for Student to be evaluated by Saddleback Valley. Dr. Passaro then visited the Johnson Academy to observe Student's anxiety and obtain an idea of his progress there.

CREDIBILITY

70. Parent's testimony was clearly emotionally weighted, and displayed understandable identification with Student. She described issues and events with Student that were not corroborated in the record or by other witnesses, particularly regarding Student's behavior at school. Like some Saddleback Valley witnesses, she gave some answers that were inconsistent with the documentary evidence or other witness' testimony. Overall, her testimony was reliable, if colored by interest.

71. A number of Saddleback Valley witnesses, including Ms. Ross, Ms. Berg, and Ms. Nacar, gave conflicting testimony about details surrounding the May 2018 IEP team meeting. In particular, no clear picture could be drawn about what documents were given to the IEP team prior to, during, or after the meeting. The question is not particularly significant, and the uncertainty may be due to some degree to the form of the questions posed to the witnesses. At worst, the witnesses were inaccurate in their answers on matters they were unlikely to have fixed in their memory.

72. Dr. Passaro was careful and measured in his testimony. He readily

acknowledged that he did not raise any concerns at the May 2018 IEP team meeting and that he did not have a strong opinion about the adequacy of the FAPE offer until after Dr. Lesser's observation. His testimony suffered from two infirmities, however.

73. Dr. Passaro's concern for Student's development and progress led him to frequently blur the line between what would be most preferable for Student's education and what is required for meaningful educational progress. In addition, his awareness of Student's troubles with anxiety in the fall of 2018 bled into his recollection of Student's mental state prior to the May 2018 IEP team meeting. Neither the record, Dr. Shilakes' testing observations, nor his own writings at the time reflect a concern with anxiety equal to the magnitude he presented at hearing. On that basis, and in view of the misstatements and dubious positions taken in his June 30, 2018 letter, Dr. Passaro's testimony was more that of an advocate than of a dispassionate expert.

LEGAL CONCLUSIONS

INTRODUCTION – LEGAL FRAMEWORK UNDER THE IDEA⁵

1. This hearing was held under the Individuals with Disabilities Education Act, its regulations, and California statutes and regulations intended to implement it. (20 U.S.C. § 1400 et. seq.; 34 C.F.R. § 300.1 (2006)⁶ et seq.; Ed. Code, § 56000 et seq.; Cal. Code Regs., tit. 5, § 3000 et seq.) The main purposes of the IDEA are: (1) to ensure that 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

⁵ Unless otherwise indicated, the legal citations in the introduction are incorporated by reference into the analysis of each issue decided below.

⁶ All subsequent references to the Code of Federal Regulations are to the 2006 version.

needs and prepare them for employment and independent living, and (2) to ensure that the rights of children with disabilities and their parents are protected. (20 U.S.C. § 1400(d)(1); see Ed. Code, § 56000, subd. (a).)

2. A FAPE means special education and related services that are available to an eligible child at no charge to the parent or guardian, meet state educational standards, and conform to the child's individualized education program. (20 U.S.C. § 1401(9); 34 C.F.R. § 300.17.) "Special education" is instruction specially designed to meet the unique needs of a child with a disability. (20 U.S.C. § 1401(29); 34 C.F.R. § 300.39; Ed. Code, § 56031.) "Related services" are transportation and other developmental, corrective and supportive services that are required to assist the child in benefiting from special education. (20 U.S.C. § 1401(26); 34 C.F.R. § 300.34; Ed. Code, § 56363, subd. (a).) In general, an IEP is a written statement for each child with a disability that is developed under the IDEA's procedures with the participation of parents and school personnel that describes the child's needs, academic and functional goals related to those needs, and a statement of the special education, related services, and program modifications and accommodations that will be provided for the child to advance in attaining the goals, make progress in the general education curriculum, and participate in education with disabled and non-disabled peers. (20 U.S.C. §§ 1401(14), 1414(d)(1)(A); Ed. Code, §§ 56032, 56345, subd. (a).)

3. In *Board of Education of the Hendrick Hudson Central School District v. Rowley* (1982) 458 U.S. 176, 201 [102 S.Ct. 3034, 73 L.Ed.2d 690] (*Rowley*), the Supreme Court held that "the 'basic floor of opportunity' provided by the [IDEA] consists of access to specialized instruction and related services which are individually designed to provide educational benefit to" a child with special needs. *Rowley* expressly rejected an interpretation of the IDEA that would require a school district to "maximize the potential" of each special needs child "commensurate with the opportunity provided" to

typically developing peers. (*Id.* at p. 200.) Instead, *Rowley* interpreted the FAPE requirement of the IDEA as being met when a child receives access to an education that is reasonably calculated to “confer some educational benefit” upon the child. (*Id.* at pp. 200, 203-204.)

4. The Ninth Circuit Court of Appeals has held that despite legislative changes to special education laws since *Rowley*, Congress has not changed the definition of a FAPE articulated by the Supreme Court in that case. (*J.L. v. Mercer Island School Dist.* (9th Cir. 2010) 592 F.3d 938, 950 [In enacting the IDEA 1997, Congress was presumed to be aware of the *Rowley* standard and could have expressly changed it if it desired to do so.]) Although sometimes described in Ninth Circuit cases as “educational benefit,” “some educational benefit,” or “meaningful educational benefit,” all of these phrases were applied to define the *Rowley* standard, which should be applied to determine whether an individual child was provided a FAPE. (*Id.* at p. 951, fn. 10.)

5. The Supreme Court’s recent decision in *Endrew F. v. Douglas County Sch. Dist. RE-1* (2017) 580 U.S. ____ [137 S.Ct. 988] reaffirmed that to meet its substantive obligation under the IDEA, a school district must offer an IEP reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances. The Ninth Circuit further refined the standard in *Antelope Valley, supra*, 858 F.3d at pp. 1200-1201, stating that an IEP should be reasonably calculated to remediate and, if appropriate, accommodate the child’s disabilities so as to enable the child to make progress in the general education curriculum, taking into account the child’s potential.

6. 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, evaluation, or educational placement of the child, or the provision of a FAPE to the child. (20 U.S.C. § 1415(b)(6) & (f); 34 C.F.R. 300.511; Ed. Code, §§ 56501, 56502, 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. (20 U.S.C. § 1415(f)(3)(B); Ed. Code, § 56502, subd. (i).) At the hearing, the party filing the complaint has the burden of persuasion by a preponderance of the evidence. (*Schaffer v. Weast* (2005) 546 U.S. 49, 56 62 [126 S.Ct. 528, 163 L.Ed.2d 387] (*Schaffer*); see 20 U.S.C. § 1415(i)(2)(C)(iii) [standard of review for IDEA administrative hearing decision is preponderance of the evidence].) Student, as the complaining party, bears the burden of proof in this case.

ISSUE 1A: FAILURE TO INCLUDE APPROPRIATE GOALS

7. Student contends that Saddleback Valley failed to draft and offer adequate goals for Student's needs in social/emotional functioning, reading/writing, and gross and fine motor skills. The IEP team drafted no goals in social/emotional functioning, four goals connected with reading and writing, and two occupational therapy goals.

8. A child's IEP must contain a statement of measurable annual goals, including academic and functional goals designed to meet the child's needs that result from the child's disability to enable the child to be involved in and make progress in the general education curriculum, and meet each of the child's other educational needs that result from the child's disability. (20 U.S.C. § 1414(d)(1)(a)(ii); 34 C.F.R. § 300.320(a)(2)(i); Ed. Code, § 56345, subd. (a)(2).) For each area of identified need, the IEP team must develop measurable goals that are based upon the child's present levels of academic achievement and functional performance, and which the child has a reasonable chance of attaining within a year. (Ed. Code, § 56344.) The failure to offer goals is a procedural violation.

9. Procedural violations of the IDEA only constitute a denial of FAPE if they: (1) impeded the student's right to a FAPE; (2) significantly impeded the parent's opportunity to participate in the decision making process; or (3) caused a deprivation of educational benefits. (20 U.S.C. § 1415(f)(3)(E)(ii); Ed. Code, § 56505, subd. (f)(2); *W.G. v.*

Board of Trustees of Target Range School Dist. No. 23 (9th Cir. 1992) 960 F.2d 1479, 1484 (*Target Range*).

10. Student contends that his level of impairment in social/emotional functioning is quite severe. He asserts that he needed goals to mark his progress in dealing with his anxiety at school and his difficulty in transitioning between environments. Student rests this argument on Dr. Passaro's testimony, noting that treatment for anxiety has to be carefully designed and thought out lest it become an overwhelming and difficult behavioral problem.

11. The assertion that Student had a sufficiently severe problem with anxiety to interfere with his education is not supported by the record or testimony. He was diagnosed by Dr. Park in her letter of March 5, 2018, as having an "Unspecified Anxiety Disorder," but her report does not set out the severity of that anxiety or any impact it was having on his education, and her only other reference to his anxiety is to note that it was now less severe than it had been.

12. Dr. Park did not attend the IEP team meeting or testify at hearing to explain the statements in her letter. Further, she began treating Student after he had been away from public school for nearly an entire school year, yet gave her opinion a year later that his anxiety was significantly reduced from what it had been when he was in kindergarten at public school. As she had no direct knowledge of the level of Student's anxiety before he entered Prentice, this statement was based upon second-hand information and is not reliable.

13. As part of Dr. Passaro's informal educational assessment, Dr. Shilakes noted in her testing report that Student displayed only mild signs of restlessness and impulsivity during testing, which Dr. Passaro testified at hearing could be attributed to ADHD or anxiety. He stated that Student's anxiety appeared to be "very well managed" during testing. Dr. Passaro acknowledged that his knowledge of Student's anxiety came

from Dr. Park's letter and anecdotal stories from Parents. In addition, Dr. Passaro's perspective on Student's level of anxiety in May 2018 is colored by his interactions with Student in the 2018-2019 school year when he observed Student at the Johnson Academy.

14. Student's teacher at Prentice reported that he was friendly and sociable, and they had no concerns in that area. To the degree that Student had episodes or problematic behavior, they were connected to medication issues. Because Student's anxiety did not interfere with his academic progress, there was no need to include goals in those areas.

15. The four goals for reading and writing in the IEP were criticized by Ms. Johnson at hearing and Student in briefing because they did not contain the methodology by which they would be achieved. This is an entirely novel requirement for goals, and appears to be a preference of Ms. Johnson. Establishing goals allows a parent a benchmark against which she can judge her child's progress and thereby have a means to judge the success of the implemented educational program. Student failed to provide any legal authority supporting his assertion that Saddleback Valley was required to designate the methodology to be used to achieve the goal or that Parent was entitled to dictate the methodology that would be employed by the teaching staff.

16 The choice of methodology is left to the expertise of the school and its employees. (*R.P. ex rel. C.P v. Prescott Unified School Dist.* (9th Cir. 2011) 631 F. 3d 1117, 1122. "The IDEA accords educators discretion to select from various methods for meeting the individualized needs of a student, provided those practices are reasonably calculated to provide him with educational benefit."; *G.D. ex rel. Dien Do v. Torrance Unified School Dist.* (C.D. Cal. 2012) 857 F.Supp.2d 953, 965.) Student and Ms. Buky argue that the occupational therapy goals in her evaluation should have been imported in full into Student's IEP, but have not explained how the goals already established

would be insufficient to allow Parent to meaningfully monitor Student's progress in reading and writing.

17. Student had significant occupational therapy needs because of his poor visual-motor integration, sensory issues, and poor coordination. Primarily these issues affected his handwriting and his self-care at school. To that end, goals in sentence copying with appropriate letter sizing, format, and orientation and in independent tying of his shoes were set.

18. Ms. Buky's evaluation report suggested 25 occupational therapy goals in five areas of functioning. One of those goals is to independently tie his shoes and another is to demonstrate appropriate letter sizing, formation, and margin use. Another occupational therapy goal proposed by Ms. Buky is for him to stay on-task for a 30-minute activity, which echoes the IEP's first academic goal.

19. Other goals suggested by Ms. Buky are for gross motor achievements, such as climbing a ladder or maintaining a supine flexion position for 25 seconds. While potentially helpful for his muscular development, these goals have little relevance to the school environment because there is nothing indicating that Student had gross motor impairment that has an effect on his academics. Similarly, the proposed goals that Student do chores at home or pick out clothing appropriate to weather and occasion are not academically-related.

20. The IEP team did not adopt all of Ms. Buky's goals, but it was under no obligation to do so and would be wrong to delegate its responsibility to her. Student has again not shown how the existing goals would have left Parent unable to monitor the effectiveness of Student's program through progress on the goals provided. Relief on Issue 1(a) is denied.

ISSUE I(B): FAILURE TO PROVIDE APPROPRIATE ACCOMMODATIONS

21. Student contends in briefing that Saddleback Valley failed to provide

necessary accommodations in three areas. First, Student required accommodations to help him deal with his awakening anxiety over failing to develop on a par with his brother and peers. Secondly, Student needed accommodations to support his transition back to public school due to his anxiety issues. Last, Student needed to be given additional time on his homework as an accommodation for his fine motor skills shortcoming.

22. Accommodations are alterations in the learning environment, the curricular format, or the use of equipment that allows an individual with a disability to gain access to content or complete assigned tasks. An accommodation allows a child with a disability another means to make educational progress.

23. Student has not explained what accommodation could be employed to help him accept his developmental differences with his brother or family. As discussed above, Student does not have sufficient anxiety issues to need a transition plan of the complexity suggested by Dr. Passaro. Student did have a transition plan proposed in the IEP team meeting report, which included tours, a meeting with the school psychologist prior to the start of the school year, and front-loading with school and class schedules. This plan meets Student's needs as established by the evidence in this case.

24. The lack of one specific accommodation is proposed as a dereliction in Student's education plan: additional time to do homework. Presumably, this relates to Student's difficulties with fine motor control and handwriting. No such accommodation was requested at the IEP team meeting, and there is no evidence in the record that Student required this accommodation. Further, already-proposed accommodations in the IEP plan, such as additional time as needed with writing assignments, text-to-speech, and speech-to-text, will be sufficient to meet needs posed by Student's motor skills deficits. Student has not carried his burden on Issue 1(b).

ISSUE 1(C): FAILURE TO OFFER APPROPRIATE RELATED SERVICES

25. Student argues that Saddleback Valley failed to provide him with adequate services for his needs due to anxiety and with an appropriate level of occupational therapy services. Because of his anxiety, Student argues again that he needed a more detailed transition plan for his return to public school.⁷ In addition, Student asserts that the level of occupational therapy services offered was insufficient to meet his needs.

26. An IEP for a disabled child must be reasonably calculated to enable a child .Ct. at p. 993.) The Supreme Court has noted that, “[t]he core of the [IDEA] ... is the cooperative process that it establishes between parents and schools.” (*Schaffer, supra*, 546 U.S. 56 at p. 53.) However, a school district has the right to select a program and/or service provider for a special education student, as long as the program and/or provider is able to meet the student’s needs; IDEA does not empower parents to make unilateral decisions about programs funded by the public. (*See, N.R. v. San Ramon Valley Unified Sch. Dist.* (N.D.Cal. January 25, 2007, No. C 06-1987 MHP) 2007 WL 216323; *Slama ex rel. Slama v. Indep. Sch. Dist. No. 2580* (D. Minn. 2003) 259 F.Supp.2d 880, 885.) An IEP is not required to conform to a parent’s wishes to be sufficient or appropriate. (*Shaw v. Dist. of Colombia* (D.D.C. 2002) 238 F.Supp.2d 127, 139 [The IDEA does not provide for an

⁷ In his briefing, Student argues that Saddleback Valley was in violation of Education Code section 56345, subdivision (b)(4), because it did not have a description of activities provided to reintegrate him to public school from Prentice. (*Brennise v. San Diego Unified Sch. Dist.* (9th Cir. 2015) 806 F.3d 451, 462-463.) Student did not allege the statutory violation in his due process hearing request and provide Saddleback Valley with notice that it was at issue, so it may not be raised here. (*See A.W. v. Tehachapi Unified School District* (E.D. Cal. March 8, 2019, No. 1:17-cv-00854-DAD-JLT) 2019 WL 1092574, **5-6.)

"education . . . designed according to the parents' desires."], citing *Rowley*, supra, 458 U.S. at p. 207.)to make progress appropriate in light of the child's circumstances. (*Andrew F.*, supra, 137 S

27. Student asserts that the lack of an extensive behavioral and cognitive therapy-based transition plan constitutes a failure to provide adequate related services. As discussed above, the record does not support the assertion that anything more was required than the transition plan offered.

28. As to occupational therapy services, the May 2018 IEP plan offered Student 30 minutes per week of occupational therapy. Student contends that Saddleback Valley failed to meet his needs because it took Ms. Buky's report at face value when it recommended one session of occupational therapy per week. Student acknowledges that the report did not specify any length for the occupational therapy sessions, but notes that if Ms. Buky had been consulted she would have explained not only that she intended that the length of the session should have been 50 minutes but also that her actual recommendation would have been for two 50-minute sessions per week if Parents had the means to pay for that much therapy. The difference between what Saddleback Valley offered and what Ms. Buky would have, but did not, recommend is contended to deprive Student of FAPE.

29. Saddleback Valley was under no obligation to adopt either Ms. Buky's explicit recommendation or her intended one, and it had no knowledge that her actual recommendation was less than what she believed necessary. Saddleback Valley's occupational therapist Ms. Berg is an occupational therapist of equal distinction and greater experience. Ms. Berg read and considered Ms. Buky's report prior to the IEP team meeting and considered its observations and assessment results. She had no questions to pose to Ms. Buky. Ms. Berg's opinion was guided by her previous experience with Student, her review of Ms. Buky's report, her observation of Student,

and her consultation with the occupational therapist at Prentice. Ms. Berg agreed with the stated recommendation in the report and the IEP team endorsed that recommendation. The fact that Ms. Buky would have recommended a higher level of service if Parents would have paid for it does not meet Student's burden of proof to show the level of service was inadequate.

30. At hearing Ms. Buky stated that a 30-minute occupational therapy session for a child of Student's age would be of minimal therapeutic value. With a young client, she stated, so much of the session is taken up with building rapport and warming up that nothing could be accomplished. Ms. Buky did concede that 45 minutes would be an adequate length for someone at Student's age.

31. Asked at hearing about Ms. Buky's contention that 30-minute sessions were inadequate, Ms. Berg flatly disagreed. She stated that her 30-minute sessions were nearly all therapy, and in the school setting a provider had to worry about the educational impact of taking a child out of class for a prolonged period; something not an issue for a private provider. Ms. Berg's explanation for her decision on session length was persuasive. Student failed to establish that his needs required a greater amount or duration of occupational therapy services than were offered at the May 2018 IEP team meeting. No violation is found in Issue 1(c).

ISSUE 1(D): FAILURE TO OFFER AN APPROPRIATE PLACEMENT

32. Student contends that Saddleback Valley's offer of placement and services was not reasonably designed to allow him to make appropriate progress because they did not appreciate the severity of his reading and writing difficulties and did not offer sufficiently intense intervention. In short, he argues that the plan to address Student's literacy issues was neither sufficiently large-scale nor individualized.

33. The sufficiency of any educational plan is measured at the time that it was created. (*Adams v. State of Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149; *Tracy N. v. Dept.*

of Educ., State of Hawaii (D. Hawaii 2010) 715 F.Supp.2d 1093, 1112.) This evaluation standard is known as the “snapshot rule.” (*J.W. v. Fresno Unified School Dist.* (9th Cir. 2010) 626 F.3d 431, 439.) Under the snapshot rule, the decision concerning an IEP is not evaluated retrospectively or in hindsight. (*Ibid.*; *JG v. Douglas County School Dist.* (9th Cir. 2008) 552 F.3d 786, 801.) In reviewing the sufficiency of an IEP’s offer of FAPE, the snapshot rule instructs that the offer must be evaluated based on whether it was reasonable given the information available to the team at the time.

34. 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. (See *Gregory K. v. Longview School 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 of educational services and/or placement must be designed to meet the student’s unique needs, comport with the student’s IEP, and be reasonably calculated to provide the pupil with meaningful educational benefit in the least restrictive environment. (*Ibid.*) An IEP should remediate and, if appropriate, accommodate the child’s disabilities so as to enable the child to make progress in the curriculum, taking into account the child’s potential. (*Antelope Valley, supra*, 858 F.3d at p. 1201.)

35. As noted above, a school district has the right to select a provider or methodology for a special education student as long as the chosen means is able to meet the student’s needs. (See, *San Ramon Valley, supra*, 2007 WL 216323.)

36. Student argues⁸ that the offer of FAPE should have included individualized

⁸ In his briefing Student argues that his placement violated the principles of least restrictive environment and attempted to demonstrate that the factors identified in *Sacramento City Unified Sch. Dist. v. Rachel H.* (9th Cir. 1994) 14 F.3d 1398, 1404, justified placing him in a private school rather than in a public school general education

Lindamood-Bell-based reading instruction to help Student overcome his difficulties with reading and writing. The offer, he asserts, was for “generic” intensive reading services that could be provided either individually or in a small group. He notes that Dr. Passaro recommended that Student receive two and one-half to three hours of reading per day, which he asserted was the guidance by the California State Board of Education for Students reading two or more years below grade level.

37. Based upon the progress reports from Lindamood-Bell, Parents believed that the Lindamood-Bell program was effective where Orton-Gillingham had failed. For that reason, they wanted instruction in that methodology. Parents had no trust in Saddleback Valley’s ability to provide a suitably-trained instructor, despite the assurances by Saddleback Valley’s reading specialist. Dr. Passaro’s June 30th, 2018 letter likewise criticized the IEP’s offer of Lindamood-Bell services because he did not believe Saddleback Valley could act in time to get an instructor trained. Because they did not have faith that Saddleback Valley would provide an appropriate instructor and deliver the promised intensive reading intervention, Parents concluded that Student was not being offered FAPE.

38. Parents may not dictate the methodology of an intervention (*G.D. v. Torrance, supra*, 857 F.Supp.2d at p. 965), but they are entitled to require that an

classroom. If a child cannot be educated in a general education environment, then the least restrictive analysis determines whether the child has been mainstreamed to the maximum extent that is appropriate in light of the continuum of program options. Student compares his placement in general education with a placement several steps down on the continuum of restrictiveness to argue that he should be placed at his preferred private school. This is a misuse of the principles of least restrictive environment and wholly unpersuasive.

educational plan be capable of implementation. Student contends Saddleback Valley would not be able to train a teacher to deliver Lindamood-Bell reading instruction over the course of a summer, so its offer of appropriate intensive reading intervention to start in the new school year was a false promise and they were justified in rejecting the offer and placing Student at the Johnson Academy.

39. The offer of reading instruction in the Lindamood-Bell methodology by Saddleback Valley was capable of fulfillment. The initial training can be completed in less than two full weeks. Student's chosen reading instructor, Ms. Johnson, completed both Seeing Stars and Visualizing and Verbalizing training in a total of four days. Instructors at Lindamood-Bell now complete their training in a week. At most, the substance of the objection to school-provided Lindamood-Bell instruction is that Lindamood-Bell requires its recent graduates to be supervised by their instructor for up to a year afterwards to be sure they are maintaining fidelity to the principles of the program.

40. Saddleback Valley had designated a staff member to take the training and had on its staff an already-trained reading specialist who was going to supervise the delivery of Lindamood-Bell instruction to Student. Student's assumption that Saddleback Valley would not be able to provide the reading intervention it promised in the offer of FAPE does not make the offer inadequate.

41. Similarly, Student's belief that he will get more benefit if he receives his instruction on a one-to-one basis does not make Saddleback Valley's offer inadequate because it includes small-group instruction. Dr. Passaro's educational consultation letter states that one-on-one instruction is the most appropriate intervention for Student, but it does not state that small group instruction would fail to offer any benefit. His June 30, 2018 letter objected to Saddleback Valley's placement because it had an overall 13:1 student to teacher ratio, but did not account for the fact that the students receiving

special education would be in a 6:1 ratio or for the effect of Student's proposed one-to-one aide. That proportion is reasonably close to Dr. Passaro's preferred 4:1 ratio and similar to that at the Johnson Academy.

42. Student might benefit more from receiving three hours of reading instruction per day, but that is not the test required under the law. The offer of FAPE produced at the May 31, 2018 IEP team meeting addresses Student's needs as known to the IEP team at the time and is reasonably calculated to provide him with educational benefit. Relief is denied on Issue 1(d).

ORDER

All of Student's requested relief is denied.

PREVAILING PARTY

Pursuant to 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. Here, Saddleback Valley prevailed on all issues heard.

RIGHT TO APPEAL

This Decision is the final administrative determination and is binding on all parties. (Ed. Code, § 56505, subd. (h).) Any party has the right to appeal this Decision to a court of competent jurisdiction within 90 days of receiving it. (Ed. Code, § 56505, subd. (k).)

DATED: March 22, 2019

/s/

CHRIS BUTCHKO

Administrative Law Judge

Office of Administrative Hearings