

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

CASE NO. 2021040283

PARENTS ON BEHALF OF STUDENT,

V.

VENTURA UNIFIED SCHOOL DISTRICT.

DECISION

JANUARY 24, 2022

On April 8, 2021, Student filed a due process hearing request with the Office of Administrative Hearings, called OAH, naming Ventura Unified School District, called Ventura. Student's amended complaint was deemed filed by OAH on August 10, 2021. Administrative Law Judge Sabrina Kong heard this matter by videoconference on October 5, 6, 7, 13, 19, 20, 21, 26, and November 2, 3, 4, 16, 17, and 18, 2021.

Attorney Andréa Marcus represented Student, and was assisted by paralegals Natalie Cummings and Juan Carlos Villanegrette. Parent attended the hearing on

October 5, 6, 7, and November 16, 2021, on Student's behalf. Student did not attend the hearing. Attorney Melissa Hatch represented Ventura. Attorneys Margaret Saleh and Kathe Grant from Hatch's office attended some days of the hearing. Ventura's Executive Director of Special Education Marcus Konantz attended all hearing days on Ventura's behalf.

At the parties' request, the matter was continued to January 18, 2022 for written closing briefs. Closing briefs were due on December 28, 2021 and January 18, 2022. The record was closed, and the matter was submitted on January 18, 2022.

ISSUES

A free appropriate public education is called a FAPE. An individualized education program is called an IEP.

1. Did Ventura deny Student a FAPE by failing to assess in all areas of disability, specifically:
 - a. autism and other health impairment in May 2012;
 - b. autism in March 2015;
 - c. autism in February 2018;
 - d(i). autism and pragmatic language from April 8, 2019 to August 10, 2021; and
 - d(ii). other health impairment from April 8, 2019 to August 10, 2021?

2. Did Ventura deny Student a FAPE by failing to offer appropriate goals in the following areas of need and in the IEPs from April 8, 2019 to August 10, 2021:
 - a. February 5, 2019 IEP: attention, work completion, pragmatic language, behavior, adaptive skills, social skills, atypicality, and fine motor;
 - b(i). January 15, 2020 IEP: attention, work completion, and pragmatic language;
 - b(ii). January 15, 2020 IEP: behavior, adaptive skills, social skills, atypicality, and fine motor;
 - c(i). February 17, 2021 IEP: attention, work completion, and pragmatic language;
 - c(ii). February 17, 2021 IEP: behavior, adaptive skills, social skills, atypicality, and fine motor?
3. Did Ventura deny Student a FAPE by failing to offer appropriate services in the following areas of need and in the IEPs from April 8, 2019 to August 10, 2021:
 - a. February 5, 2019 IEP: work completion, attention, pragmatic language, dyslexia, behavior, adaptive skills, social skills, atypicality, and fine motor;
 - b(i). January 15, 2020 IEP: work completion, attention, pragmatic language, and dyslexia;
 - b(ii). January 15, 2020 IEP: behavior, adaptive skills, social skills, atypicality, and fine motor;

- c(i). February 17, 2021 IEP: work completion, attention, pragmatic language, and dyslexia;
 - c(ii). February 17, 2021 IEP: behavior, adaptive skills, social skills, atypicality, and fine motor?
- 4. Did Ventura deny Student a FAPE by misrepresenting material facts to Parents regarding:
 - a. whether Student had autism and other health impairment as suspected disabilities in May 2012;
 - b. whether Student had autism as a suspected disability in March 2015, and February 2018;
 - c. whether Student had autism, other health impairment, and pragmatic language impairment as suspected disabilities from April 8, 2019 to August 10, 2021?
- 5. Did Ventura deny Student a FAPE by failing to implement:
 - a(i) the January 15, 2020 IEP, from April 13, 2020 through June 2021, during the COVID-19 school closure: from April 13, 2020, to June 11, 2020; and from August 18, 2020, to April 1, 2021;
 - a(ii) the January 15, 2020 IEP, from April 13, 2020 through June 2021, during the COVID-19 school closure: from June 12, 2020 to August 17, 2020; April 2, 2021, to June 10, 2021;
 - b. the February 14, 2017 IEP regarding an elective?
- 6. Did Ventura deny Student a FAPE by changing Student's placement outside the IEP process regarding an elective and a reduction in general education time in the February 14, 2017 IEP?

The Issues were renumbered for clarity. Subsections (i) and (ii) were delineated as subsections under Issues 1(d), 2(b), 2(c), 3(b), 3(c) and 5(a) to identify which parts of the issue Student and Ventura prevailed. The ALJ has authority to clarify a party's issues, so long as no substantive changes are made. (*J.W. v. Fresno Unified School District* (9th Cir. 2010) 626 F.3d 431, 442-443.

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

The IDEA affords parents and local educational agencies the procedural protection of an impartial due process hearing with respect to any matter relating to the identification, assessment, or educational placement of the child, or the provision of a FAPE to the child. (20 U.S.C. § 1415(b)(6) & (f); 34 C.F.R. § 300.511; 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 has the burden of proof in this case. 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).)

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 that 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 District v. Rowley* (1982) 458 U.S. 176, 201-204; *Endrew F. v. Douglas County School District RE-1* (2017) 580 U.S. ____ [137 S.Ct. 988, 1000].)

Student was 15 years old and in the 10th grade at the time of hearing. Student attended middle school at Ventura's De Anza Academy of Technology and the Arts in

the 2018-2019 school year, and transitioned to Ventura High School in the ninth grade in the 2020-2021 school year. Student resided within Ventura's geographic boundaries since 2012, and moved to Texas by October 1, 2021. Student was eligible for special education under the primary category of specific learning disability and the secondary category of speech and language impairment since May 2012 when he was six-years old.

As discussed below, Student's claims were limited to the period between April 8, 2019, two-years before Student filed his complaint with OAH, through August 10, 2021, the date Student filed his amended complaint. This Decision first addressed Student's erroneous assertion that the two-year statute of limitations did not apply to Issues 1a, 1b, 1c, 2a, 3a, 4a, 4b, 5b, and 6. As explained below, all of those claims were barred by the two-year statute of limitations. The Decision then addressed the remaining Issues.

ISSUES 1a, 1b, 1c, 2a, 3a, 4a, 4b, 5b, AND 6: THE TWO-YEAR STATUTE OF LIMITATIONS WAS NOT TOLLED BY THE EXCEPTIONS ON THE CLAIMS PREDATING APRIL 8, 2019

Student contends that the two-year statute of limitations did not apply to his claims against Ventura set forth in Issues 1a, 1b, 1c, 2a, 3a, 4a, 4b, 5b, and 6 based on the two statutory exceptions to the statute of limitations. First, Student contends Ventura did not assess Student for autism and attention deficit hyperactivity disorder/other health impairment, but misrepresented that it had conducted assessments in those areas when it assessed Student in May 2012, and withheld information showing Student had deficits in those areas. Student also contends Ventura

did not assess Student for autism and misrepresented it assessed for autism in March 2015 and February 2018, and withheld information showing Student had autism. Student contends Ventura's obligation to assess in all areas of suspected disability required it to assess in all disability areas, and Ventura's not doing so amounted to a specific misrepresentation, or withholding of information, to toll the statute of limitations.

Second, regarding Issues 2a and 3a, Student contends Ventura should have offered goals and services regarding

- behavior,
- attention,
- work completion,
- adaptive skills,
- pragmatic language,
- social skills,
- atypicality, and
- fine motor

at the February 5, 2019 IEP, which was operative during the two-year statute of limitations that began on April 8, 2019. Additionally, Student contends under Issue 3a that Ventura should have offered services for dyslexia at the February 5, 2019 IEP, which was operative during the two-year statute of limitations that began on April 8, 2019.

Third, although Student's Issues 4a and 4b were misrepresentation claims, Student contends the statute of limitations was tolled because Ventura withheld information from Parents that Student had autism and attention deficit hyperactivity

disorder/other health impairment as suspected disabilities in May 2012, and misrepresented that these were not areas of suspected disability at that time. Student further contends Ventura misrepresented that autism was not a suspected disability and withheld information from Parents that autism was a suspected disability in March 2015 and February 2018.

Finally, Student contends Ventura did not implement an elective in Student's February 14, 2017 IEP which had the effect of reducing the percentage of his general education participation and changing Student's placement outside the IEP process, without informing Parents. Specifically, Student contends Parents did not know Student never took the elective described in the February 14, 2017 IEP until they requested and received educational records in 2020. Student contends this amounted to a misrepresentation or withholding of information from Parents, tolling the two-year statute of limitations.

Ventura contends that the two-year statute of limitations barred all of Student's claims before April 8, 2019 because there was insufficient evidence that proved either of the statutory exceptions applied. Ventura contends it did not make any specific misrepresentations to Parents that it solved the problem forming the basis of Student's claims that it failed to assess for autism or attention deficit hyperactivity disorder/other health impairment. Ventura asserts it did not make misrepresentations to Parents about Student's areas of suspected disabilities. Ventura also contends it did not withhold any information it was required to provide to Parents which caused Parents to delay in timely filing Student's due process complaint.

A parent is required to request a due process hearing within two years of the date the parent knew or should have known about the alleged action that forms the basis of the complaint, or in such time as the State law allows. (20 U.S.C. § 1415(f)(3)(C).) In California, a request for a due process hearing “shall be filed within two years from the date the party initiating the request knew or had reason to know of the facts underlying the basis for the request.” (Ed. Code, § 56505, subd. (l).) The two-year limitations period does not apply to a parent if the parent was prevented from requesting the due process hearing due to either:

1. specific misrepresentations by the local educational agency that it had solved the problem forming the basis of the due process hearing request; or
2. the withholding of information by the local educational agency from the parent that was required to be provided to the parent under special education law. (*Ibid*; 20 U.S.C. § 1415(f)(3)(C)(D).)

For purposes of the statute of limitations, California’s discovery rule is consistent with the IDEA. In California, a claim accrues when a parent learns of the underlying facts that form a basis for the action. (Ed. Code, § 56505, subd. (l).) A parent’s knowledge that a student’s education is inadequate is sufficient for the statute of limitations to begin to accrue. (*M.M. & E.M. v. Lafayette School District*. (N.D.Cal., Feb. 7, 2012, Nos. CV 09– 4624, 10–04223 SI) 2012 WL 398773, at pp.**17–19 (*M.M.*), *affd.* in part & *revd.* in part (9th Cir. 2014) 767 F.3d 842, 858-859; see also *M.D. v. Southington Board of Education* (2d Cir. 2003) 334 F.3d 217, 221.) The statute of limitations begins to run when a party is aware of the underlying facts that would support a legal claim, not when

a party learns that the action was wrong. (*M.M., supra*, at p. *18; see also *Bell v. Board of Education of the Albuquerque Public Schools* (D.N.M. 2008) 2008 WL 4104070, at p.*17; *Avila v. Spokane School District 81* (9th Cir. 2017) 852 F.3d 936, 937, 945 [the IDEA’s statute of limitations barred claims that were filed more than two years after the time parents “knew or should have known” about the actions forming the basis for their complaint].) Congress did not intend to authorize the filing of claims under the IDEA many years after the alleged wrongdoing occurred. (*Alexopoulos v. San Francisco Unified School District* (9th Cir. 1987) 817 F.2d 551, 555.)

The Federal District Court for the Eastern District of California upheld OAH’s determination that parents’ claim was time barred when parents argued that they were unaware of how far below grade level student was performing until shortly before filing their complaint. (*Fernandez v. Elk Grove Unified School District*, E.D.Cal., March 31, 2020, No. 2:19-cv-00082-MCE-AC) 2020 WL 1532229.) (*Fernandez*.) *Fernandez* emphasized that for accrual purposes, it did not matter if parents understood that they had a particular legal claim; rather, what mattered was that parents had knowledge of student’s performance more than two years prior to the filing of the complaint. Specifically, the District Court concluded that parents demonstrated they knew, or should have known, “the problem which formed the basis of the action” by their communications with the IEP team annually about student’s subpar progress more than two years before they filed student’s claims. (*Id.* at **4-5.)

The IDEA requires that school districts establish and maintain procedures to ensure that children with disabilities and their parents are guaranteed procedural safeguards with respect to the provision of FAPE by such agencies. (20 U.S.C. § 1415(a).)

A copy of the notice of a parent's or guardian's rights shall be attached to the assessment plan. A written explanation of all the procedural safeguards under the IDEA shall be included in the notice of a parent's or guardian's rights. (Ed. Code, § 56321, subd. (a).) A copy of the procedural safeguards must be given by a school district to a particular parent of a child with a disability a minimum of once a year, except that a copy shall be given to the parents:

1. upon initial referral for assessment or parent request for assessment;
2. upon filing a request for a due process hearing;
3. in accordance with certain discipline procedures; or
4. upon parent request. (20 U.S.C. § 1415(d)(1)(A); 34 C.F.R. § 300.504(a); Ed. Code, § 56301, subd. (d)(2).

Thus, where the evidence shows that the parents were fully aware of their procedural options, they cannot excuse a late filing by pointing to the school's failure to formally notify them of those options. (*D.K. v. Abington School District* (3rd Cir. 2012) 696 F.3d 233, 246-247.)

Special education law does not recognize the doctrine of continuing violations as an exception to the two-year statute of limitations. (20 U.S.C. §§ 1415(b)(6)(B), (f)(3)(D); see also *E.F. v. Newport Mesa Unified School District* (C.D. Cal., June 23, 2015, No. SACV 14-00455-CJC (RNBx) 2015 WL 3867982, * 8, fn. 6, affd. on remand *E.F. by and through Fulsang v. Newport Mesa Unified School District* (9th Cir. 2018) 726 Fed.Appx. 535; *J.L. v. Ambridge Area School District* (W.D. Pa. 2008) 622 F.Supp.2d 257, 268-269 [finding that IDEA claims are not tolled under a continuing violation theory as the two exceptions specifically set forth in the statute are the exclusive exceptions to the statute of

limitations.) A parent may not file a due process complaint challenging the appropriateness of an IEP that was created outside the statute of limitations, although the IEP was in effect within the statute of limitations. (*K.P., etc., v. Salinas Union High School District* (N.D. Cal., April 8, 2016 No. 5:08-cv-03076-HRL) 2016 WL 1394377, **10-11 [student could not challenge development of IEP in effect outside two-year statute of limitations].)

VENTURA DID NOT MAKE SPECIFIC MISREPRESENTATIONS NOR WITHHOLD INFORMATION REGARDING AUTISM OR OTHER HEALTH IMPAIRMENT TOLLING THE STATUTE OF LIMITATIONS FOR ISSUES 1a, 1b, 1c, 4a, AND 4b.

Student's expert and clinical psychologist, Betty Jo Freeman, opined at hearing that Ventura should have concluded that Student had autism when it assessed him in 2012, 2015, and 2018 based on Student's with verbal/nonverbal deficits, and social immaturity which Ventura documented in each triennial assessment report, and IEP from 2012 to 2019. Freeman assessed Student in June 2021 specifically to determine if he had autism. Freeman was qualified to conduct the assessment based on her education, training, and experience. Freeman diagnosed Student with autism spectrum disorder based on Parent's 2021 report to Freeman of Student's behaviors from infancy to 2021; Freeman's June 2021 standardized testing; a June 2021 school observation; and her review of Student's records. including Ventura's assessment reports and IEPs for the years at issue.

In contrast to Freeman's findings regarding autism, Ventura's school psychologists opined at hearing that Student's verbal/nonverbal deficits, and social immaturity detailed in the prior triennial assessments and IEPs did not lead them to suspect autism as an area of suspected disability for Student, so it never conducted an autism assessment. Instead, Ventura's witnesses explained that the verbal/nonverbal deficits, and social immaturity detailed in Ventura's 2012, 2015, 2018, and 2021 triennial assessments and IEPs led Ventura to suspect, and conclude, Student had a specific learning disability and speech and language impairment, not autism.

The only relevant health condition under the special education eligibility category of health impairment in this hearing was attention deficit hyperactivity disorder. Student did not present any evidence of another other health impairment special education eligibility category besides attention deficit hyperactivity disorder. Regarding attention deficit hyperactivity disorder/other health impairment, Ventura never specifically assessed in this area in 2012. It concluded that attention deficit hyperactivity disorder/other health impairment was not a suspected disability. At hearing, Freeman agreed with Ventura's prior conclusion, and opined Student never had attention deficit hyperactivity disorder.

As explained below, Student did not prove that Ventura made any specific misrepresentations it had solved the problem forming the basis of Issues 1a, 1b, 1c, 4a, or 4b. Student also did not prove that Ventura withheld information from Parents it was required to provide regarding autism, or attention deficit hyperactivity disorder/other health impairment, that prevented Parents from timely filing the due process complaint.

FACTS DOCUMENTED IN THE 2012 ASSESSMENT REPORT AND THE 2012, 2013, AND 2014 IEPS ABOUT STUDENT'S BEHAVIOR AND ATTENTION FORMING THE BASIS FOR PARENTAL KNOWLEDGE TO TIMELY FILE THE COMPLAINT

Ventura's school psychologist Roxana Llano conducted an initial special education psychoeducational assessment of Student in 2012 when he was a kindergartener at Will Roger Elementary School. The assessment plan specifically represented Ventura would assess in the following areas:

- Pre-academic/academic achievement;
- Social/emotional behavior;
- Self-help/adaptive skills;
- Motor skills development;
- Language/speech/communication development;
- Intellectual development;
- Health; and
- Occupational therapy.

Parent consented to the assessment plan. Llano administered standardized assessments, observed Student in class, interviewed Parent and teachers, and both Parent and a teacher filled out standardized behavior and functional skills rating scales for the 2012 assessment. Llano summarized her assessment findings, results, and recommendations in the May 2012 psychoeducational report.

The May 2012 psychoeducational report documented Parent reports that Student adjusted well to routine changes; got along well with family members and peers; and that, except for speech delays and difficulty expressing his needs, Student's developmental milestones were within normal limits. Parent also reported Student had a family history of learning disabilities. The psychoeducational report also documented teachers' concerns with Student's

- inattentiveness,
- restlessness,
- immaturity,
- difficulty following directions, and
- frequent redirection and clarification to perform tasks.

A teacher rated Student's functional communication, conduct problems, adaptability, withdrawal, social skills, study skills and leadership skills in the at-risk range. A teacher also rated Student's social, emotional, and behavioral function in the clinically significant range as to hyperactivity, attention problems, and atypicality. Llano observed Student socializing and seeking adult attention in class.

The psychoeducational report further documented that Student required consistent prompting and redirection to maintain focus during testing and clarification and modification of instructions to perform test tasks. Llano attributed Student's inattentiveness to processing weaknesses and concluded that it did not result from an attention deficit hyperactivity disorder but rather to a specific learning disability. Llano concluded that Student's cognitive function was in the delayed range and that Student had significant weaknesses in auditory processing and adaptive function. Student scored in the lower-extreme to below-average range academically and demonstrated

strength in passage comprehension skills. Llano concluded that Student qualified for special education under specific learning disability based on a significant discrepancy between Student's intellectual ability and achievement in basic reading skills, and a processing deficit in Student's auditory processing skills.

Significantly, when Freeman reviewed Student's records as part of her June 2021 assessment, Freeman agreed with Llano that the documented attention difficulties/distractions in all of Student's assessments and IEPs, including the 2012 assessment, were unrelated to attention deficit hyperactivity disorder/other health impairment. However, Freeman attributed Student's attention difficulties/distractions to autism, in addition to the special education eligibilities Ventura concluded were impacting Student's education in 2012, namely specific learning disability and speech and language impairment.

Ventura shared the assessment findings and results with Parents at the May 2012 initial IEP team meeting. The 2012 IEP showed that Parents attended and participated in the 2012 IEP team meeting. Ventura gave Parents a copy of parental rights and procedural safeguards in 2012. The IEP team discussed eligibility, placement and services with Parents and included the following details about Student in the IEP document.

1. Student had below average cognitive function, and severely delayed syntax, morphology, and pragmatic language skills. His communication weaknesses interfered with his academic access. Student's pragmatic deficits such as topic maintenance, and awareness of social settings and personal space, impact communications.

2. Student had difficulties with receptive and expressive vocabulary, concept comprehension, following directions, intelligibility, turn taking, and voice intensity.
3. Student had social emotional and behavior function difficulties. He lacked maturity compared to peers, had difficulty interacting with others, and tended to play by himself.

Ventura did not specifically represent to Parents that it assessed Student for autism or attention deficit hyperactivity disorder/other health impairment in the 2012 assessment plan, in the 2012 psychoeducational report or during the May 2012 IEP team meeting. Ventura also did not specifically represent to Parents in 2012 that it had solved the problem regarding assessing for autism, or attention deficit hyperactivity disorder/other health impairment. In fact, Ventura never suspected that Student had autism, or attention deficit hyperactivity disorder/other health impairment in the 2012 based on information provided by Parent, and the information gathered through its 2012 assessment. Therefore, Ventura never assessed Student in these areas, or specifically represented that it did. Further, Ventura did not misrepresent material facts to Parents regarding solving the problem regarding autism, or attention deficit hyperactivity disorder/other health impairment as suspected disabilities as to Student.

Ventura also shared with Parents Student's updated behaviors and functions in 2013 and 2014 IEPs. The March 2, 2013 IEP reported that Student had below-average cognitive function and severely delayed syntax, morphology, and pragmatic language skills. Student spoke loudly, and had difficulties following directions, understanding verbal information, asking questions, retrieving vocabulary, retelling experiences, taking turns during conversation and with peers. The March 2, 2013 IEP also reported that Student lacked maturity compared to peers, had difficulty interacting with others, and

tended to play by himself. The March 2, 2013 IEP included a behavior support plan to address Student's non-compliant behaviors such as refusing to transition to the classroom, follow directions, and perform assigned non-preferred tasks.

The March 25, 2014 IEP reported similar behaviors and functions as the March 2, 2013 IEP. Additionally, the March 25, 2014 IEP reported that Student teased peers, exposed his bare stomach to peers daily, and blurted inappropriate sounds and words during academic instruction when the teacher spoke. Student had a behavior support plan in the March 25, 2014 IEP which identified disruptive behaviors such as inappropriate comments, yelling, getting out of seat, and inappropriately moving around during academic instruction. The information documented on the 2012 assessment report, and the 2012, 2013, and 2014 IEPs put Parents on notice of Ventura's findings and conclusions and provided them with all the information they needed to timely file for due process if they disagreed with Ventura.

FACTS DOCUMENTED IN THE 2015 ASSESSMENT REPORT AND THE 2015, 2016, AND 2017 IEPs ABOUT STUDENT'S BEHAVIOR FORMING THE BASIS FOR PARENTAL KNOWLEDGE TO TIMELY FILE THE COMPLAINT

Ventura's school psychologist Katherine Beley conducted a psychoeducational assessment of Student as part of Student's 2015 triennial assessments. The assessment plan specifically represented Ventura would assess in the following areas:

- Pre-academic/academic achievement;
- Social/emotional behavior;
- Self-help/adaptive skills;

- Motor skills development;
- Language/speech/communication development;
- Intellectual development; and
- Health.

Parent consented to the assessment plan. Beley interviewed Mother and teacher, and both filled out standardized rating scales for the 2015 triennial assessment. Parents reported Student met all childhood milestones and Student's behaviors were in the average range. Neither Parent, nor the teacher, reported any maladaptive behaviors at home, or in the classroom leading Beley to suspect and assess for autism as a disability in 2015.

Beley summarized her assessment findings, results, and recommendations in the March 2015 psychoeducational report. Beley recommended that the IEP team consider specific learning disability, intellectual disability, and speech and language impairment as special education eligibilities. Beley noted in her March 2015 report that Student did not qualify for intellectual disability because he scored in the average range in several adaptive areas despite scoring low on most cognitive assessments. Ventura shared all of the assessment findings and results with Parents at the March 2015 IEP team meeting. The IEP team also discussed eligibility, placement, and services with Parents and included the following details about Student in the IEP document:

1. Student had significant difficulty with verbal expression, and memory for auditory and visual stimuli.
2. Student's anger and attitude impedes learning, but could be redirected.

3. Student struggled with vocabulary, and impulse control. Student blurted out inappropriate sounds and words during small group and when the teacher spoke.

The March 13, 2015 IEP document also noted that Ventura offered a behavior intervention plan in Student's 2014 IEP which was removed in March 2015 because Student no longer exhibited the maladaptive behaviors addressed by the behavior intervention plan.

Ventura did not specifically represent to Parents that it assessed Student for autism in the 2015 assessment plan, in the 2015 psychoeducational report, or during the March 2015 IEP team meeting. Ventura also did not specifically represent to Parents in 2015 that it had solved the problem regarding assessing for autism because Ventura never suspected autism as a disability in 2015 based on information provided by Parent, and based on information gathered through its assessment. Further, Ventura did not misrepresent material facts to Parents regarding solving the problem regarding autism, as a suspected disability as to Student.

Ventura also shared Student's updated behaviors and functions in the 2016 and 2017 IEPs with Parents. The March 5, 2016 and February 14, 2017 IEPs reported that Student continued to function low cognitively, with difficulties with memory for auditory and visual stimuli. However, the March 5, 2016 IEP also reported that Student progressed in speech, vocabulary, and reading comprehension skills. The March 5, 2016 IEP further reported Student's behaviors improved and he independently stayed on task and conversed with peers and adults. The February 14, 2017 IEP reported that Student's vocabulary skills improved significantly, and that he liked sports and played with peers at recess. The information documented on the 2015 assessment report, and the 2015,

2016, and 2017 IEPs put Parents on notice of Ventura's findings/conclusions and provided them with all the information they needed to timely file for due process if they disagreed with Ventura.

FACTS DOCUMENTED IN THE 2018 ASSESSMENT REPORT AND THE 2018 AND 2019 IEPs ABOUT STUDENT'S BEHAVIOR FORMING THE BASIS FOR PARENTAL KNOWLEDGE TO TIMELY FILE THE COMPLAINT

Ventura's school psychologist Jana Woodruff conducted a psychoeducational assessment of Student as part of the 2018 triennial assessments. The assessment plan specifically represented Ventura would assess in the following areas:

- Pre-academic/academic achievement;
- Social/emotional behavior;
- Self-help/adaptive skills;
- Motor skills development;
- Language/speech/communication development;
- Intellectual development; and
- Health.

Parent consented to the assessment plan. Woodruff administered standardized assessments, observed Student in class, interviewed Parent and teachers, and both filled out standardized behavior and functional skills rating scales for the 2018 assessment. Woodruff summarized her assessment findings, results, and recommendations in the psychoeducational report. The February 2018 psychoeducational report documented Parent reports that Student got along with peers and siblings, and met all childhood

milestones. Teachers reported Student was typically behind academically and required individual assistance for task completion, exhibiting more inappropriate behaviors when he did not understand a concept. Student's inappropriate classroom behaviors included singing age-inappropriate songs in class, annoying peers by making noises that included simulating flatulent sounds and creating sound effects during instruction time, and attempting to cut his hand twice during science class to see the flesh while studying the human body.

Woodruff concluded during her 2018 triennial assessment that based on parental reports, school records, observations, and the 2018 triennial testing results, autism was not an area of suspected disability in 2018. Ventura did not assess Student for autism in 2018. Woodruff specifically explained in the 2018 psychoeducational report that Student did not meet the eligibility criteria for autism because:

1. Student did not have a developmental disability significantly affecting verbal and nonverbal communication and social interaction.
2. Student did not exhibit unusual responses to sensory experiences; movement seeking behaviors; self-stimulatory behaviors; or fearful response to sound or touch; and did not play with his visual field.
3. Student's demonstrated normal development in pragmatic communications based on Mother' and teachers' ratings on the behavior and functional rating scales.

Ventura did not specifically represent to Parents that it assessed Student for autism in the 2018 assessment plan, in the 2018 psychoeducational report, or during the February 2018 IEP team meeting. Ventura also did not specifically represent to Parents in 2018 that it had solved the problem regarding assessing for autism because Ventura

never suspected autism as a disability in 2018 based on information provided by Parent, and information gathered through its assessment. Further, Ventura did not misrepresent material facts to Parents about solving the problem regarding autism, as a suspected disability as to Student.

Parent's and teacher's responses on standardized rating scales, Parent's responses as to Student's home behaviors and developmental history, and Woodruff's 2018 observations of Student led Ventura not to suspect autism as a disability. Ventura shared all of the assessment findings and results with Parents at the March 2018 IEP team meeting. The IEP team discussed eligibility, placement, and services with Parents and included the following details about Student in the IEP document:

1. Student's cognitive function was in the average range. Student functioned below average in auditory and oral language skills. Student scored low in communication/language standardized assessment, showing relatively strength with his vocabulary.
2. Student liked to socialize with friends during break and lunch, but was reported as immature, or a "young" sixth grader, sometimes singing in the middle of class.
3. Student had same aged friends and was generally liked by teachers and peers.

Ventura also shared Student's updated behaviors and functions in the February 5, 2019 IEP. The February 5, 2019 IEP reported that Student was immature for his age. The February 5, 2019 IEP also reported that Student had significant academic deficits, had difficulty keeping up with the class, played with supplies and objects instead of following the lesson, complained that work was too difficult, and did not comply with

teachers' requests to perform tasks. The information documented on the 2018 assessment report, and the 2018, and 2019 IEPs put Parents on notice of Ventura's findings and conclusions and provided them with all the information they needed to timely file for due process if they disagreed with Ventura.

PARENTS KNEW OR SHOULD HAVE KNOWN THE FACTS THAT
ENABLED THEM TO TIMELY FILE FOR DUE PROCESS UNDER
ISSUES 1a, 1b, 1c, 4a, AND 4b.

THERE WAS NO SPECIFIC MISREPRESENTATION OR
WITHHOLDING OF INFORMATION BY VENTURA IN 2012
WHICH CAUSED PARENTS TO DELAY FILING THE
COMPLAINT

Ventura did not specifically represent to Parents that it assessed Student for autism or attention deficit hyperactivity disorder/other health impairment in 2012 under Issue 1a. Ventura did not misrepresent material facts to Parents regarding autism or attention deficit hyperactivity disorder/other health impairment as suspected disabilities in 2012 under Issue 4a. Ventura did not suspect Student had autism or attention deficit hyperactivity disorder/other health impairment based on Parent's and teacher's responses on standardized rating scales, Parent's responses as to Student's home behaviors and developmental history, and Llano's 2012 assessment and observations of Student in 2012. Accordingly, it never assessed for autism or attention deficit hyperactivity disorder/other health impairment, and never told Parents it had assessed

in these areas. Further, Ventura did not misrepresent material facts to Parents regarding solving the problem regarding autism, or attention deficit hyperactivity disorder/other health impairment as suspected disabilities as to Student.

The 2012 assessment plan enumerated the areas Ventura would assess and did not include autism and attention deficit hyperactivity disorder/other health impairment. Student argued that Ventura's obligation to assess in all areas of suspected disability amounted to a specific representation that it would assess for autism and attention deficit hyperactivity disorder/other health impairment. Student's argument was unsupported by law, or evidence, to toll the statute of limitations. There was no mention of autism or attention deficit hyperactivity disorder/other health impairment in the 2012 report or IEP. The preponderance of evidence established Parents were on notice that Ventura never assessed for autism or attention deficit hyperactivity disorder/other health impairment based on what was stated in the assessment plan, the May 2012 assessment report, and the 2012 IEP. Further, Student did not point to any specific representations of material facts Ventura made regarding autism and attention deficit hyperactivity disorder/other health impairment as suspected disability areas for Student. Having failed to establish that any specific representations occurred, Student did not prove a basis for tolling the statute of limitations based on alleged misrepresentations of material facts. Therefore, Student did not prove that Ventura made specific misrepresentations regarding assessing for, or material facts regarding autism or attention deficit hyperactivity disorder/other health impairment as suspected disabilities which caused Parents to untimely file the due process complaint.

Student also did not show that Ventura withheld information from Parents it was required to provide which prevented Parents from timely filing the due process

complaint. Specifically, Student did not establish by a preponderance of evidence that Ventura withheld information that autism and attention deficit hyperactivity disorder/other health impairment were suspected disabilities in May 2012 under Issues 1a and 4a. Ventura shared the assessment findings and results with Parents at the May 2012 initial IEP team meeting. There was no persuasive evidence Ventura suspected autism or and attention deficit hyperactivity disorder/other health impairment at that time, and then withheld that information from the Parents. In fact, the weight of evidence was Ventura suspected neither. The IEP team discussed eligibility, placement and services with Parents and included details about Student's behaviors and functions in the IEP document. Ventura reported Student's low cognitive function, verbal and nonverbal speech and communication difficulties, and social emotional/behavioral function including behavioral and attention difficulties in the 2012 IEP team meeting. Parents advocated on Student's behalf and participated in Student's 2012 IEP team meeting. Parents were, or should have been, aware of all Student's educational challenges and deficits in 2012.

Even if Ventura did not disclose that autism and attention deficit hyperactivity disorder/other health impairment were areas of suspected disability in May 2012, Student failed to prove that caused his Parents to untimely file the complaint. The information Parents were provided was sufficient to put Parents on notice of the very behaviors which Student argued were indicative of autism, or an attention deficit hyperactivity disorder. Specifically, Freeman opined at hearing that Ventura should have concluded that Student had autism when Ventura assessed him in 2012 based on his verbal/nonverbal deficits, and social immaturity that Ventura documented in the 2012 assessment report, and 2012 IEP. The information Freeman's opinion was based was

provided to Parents in 2012. Among other things, Parents were informed of Student's behaviors and attention challenges in the 2012 assessment report, and in the 2012 IEP document.

Significantly, Freeman agreed with Ventura that the documented attention difficulties/distractions in the 2012 assessment and IEP were unrelated attention deficit hyperactivity disorder/other health impairment. Freeman's testimony along with the weight of other evidence established that autism and attention deficit hyperactivity disorder/other health impairment were never suspected disabilities concealed from Parents.

Student did not prove that Ventura withheld any information that was required to be provided to Parents in 2012, or that it withheld information which caused Parents to untimely file the due process complaint. As of 2012, Parents were on notice of all the assessments Ventura conducted in 2012 which did not include autism and attention deficit hyperactivity disorder/other health impairment.

At hearing, Student disputed Ventura's conclusion that it did not suspect autism, and attention deficit hyperactivity disorder/other health impairment based on the information it had about Student in 2012. Student also argued that Ventura should have conducted standardized testing in those areas in 2012. However, because Student failed to prove that either exception to the statute of limitation applied, Student's challenges to Ventura's 2012 assessment instruments, findings, and conclusions were required to be timely brought within the two-year statutory period, by May 2014.

THERE WAS NO SPECIFIC MISREPRESENTATION OR
WITHHOLDING OF INFORMATION BY VENTURA IN 2015
WHICH CAUSED PARENTS TO DELAY FILING THE
COMPLAINT

Ventura did not specifically represent to Parents that it assessed Student for autism in 2015 under Issue 1b. Ventura did not misrepresent material facts to Parents regarding autism as a suspected disability in 2015 under Issue 4a. Ventura did not suspect that Student had autism based on Parent's and teacher's responses on standardized rating scales, Parent's responses as to Student's home behaviors and developmental history, and Beley's 2015 assessment and observations of Student in 2015. Accordingly, it never assessed for autism, and never told Parents it had assessed for autism. Further, Ventura did not misrepresent material facts to Parents regarding solving the problem regarding autism, as a suspected disability as to Student.

The 2015 assessment plan enumerated the areas Ventura would assess and did not include autism. Student argued that Ventura's obligation to assess in all areas of suspected disability amounted to a specific representation that it would assess for autism. Student's argument was unsupported by law, or evidence, to toll the statute of limitations. There was no mention of autism in the 2015 report or IEP. The preponderance of evidence established Parents were on notice that Ventura never assessed for autism based on what was stated in the assessment plan, the March 2015 assessment report, and the 2015 IEP. Further, Student did not point to any specific representations of material facts Ventura made regarding whether autism was a

suspected disability for Student. Having failed to establish that any specific representations occurred, Student did not prove a basis for tolling the statute of limitations based on alleged misrepresentations of material facts. Therefore, Student did not prove that Ventura made specific misrepresentations regarding assessing for, or material facts regarding autism as a suspected disability which caused Parents to untimely file the due process complaint.

Student also did not show that Ventura withheld information from Parents it was required to provide which prevented Parents from timely filing the due process complaint. Specifically, Student did not establish by a preponderance of evidence that Ventura withheld information that autism was a suspected disability in March 2015 under Issues 1b and 4b. Ventura shared the assessment findings and results with Parents at the March 2015 IEP team meeting. There was no persuasive evidence Ventura suspected autism at that time, and then withheld that information from Parents. The IEP team discussed eligibility, placement, and services with Parents and included details about Student's behaviors and functions in the IEP document. Parents were informed of Student's behavioral challenges in the 2012 assessment report, the 2015 triennial assessment report, and in IEP documents every year from 2012 to 2015. Ventura reported Student's low cognitive function, verbal and nonverbal speech and communication difficulties, and social emotional/behavioral function including behavioral and attention difficulties in all IEP team meetings since 2012. Parents advocated on Student's behalf and had extensive involvement in Student's education since 2012. Parents were, or should have been, aware of all Student's educational challenges and deficits since 2012.

Even if Ventura did not disclose that autism was an area of suspected disability in March 2015, Student failed to prove that caused his Parents to untimely file the complaint. The information Parents were provided was sufficient to put Parents on notice of the very behaviors which Student argued in this hearing were indicative of autism. Specifically, Freeman opined at hearing that Ventura should have concluded that Student had autism when Ventura assessed him in 2012 and 2015 based on his verbal/nonverbal deficits, and social immaturity that Ventura documented in the 2012 and 2015 assessment reports, and all IEPs since 2012. The information Freeman's opinion was based was timely provided to Parents in 2012, 2013, 2014, and 2015. Among other things, Parents were informed of Student's behaviors and attention challenges in the 2015 assessment report, and in the 2015 IEP document. Freeman's testimony along with the weight of other evidence established that autism was never a suspected disability concealed from Parents. Student did not prove that Ventura withheld any information that was required to be provided to Parents in 2015, or that it withheld information which caused Parents to untimely file the due process complaint. As of 2015, Parents were on notice of all the assessments Ventura conducted in 2015 which did not include autism.

At hearing, Student disputed Ventura's conclusion that it did not suspect autism based on the information it had about Student in 2015. Student also argued that Ventura should have conducted standardized testing in autism in 2015. However, Student's challenges to Ventura's 2015 assessment instruments, findings, and conclusions were required to be timely brought within the two-year statutory period, by March 2017.

THERE WAS NO SPECIFIC MISREPRESENTATION OR
WITHHOLDING OF INFORMATION BY VENTURA IN 2018
WHICH CAUSED PARENTS TO DELAY FILING THE
COMPLAINT

Ventura did not specifically represent to Parents that it assessed Student for autism in 2018 under Issue 1c. Ventura did not misrepresent material facts to Parents regarding autism as a suspected disability in 2018 under Issue 4b. Ventura did not suspect that Student had autism based on Parent's and teacher's responses on standardized rating scales, Parent's responses as to Student's home behaviors and developmental history, and Woodruff's 2018 assessment and observations of Student in 2018. Accordingly, it never assessed for autism, and never told Parents it had assessed for autism. Further, Ventura did not misrepresent material facts to Parents regarding solving the problem regarding autism, as a suspected disability as to Student.

The 2018 assessment plan enumerated the areas Ventura would assess and did not include autism. Student argued that Ventura's obligation to assess in all areas of suspected disability amounted to a specific representation that it would assess for autism. Student's argument was unsupported by law, or evidence, to toll the statute of limitations. Ventura explained in the 2018 psychoeducational report why it concluded that autism was not a suspected disability. The preponderance of evidence established Parents were on notice that Ventura never assessed for autism based on what was stated in the assessment plan, the February 2018 assessment report, and the 2018 IEP. Further, Student did not point to any specific misrepresentations of material facts Ventura made regarding autism as a suspected disability for Student. Therefore,

Student did not prove that Ventura made specific misrepresentations regarding assessing for, or material facts regarding autism as a suspected disability which caused Parents to untimely file the due process complaint.

Student also did not show that Ventura withheld information from Parents it was required to provide which prevented Parents from timely filing the due process complaint. Specifically, Student did not establish by a preponderance of evidence that Ventura withheld information that autism was a suspected disability in February 2018 under Issues 1c and 4b. Ventura shared the assessment findings and results with Parents at the February 2018 IEP team meeting. There was no persuasive evidence Ventura suspected autism at that time, and then withheld that information from the Parents. The IEP team discussed eligibility, placement and services with Parents and included details about Student's behaviors and functions in the IEP document. Parents were informed of Student's behavioral challenges in the 2012 assessment report, the 2015 and 2018 triennial assessment reports, and in IEP documents every year from 2012 to 2018. Ventura reported Student's low cognitive function, verbal and nonverbal speech and communication difficulties, and social emotional/behavioral function including behavioral and attention difficulties in all IEP team meetings since 2012. Parents advocated on Student's behalf and had extensive involvement in Student's education since 2012. Parents were, or should have been, aware of all Student's educational challenges and deficits since 2012.

Even if Ventura did not disclose that autism was an area of suspected disability in February 2018, Student failed to prove that caused his Parents to untimely file the complaint. The information Parents were provided was sufficient to put Parents on notice of the very behaviors which Student argued were indicative of autism.

Specifically, Freeman opined at hearing that Ventura should have concluded that Student had autism when Ventura assessed him in 2012, 2015, and 2018 based on his verbal/nonverbal deficits, and social immaturity that Ventura documented in the 2012, 2015, and 2018 assessment reports, and all IEPs since 2012. The information Freeman's opinion was based was provided to Parents in 2012, 2013, 2014, 2015, 2016, 2017, and 2018. Among other things, Parents were informed of Student's behaviors and attention challenges in the 2018 assessment report, and in the 2018 IEP document. Freeman's testimony along with the weight of other evidence established that autism was never a suspected disability concealed from Parents. Student did not prove that Ventura withheld any information that was required to be provided to Parents in 2018, or that it withheld information which caused Parents to untimely file the due process complaint. As of 2018, Parents were on notice of all the assessments Ventura conducted in 2018 which did not include autism.

At hearing, Student disputed Ventura's conclusion that it did not suspect autism based on the information it had about Student in 2018. Student also argued that Ventura should have conducted standardized testing in autism in 2018. However, Student's challenges to Ventura's 2018 assessment instruments, findings, and conclusions were required to be timely brought within the two-year statutory period by February 2020.

Student argued that Parent was unfamiliar with autism until Freeman's assessment in June 2021. Therefore, Parent did not know that the behaviors documented in Students' IEPs were also characteristics in some children with autism. However, Parent's unfamiliarity with autism did not toll the statute of limitations. The statute of limitations began to run when Parents became aware of the underlying facts that would support a legal claim, not when Parents learned the action was wrong. (See

M.M., supra, 2012 WL 398773, at p.*18.) Because the information about Student's challenges and deficits were documented in every IEP team document since 2012, the evidence did not support Student's bald assertion that Parents were prevented from timely filing the complaint by Ventura's failure to disclose information regarding Student's deficits. (See *Fernandez, supra*, 2020 WL 1532229, at pp. **4-5). The weight of evidence proved that Parents knew, or should have known, of the problem which formed the basis of Student's claims more than two years before the filing of Student's complaint. Further, Ventura gave Parents their parental rights and procedural safeguards every year from 2012 to 2021. Parents were informed of their parental rights and could have timely filed for due process to challenge any of Ventura's failures to assess Student or failures to disclose areas of suspected disability. Therefore, Ventura did not cause Parents to delay in timely filing the due process complaint.

Student also unpersuasively argued that Ventura's failure to produce to Parents the behavior rating scale's publisher summary and rater responses in 2012, 2015, and 2018 amounted to a withholding of information which tolled the statute of limitations. The publisher summary was a summary of all of the raters (*e.g.* teachers', parents') who responded to the behavior rating scale questionnaire. Rater responses were the responses provided by the person filing out the behavior rating scale. Student argued that the publisher summary with Parent's responses that Student had impaired emotional social reciprocation, and difficulty in developing peer relationships in 2018 would have informed Parents that autism was a disability for Student. However, Student failed to cite any law supporting his attorney's argument that assessors were required to provide the publisher summary and rater responses to Parents. The law required assessors to make recommendations and summarize their findings based on their professional judgment. (See Ed. Code, §§ 56320, 56327 [Assessors required to be

knowledgeable regarding a student's unique needs; select appropriate assessments; administer assessments accurately to reflect a student's achievement level; and prepare a written report summarizing assessment findings, and make recommendations regarding a student's educationally related needs, and special education eligibility].) Nothing in Education Code sections 56320, or 56327 required the assessors to produce the publisher's summary or the rater responses when created.

Further, Student's argument that the publisher's summary or the rater responses would have informed Parents that autism was a disability was unpersuasive because neither was determinative of a special education eligibility. The publisher summary and rater responses were tools for assessors Llano, Beley, and Woodruff to use, and consider with the totality of all assessment results in making recommendations to the IEP team. Because Student failed to establish that Ventura was required to provide these documents to Parents, the failure to provide them was not a basis for tolling the statute of limitations.

The preponderance of evidence did not establish that Ventura made specific misrepresentations that it solved the problems forming the basis of Student's claims, or that Ventura withheld information that it was required to provide to Parents which caused Parents to untimely file the due process complaint. Ventura merely reached a different conclusion as to Student's special education eligibility than Freeman opined Ventura should have concluded when it assessed Student in 2012, 2015, and 2018. Parents had all the information including details about Student's functioning and behavior from the assessments conducted by Ventura and IEPs and were on notice as to the scope of the assessments and the conclusions reached by Ventura to timely file the claims in Issues 1a, 1b, 1c, 4a and 4b. Student did not prove that the two-year statute of limitations was tolled for Student's claims in Issues 1a, 1b, 1c, 4a, and 4b.

VENTURA DID NOT MAKE SPECIFIC MISREPRESENTATIONS OR
WITHHOLD INFORMATION REGARDING IMPLEMENTATION OF THE
FEBRUARY 14, 2017 IEP TOLLING THE STATUTE OF LIMITATIONS FOR
ISSUES 5b, AND 6

Student did not prove Ventura made any specific misrepresentations it had solved the problem, or withheld any information from Parents that it was required to provide, regarding implementation of an elective from the February 14, 2017 IEP, or changing the elective outside the IEP process. The February 14, 2017 IEP offered Student specialized academic instruction in all subjects, and general education for physical education and one elective in the 2017-2018 school year, his first year of middle school. There was no evidence Ventura made any representations to Parents regarding this elective beyond its written offer in the February 14, 2017 IEP. There was also no evidence presented at hearing that Ventura withheld any information regarding this elective.

Student failed to meet his burden of proof establishing that an exception to the statute of limitations applied to Issues 5b and 6. Student argued that Parent only noticed that the elective offered in the February 14, 2017 IEP did not appear on the report card when she requested educational records in 2020. However, Student did not offer any evidence at hearing that Ventura did not implement the elective offered in the February 14, 2017 IEP. Student also did not offer any evidence that Parents did not timely receive, or that Ventura withheld, report cards from Parents. Student did not offer any evidence that Ventura prevented Parents from asking, or obtaining, any of Student's 2017-2018 school year report cards before Parents' 2020 educational records request. Student offered no explanation as to why Parents did not know which classes

Student took in the 2017-2018 school year prior to Parents' 2020 educational records request. Student offered no evidence to support why Parents' decision not to request educational records in 2020 amounted to a specific misrepresentation, or a withholding of information Ventura was required to provide, sufficient to toll the statute of limitations. Parents were involved in Student's education every year since 2012, and knew, or should have known, all the classes Student took. Student did not present any evidence to toll the two-year statute of limitations regarding Ventura's alleged failure to implement the elective offered in the February 14, 2017 IEP, or that Ventura changed Student's placement outside the IEP process regarding this elective.

Student did not show that Ventura made specific misrepresentations it had solved the problem forming the basis of Student's claims, or that it withheld information from Parents it was required to provide as a threshold for OAH to consider Student's claims outside of the two-year limitations period set forth in Issues 1a, 1b, 1c, 4a, 4b, 5b and 6. Student's claims of misrepresentations and withholding of information under Education Code, section 56505, subdivision (l) were not supported by the weight of evidence.

Student erroneously likened himself to the student in *Amanda J. v. Clark County School District* as a basis to toll the statute of limitations. (*Amanda J. v. Clark County School District* (9th Cir. 2001) 267 F.3d 877, 892 ("*Amanda J.*").) Student's reliance on *Amanda J.* was misplaced. Significantly, *Amanda J.* did not involve tolling the statute of limitations, but timely filed claims within the statutory period. In *Amanda J.*, the Ninth Circuit Court of Appeals held that the school district's failure to give parents evaluation reports indicating the possibility of autism and the need for further psychiatric

evaluations violated procedural requirements of the IDEA. The court concluded that the procedural violation resulted in a substantive FAPE violation because it prevented parents from fully and effectively participating in the creation of the IEP. In that case, the school district did not give parents copies of evaluations despite multiple requests from parents. In contrast, Ventura provided Parents with all triennial assessments reports shortly after the 2012, 2015, and 2018 assessments. Further, unlike the school district in *Amanda J.* which had reports indicating the possibility that student had autism, Ventura never suspected Student autism as a disability and had no reports it withheld from Parents indicating otherwise.

VENTURA DID NOT MAKE SPECIFIC MISREPRESENTATIONS OR WITHHOLD INFORMATION REGARDING THE OFFER OF GOALS AND SERVICES IN THE FEBRUARY 5, 2019 IEP TOLLING THE STATUTE OF LIMITATIONS FOR ISSUES 2a AND 3a

Student contends Ventura should have offered goals and services regarding behavior, attention, work completion, adaptive skills, pragmatic language, social skills, atypicality, and fine motor at the February 5, 2019 IEP. Student also contends Ventura should have offered dyslexia services at the February 5, 2019 IEP.

Student did not prove, or offer any evidence, that Ventura engaged in any specific misrepresentations that it had solved the problem regarding

- behavior,
- attention,
- work completion,
- adaptive skills,

- pragmatic language,
- social skills,
- atypicality, and
- fine motor goals,

or services including dyslexia services, in the February 5, 2019 IEP offer, that caused Student not to timely file the due process complaint. Student did not offer any evidence that Ventura made any representations at all regarding the need for goals and services in these areas.

Student also did not prove, or offer any evidence, that Ventura withheld information regarding the need for goals and services in

- behavior,
- attention,
- work completion,
- adaptive skills,
- pragmatic language,
- social skills,
- atypicality, and fine motor

that caused Student not to timely file the due process complaint. Student also did not prove, or offer any evidence, that Ventura withheld information regarding the need for dyslexia services that caused Student not to timely file the due process complaint.

Ventura shared Student's updated behaviors and functions in the February 5, 2019 IEP. The February 5, 2019 IEP reported that Student was immature for his age. The February 5, 2019 IEP also reported that Student had significant academic deficits, difficulty keeping up with the class, often playing with supplies and objects instead of following the lesson, complained that work was too difficult, and did not comply with

teachers' requests to perform tasks. The evidence showed that Parents attended and participated in the February 5, 2019 IEP team meeting, and consented to the IEP. Parents were aware of all the goals and services offered in the February 5, 2019 IEP at the IEP team meeting. The information documented in the February 5, 2019 IEP put Parents on notice of the Ventura's findings/conclusions, including Student's reported present levels of performance, and the goals and services Ventura offered to address Student's deficits. Parents had all the information they needed at the time to dispute the goals and services Ventura offered in the February 5, 2019 IEP, and to timely file the claims in Issues 2a and 3a.

The preponderance of evidence did not establish that Ventura made specific misrepresentations that it solved the problems forming the basis of Student's claims regarding goals and services, or that Ventura withheld information that it was required to provide to Parents which caused Parents to untimely file the due process complaint. Student did not prove that the two-year statute of limitations was tolled for Student's claims in Issues 2a and 3a. Finally, the operative date to determine the applicability of the two-year statute of limitations is the date of the IEP offer, not that the IEP was implemented during the two-year statute of limitations period. Therefore, Issues 2a and 3a are barred by the statute of limitations.

Student's claims of misrepresentation and withholding of information were not credible, and no more than a veiled attempt to resuscitate expired IDEA claims. Student's Issues 1a, 1b, 1c, 2a, 3a, 4a, 4b, 5b, and 6 were precisely the type of stale claims Congress intended to bar—the untimely filing of IDEA claims many years after the alleged wrongdoing occurred. (See *Alexopoulos, supra*, 817 F.2d at p. 555.) Student's Issue 1a, 1b, 1c, 2a, 3a, 4a, 4b, 5b, and 6 are untimely, and barred by the statute of limitations.

ISSUES 1d(i) AND 1d(ii): DID VENTURA DENY STUDENT A FAPE BY FAILING TO ASSESS IN ALL AREAS OF DISABILITY, SPECIFICALLY AUTISM, OTHER HEALTH IMPAIRMENT, AND PRAGMATIC LANGUAGE FROM APRIL 8, 2019 TO AUGUST 10, 2021?

Student contends Ventura failed to assess him in all areas of suspected disability, specifically autism, attention deficit hyperactivity disorder/other health impairment, and pragmatic language from April 8, 2019 to August 10, 2021. Ventura contends it assessed Student in all areas of suspected disability based on the information it had about Student including information Parent reported about Student's behavior and developmental history. Ventura contends it did not suspect autism, attention deficit hyperactivity disorder/other health impairment and pragmatic language, were areas of disability.

Assessments are required to determine eligibility for special education, and what type, frequency, and duration of specialized instruction and related services are required. In evaluating a child for special education eligibility and prior to the development of an IEP, a district must assess him in all areas related to a suspected disability. (20 U.S.C. § 1414(b)(3)(B); Ed. Code, § 56320, subd. (f).) The IDEA provides for periodic reevaluations to be conducted not more frequently than once a year unless the parents and district agree otherwise, but at least once every three years unless the parent and district agree that a reevaluation is not necessary. (20 U.S.C. § 1414(a)(2)(B); 34 C.F.R. § 300.303(b); Ed. Code, § 56381, subd. (a)(2).) A reassessment may also be performed if warranted by the child's educational or related service's needs. (20 U.S.C. § 1414(a)(2)(A)(i); 34 C.F.R. § 300.303(a)(1); Ed. Code, § 56381, subd. (a)(1).)

The assessment must be conducted in a way that:

1. uses a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information, including information provided by the parent;
2. does not use any single measure or assessment as the sole criterion for determining whether a child is a child with a disability; and
3. uses technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors.

The assessments used must be:

1. selected and administered so as not to be discriminatory on a racial or cultural basis;
2. provided in a language and form most likely to yield accurate information on what the child knows and can do academically, developmentally, and functionally;
3. used for purposes for which the assessments are valid and reliable;
4. administered by trained and knowledgeable personnel; and
5. administered in accordance with any instructions provided by the producer of such assessments.

(20 U.S.C. §§ 1414(b) & (c)(5); Ed. Code, §§ 56320, subs. (a) & (b), 56381, subd. (h).)

The determination of what tests are required is made based on information known at the time. (See *Vasheresse v. Laguna Salada Union School District* (N.D.Cal. 2001) 211 F.Supp.2d 1150, 1157-1158 [assessment adequate despite not including

speech and language testing where the concern prompting the assessment was reading skills deficit].) No single measure, such as a single intelligence quotient, shall be used to determine eligibility or services. (Ed. Code, § 56320, subds. (c) & (e).) Assessors must be knowledgeable about the student's suspected disability and must pay attention to student's unique educational needs such as the need for specialized services, materials, and equipment. (Ed. Code, § 56320, subd. (g).)

The personnel who assess the student shall prepare a written report that shall include, without limitation, the following:

1. whether the student may need special education and related services;
2. the basis for making that determination;
3. the relevant behavior noted during observation of the student in an appropriate setting;
4. the relationship of that behavior to the student's academic and social functioning;
5. the educationally relevant health, development, and medical findings, if any;
6. if appropriate, a determination of the effects of environmental, cultural, or economic disadvantage; and
7. consistent with superintendent guidelines for low incidence disabilities (those affecting less than one percent of the total statewide enrollment in grades kindergarten through 12), the need for specialized services, materials, and equipment.

(Ed. Code, § 56327.)

A school district's failure to conduct appropriate assessments or to assess in all areas of suspected disability may constitute a procedural denial of a FAPE. (*Park v. Anaheim Union High School District* (9th Cir. 2007) 464 F.3d 1025, 1031-1033.) A disability is "suspected," and a child must be assessed, when the district is on notice that the child has displayed symptoms of that particular disability or disorder. (*Timothy O. v. Paso Robles Unified School District* (9th Cir. 2016) 822 F.3d 1105, 1119 (*Timothy O.*)). The Ninth Circuit Court of Appeals in *Timothy O.* held a school district's failure to assess a child for autism using standardized tests and relying on informal staff observation during its initial evaluation of the child resulted in substantially hindering parents' ability to participate in the child's educational program, and seriously depriving the parents, teachers, and district staff of the information necessary to develop an appropriate educational program with appropriate supports and services for the child. (*Id.*)

The term "assessment" used in the California Education Code has the same meaning as the term evaluation in the IDEA. (Ed. Code, § 56302.5.)

A procedural violation does not automatically require a finding that a FAPE was denied. (*Amanda J., supra*, 267 F.3d at p. 892.). A procedural violation results in a denial of a FAPE only if the violation:

1. impeded the child'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); see Ed. Code, § 56505, subd. (f)(2); See *W.G., et al. v. Board of Trustees of Target Range School District, etc.* (9th Cir. 1992) 960 F.2d 1479, 1484, superseded in part by statute on other grounds ["...procedural inadequacies that result

in the loss of educational opportunity, [citation], or seriously infringe the parents' opportunity to participate in the IEP formulation process, [citations], clearly result in the denial of a FAPE."].)

The United States Department of Education advised that a child's entitlement is not to a specific disability classification or label, but to a FAPE. (*Letter to Fazio* (OSEP 1994) 21 IDELR 572, 21 LRP 2759.) The IDEA does not require that children be classified by their disability so long as each child who has a disability needing special education and related services is regarded as a child with a disability. (20 U.S.C. § 1412(a)(3)(B).) A properly crafted IEP addresses a student's individual needs regardless of his eligibility category. (*See, Fort Osage R-1 School District v. Sims* (8th Cir. 2011) 641 F.3d 996,1004.) The category of special education eligibility was substantively immaterial. (*See, Hailey M. v. Matayoshi* (D.Hawaii, Sept. 7, 2011, No. 10-00733) 2011 WL 3957206, p. *3). The very purpose of categorizing disabled students is to try to meet their educational needs; it is not an end to itself. (*Pohorecki v. Anthony Wayne Local School District*, (N.D.Ohio 2009) 637 F.Supp.2d 547, 557.)

Student's experts Freeman and Karen Schnee opined at hearing that Ventura should have suspected Student had autism and pragmatic language difficulties by at least April 2019 based on Ventura's findings in the 2018 triennial assessment. Freeman opined that Student's behavior of moving his hands back and forth on the table, patting his head, and tapping his fingers while trying to respond to Woodruff during the 2018 triennial assessment should have triggered a suspicion of autism requiring Ventura to assess in that area. Further, both Freeman and Schnee opined at hearing that Ventura's knowledge of Student's verbal and nonverbal difficulties since 2012 should also have triggered a pragmatic language assessment.

Ventura school psychologist Woodruff assessed Student in 2018, and Ventura school psychologist Kaylee Peterson assessed Student in 2021 for his triennial assessment. Woodruff and Peterson administered standardized assessments, including behavior rating scales, observed Student, and concluded that autism was not a suspected disability in 2018, or in 2021. Neither Woodruff, nor Peterson, assessed Student specifically for autism or pragmatic language. Woodruff's and Peterson's assessment conclusions and findings were similar. They found that Student's behaviors and social interactions did not affect educational performance. Both concluded that while Student exhibited verbal/nonverbal communication difficulties, those communication difficulties related to processing deficits consistent with a specific learning disability, not autism.

Specifically, at the time they relied on Parent's reports to Ventura in 2018 and February 2021 regarding Student's health, development, and social history that Student:

- did not have any developmental delays, and was average, or above average, in all developmental milestones;
- struggled academically in reading and writing;
- did not understand materials taught;
- required a lot of one-to-one assistance and prompting work;
- disliked school;
- struggled to maintain friendships; and
- played with others, and preferred to play with same-aged children.

Woodruff and Peterson opined that had Parent reported the same behaviors during the February 2018 and February 2021 triennial assessments as Parent did to Freeman in June 2021, they would have suspected, and assessed for autism in 2018 and

2021. Parent reported the following behaviors to Freeman in June 2021, which were not reported to Woodruff in 2018 and Peterson in February 2021, including that Student:

- did not engage in baby games;
- did not wave or imitate at appropriate ages;
- preferred being alone, and when he played, Student preferred to play with younger children;
- had extremely keen hearing;
- stared off vacantly at times;
- flapped his hands and wiggled his fingers;
- spun and jump repeatedly;
- was sensitive to textures; and
- had frequent temper tantrums.

Woodruff and Peterson opined at hearing that even if they assessed Student for autism during the 2018 and 2021 triennial assessments, Student would not have been found eligible under the autism special education category. Their opinion was unpersuasive in explaining why Ventura did not assess Student for autism and pragmatic language. The inquiry relevant to Issue 1d was not whether Ventura should have found Student eligible under a specific eligibility category, autism or otherwise, but whether it should have assessed Student based on the information Ventura had during the April 8, 2019 to August 10, 2021 period. Here, Student proved that Ventura had enough information to trigger Ventura's obligation to assess in autism and pragmatic language as discussed in the next two sections, and the failure to do so denied him a FAPE. Student's claim regarding attention deficit hyperactivity disorder/other health impairment is addressed in a separate section below.

VENTURA FAILED TO ASSESS FOR AUTISM AND PRAGMATIC LANGUAGE FROM APRIL 8, 2019 TO THE FEBRUARY 17, 2021 IEP

Student proved that Ventura failed to assess him from April 8, 2019 to February 17, 2021 in all areas of suspected disability, specifically autism and pragmatic language. Ventura had a duty to assess Student in those areas as of April 2019 when he struggled with work completion and keeping up in school. Freeman persuasively opined that Ventura should have assessed Student for autism and pragmatic language during the 2018 triennial assessment when Student exhibited unusual behaviors and significant verbal/nonverbal difficulties. The unusual behaviors Freeman referenced included Student's head patting, finger tapping, and moving his hands back and forth which were documented in the 2018 triennial assessment report. Schnee also persuasively opined that Student's verbal/nonverbal difficulties, and his speech and language disorder should have triggered a pragmatic language assessment. Freeman and Schnee concluded that the unusual behaviors, communication difficulties, and inability to keep up in school were autism indications triggering assessment.

Ventura was aware that Student had educational difficulties in eighth grade by April 8, 2019 because the February 5, 2019 IEP documented Student had trouble keeping up with class, did not complete required work, complained work was too hard, had a short attention span, was easily distracted, and often played with school supplies and other objects instead of paying attention in class. Student continued to demonstrate significant difficulties completing work in the 2020-2021 school year when he transitioned to Ventura High School for the ninth grade.

Specialized academic instruction teacher Erica Zahn taught Student English language arts and English reading and writing in the 2018 to 2019 school year, and the

2019 to 2020 school year, from January 2020 to June 2020. Zahn reported to the January 15, 2020 IEP team that Student required a lot of prompting and one-on-one assistance to complete work during the entire time she worked with Student. Physical education teacher Gary Litton also reported to the January 15, 2020 IEP team that Student did not turn in any work in the physical education class.

Specialized academic instruction teacher Maggie Gaeta who taught Student English language arts and English reading and writing during the 2020-2021 school year also reported to the IEP team Student rarely turned in work, but engaged more when prompted during small group and individualized support sessions to complete work. Alexander Perry, Student's math teacher during the 2020-2021 school year, also reported that Student seldom worked independently, but tried hard. Parent was in constant communication with Student's teachers during the April 2019 through August 2021 period, consistently reporting that Student was overwhelmed, had trouble understanding and completing work.

Ventura never assessed Student in autism or pragmatic language with standardized assessments between April 8, 2019 and the February 2021 IEP, despite knowing Student had significant work completion difficulties in all his classes. Ventura was also aware that Student had exhibited unusual behaviors and significant nonverbal/verbal difficulties from its 2018 triennial assessment. The combination of information from the 2018 triennial assessment and Student's continued academic difficulties from April 8, 2019 and the February 2021 IEP, should have led it to follow up with standardized testing in autism and pragmatic language. Instead, Ventura summarily concluded, without standardized testing data, that Student simply lacked motivation when Student was not completing work. Student proved that Ventura

committed a procedural violation by failing to assess him from April 8, 2019 to the February 17, 2021 IEP in all areas of disability, including in autism and pragmatic language.

This procedural violation significantly impeded Parents' opportunity to participate in the decision-making process. By not assessing in autism and pragmatic language, Ventura prevented timely access to complete and necessary evaluation information, including Student's social language communication strengths and weakness, for consideration by Parent in the participation and development of an appropriate IEP for Student. (See *Timothy O.*, *supra*, 822 F.3d at p. 1119.) As noted in *Timothy O.*, absent evaluation supported by standardized tests, parents were substantially hindered in their ability to participate in developing an IEP with appropriate supports and services because they did not have the necessary information. (*Id.*) Similarly, Ventura's failure to assess Student in autism and pragmatic language from April 8, 2019 to February 17, 2021 resulted in a substantive FAPE denial.

VENTURA FAILED TO ASSESS FOR AUTISM AND PRAGMATIC LANGUAGE FROM THE FEBRUARY 2021 TRIENNIAL ASSESSMENT TO AUGUST 10, 2021

Student proved that Ventura failed to assess him for autism and pragmatic language during the February 17, 2021 triennial assessment because it did not use standardized tests in these two areas.

As discussed above, school psychologist Peterson conducted the 2021 psychoeducational assessment of Student during the COVID-19 pandemic when Ventura only offered online distance learning to its students. More specifically, Peterson

reviewed Student's educational records, interviewed teachers and Parents, and listened in on Student's online math class for 15 minutes as part of her assessment. Peterson also administered some standardized assessments to Student, but those standardized assessments were not specific to autism or pragmatic language.

Student's specialized academic instruction teacher Gaeta conducted the academic assessment. Student's speech and language pathologist Aimee May administered standardized speech and language assessments to evaluate Student's receptive and expressive language, semantic language development, and language memory skills, but did not conduct any standardized assessments in the area of pragmatic language.

The results of the 2021 triennial assessments were reviewed at the February 17, 2021 IEP team meeting. The Ventura IEP team concluded that Student continued to be eligible for special education under the primary category of specific learning disability, and the secondary category of speech and language impairment.

Both Peterson and Freeman opined at hearing that the Autism Diagnostic Observation Schedule was the standardized assessment used to measure autism spectrum disorders, but Ventura never administered it to Student. Although Peterson administered the Behavior Assessment System for Children rating scale to measure Student's behaviors and social emotional function across settings, the behavior assessment was not designed to specifically assess for autism. Peterson also did not observe Student's behaviors and performance in any class to credibly conclude that Student did not require further standardized assessments specific to autism. Peterson merely listened for 15 minutes during Student's online math class when Student, like

others in the class, had their cameras off. Peterson was unable to observe Student's behaviors and class performance to persuasively rule out autism as a suspected disability.

Speech and language pathologist May administered the Clinical Evaluation of Language Fundamentals, a standardized assessment, to evaluate some of Student's language skills. The Clinical Evaluation of Language Fundamentals also had a pragmatic language subtest, but May inexplicably did not administer that subtest, or any other standardized assessments to evaluate Student's pragmatic language skills.

Pragmatic language was known as the social aspects of language communication. Student's speech and language pathologist expert Schnee credibly opined that had Ventura administered a pragmatic language assessment, the IEP team would have been informed as to Student's social language communication strengths and weakness. Schnee credibly opined that the pragmatic language standardized test would have provided valuable information on the extent of Student's ability to take turns, read communication cues, stay on topic, engage, and articulate questions in a comprehensible manner when he did not understand a concept. Schnee credibly opined that a pragmatic language assessment was also a crucial component to assessing for autism. Ventura's witnesses did not dispute Schnee's opinions in this regard.

Timothy O. specifically held that standardized tests were required and that informal observations by teachers and assessors were insufficient to assess a child for autism. (See *Timothy O., supra*, 822 F.3d at p. 1119.) Ventura's conclusion that Student did not have autism and pragmatic language needs without standardized testing during

the February 2021 triennial assessment was the equivalent of failing to assess in those areas. Ventura's failure to assess in these areas was a procedural violation of the law.

Like the student in *Timothy O.*, Student had never been formally assessed by Ventura in the areas of autism or pragmatic language. Consistent with *Timothy O.*, Ventura's failure to assess with standardized instruments in autism and pragmatic language as part of the February 2021 assessment process significantly deprived Parents meaningful participation in the February 17, 2021 IEP process. By not conducting standardized assessments in autism and pragmatic language, Ventura prevented timely access to complete and necessary information for developing an appropriate IEP for Student. Ventura's failure to assess in these areas continued to August 10, 2021, the day the amended complaint was filed. Therefore, Ventura's procedural violation in failing to conduct standardized assessments regarding autism and pragmatic language during the 2021 triennial evaluation was substantive FAPE denial.

Student's remedy for Ventura's FAPE denial in failing to assess in autism and pragmatic language from April 8, 2019 to August 10, 2021 is discussed below.

VENTURA DID NOT DENY STUDENT A FAPE BY FAILING TO ASSESS FOR ATTENTION DEFICIT HYPERACTIVITY DISORDER/OTHER HEALTH IMPAIRMENT FROM APRIL 8, 2019 TO AUGUST 10, 2021

Student did not prove that Ventura denied him a FAPE by failing to assess for attention deficit hyperactivity disorder/other health impairment between April 8, 2019 and August 10, 2021. School psychologist Woodruff administered standardized rating scales to Parent and Student's specialized academic instruction teacher during the 2018 triennial assessment. Student scored within the average range under both Parent's and

teacher's responses. Based on standardized assessment results, and Woodruff's observations of Student in class and during the assessments, she did not suspect attention deficit hyperactivity disorder as a disability for Student. Therefore, she did not administer standardized assessments to specifically assess for attention deficit hyperactivity disorder. However, Woodruff recommended continued monitoring to see if attention impacted Student's education because she observed Student with attention difficulties during the 2018 assessment.

During Student's 2021 triennial assessment, Peterson also administered standardized rating scales to Parent and Student's specialized academic instruction teacher. Student scored in the average range under both Parent's and teacher's responses. Peterson credibly opined that Student's attention and focus were consistently appropriate. Based on standardized assessment results, and Peterson's observations of Student in class and during the assessments, Peterson did not suspect attention deficit hyperactivity disorder as a disability for Student. Therefore, she did not administer standardized assessments to specifically assess for attention deficit hyperactivity disorder.

Significantly, Student's expert Freeman corroborated Ventura's conclusions. Freeman also concluded that further standardized assessments specific to attention deficit hyperactivity disorder/other health impairment was not needed. Because Student was easily redirected, Freeman agreed that Student did not display attention deficit hyperactivity disorder/other health impairment characteristics despite Ventura's documented attention difficulties/distractions in his triennial assessments and IEPs. Freeman opined that attention deficit hyperactivity disorder did not impact Student's education.

The evidence established that Ventura did not need to assess Student for attention deficit hyperactivity disorder/other health impairment during 2018 and 2021 assessments because it was not a suspected disability. Student did not show that further standardized assessments specific to attention deficit hyperactivity disorder/other health impairment were necessary during the period at issue. Therefore, Student did not prove that Ventura committed a procedural violation by not assessing Student specifically for attention hyperactivity disorder/other health impairment from April 8, 2019 to August 10, 2021.

Student did not prove that Ventura denied him a FAPE by not assessing for attention deficit hyperactivity disorder/other health impairment from April 8, 2019 to August 10, 2021.

ISSUES 2b(i) AND (ii), AND 2c(i) AND (ii): DID VENTURA DENY STUDENT A FAPE BY FAILING TO OFFER APPROPRIATE GOALS IN BEHAVIOR, ATTENTION, WORK COMPLETION, ADAPTIVE SKILLS, PRAGMATIC LANGUAGE, SOCIAL SKILLS, ATYPICALITY, AND FINE MOTOR AREAS OF NEED IN THE IEPs FROM APRIL 8, 2019 TO AUGUST 10, 2021?

Student contends Ventura failed to offer Student appropriate goals to address behavior, attention, work completion, adaptive skills, pragmatic language, social skills, atypicality, and fine motor in the January 15, 2020, and February 17, 2021 IEPs. Ventura contends it offered Student appropriate goals in all areas of need, and a FAPE in those IEPs.

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. The IEP sets forth 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); Ed. Code, § 56032.)

For each area in which a special education student has an identified need, the IEP team must develop measurable annual 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, § 56345; *Letter to Butler* (OSERS 1988) 213 IDELR 118.) The IEP must also contain a statement of how the child's goals will be measured. (20 U.S.C. § 1414(d)(1)(A)(viii); Ed. Code, § 56345, subd. (a)(3).) The IEP must show a direct relationship between the present levels of performance, the goals, and the educational services to be provided. (Cal. Code Regs., tit. 5, § 3040, subd. (c).) A failure to offer an appropriate goal may be a procedural violation of the IDEA. (*Park v. Anaheim Union High School District, supra*, 464 F.3d at p. 1031).

STUDENT NEEDED A WORK COMPLETION/ATTENTION GOAL

Student showed that he needed goals to address work completion/attention challenges in the January 15, 2020, and February 17, 2021 IEPs. The term attention discussed in Issues 2(b)(i), and 2(c)(i) addressed Student's attention challenges, and not an attention deficit hyperactivity disorder discussed earlier in this Decision. Although Student did not have an attention deficit hyperactivity disorder, Student had difficulties

attending in class and completing work. The February 5, 2019 IEP team documented Student had trouble keeping up with class, did not complete required work, complained work was too hard, had a short attention span, was easily distracted, and often played with school supplies and other objects instead of paying attention in class. Therefore, Ventura was aware that Student had work completion/attention difficulties by April 8, 2019.

Student continued to demonstrate difficulties completing work in 2019-2020 school year. Although the January 15, 2020 IEP noted that Student started assignments with decreased prompting, the evidence at hearing showed that he still had significant difficulties completing work. Zahn and Parent communicated about Student's work completion difficulties throughout the 2019-2020 school year. Student's specialized academic instruction English teacher Zahn opined that Student required a lot of prompting and one-on-one assistance to complete work in the 2019-2020 school year.

Student's work completion/attention difficulties continued into the 2020-2021 school year when he transitioned to Ventura High School for the ninth grade, including during distance learning which started in March 2020. Physical education teacher Gary Litton reported Student did not turn in any work in the ninth-grade physical education class. Student's ninth grade specialized academic instruction English teacher Gaeta also reported Student rarely turned in work, and required a lot of prompting, instructions rewording, and rechecking for understanding before Student could complete work. Student's ninth grade math teacher Alexander Perry also reported Student seldom worked independently, but completed work with instructions directly from either Perry or his paraeducator. The February 17, 2021 IEP noted that Student had significant work completion difficulties.

From 2019 through 2021, Parent also told the teachers that Student often did not understand, attend to, or complete work unless someone read and explained the work to Student. Both Zahn and Gaeta also reported Student required extra assistance and explanations to attend and complete work in 2019, 2020, and 2021. Ventura's claim that Student did not complete work because he lacked motivation was unpersuasive because the evidence showed that Student completed work when he received extra help to aid comprehension. For example, Student focused and completed more work in Perry's math class when Perry, or his paraeducator, explained the work to Student. The evidence was undisputed that Student's work completion/attention was a documented area of need from April 8, 2019 to August 10, 2021. Yet, Ventura did not offer Student any goals to address Student's work completion/attention difficulties in the January 15, 2020, or February 17, 2021 IEPs.

Ventura was unpersuasive in asserting that Student did not need a work completion/attention goal because Student made some academic progress, met some goals, and earned passing grades during the relevant period. Although Student earned passing grades in most classes since April 2019, Student's grades fluctuated and some dropped to Ds and Fs between April 2019 and August 2021, because he did not attend to, and complete work. Zahn and Gaeta opined at hearing that while Student progressed academically, the progress was minimal. For example, Student stayed at the same non-reader beginner reading level from May 2019 to May 2021. The January 15, 2020 IEP documented Student was reading at a pre-primer/non-reader beginner level while in the eighth grade. Gaeta opined that although Student progressed in reading by achieving a lexile score for the first time in May 2021, Student's ninth grade reading skills were still at a non-reader beginner reading level as of May 2021. Lexile score was

a numeric representation of reading ability. Student's reading expert Theresa Gorey, who assessed Student's reading level in June 2021, also agreed with Gaeta's conclusion that Student's was at a non-reader beginning reading level.

Ventura's witnesses opined unpersuasively at hearing that Student progressed in writing based on the difference in Student's baseline writing goals between 2019 and 2021. Student's baseline writing goals included: the ability to write one paragraph with heavy prompting in the February 5, 2019 IEP; the ability to write two paragraphs in the January 15, 2020 IEP; and the ability to write one paragraph in the February 17, 2021 without prompting. Ventura's conclusion of Student's writing progress was inconsistent with its finding that Student's reading level remained at a non-reader level from 2019 to 2021. However, Gorey was more convincing when she opined that the writing progress reported by Ventura was inaccurate based on Student's difficulty constructing even one sentence in June 2021. Gorey was qualified to conduct a reading assessment based on her education, training, and experience.

Student proved that Ventura committed a procedural violation by not offering goals to address Student's work completion/attention difficulties in the January 15, 2020 and February 17, 2021 IEP. This procedural violation caused a deprivation of educational benefits and impeded Student's right to a FAPE because it impacted Student's academic progress. From April 8, 2019 to August 10, 2021, Student made minimal progress in reading and writing, and his grades dropped because he did not complete most of the assigned work. By failing to offer a work completion/attention goal, Ventura denied Student the opportunity to complete assigned work and access his education. Further, the IEP team had no information to track and objectively measure Student's academic progress in relation to the amount of assigned work he completed.

Student proved that Ventura denied him a FAPE by not offering a goal to address his work completion/attention challenges in the January 15, 2020, and February 17, 2021 IEPs. Student's remedy is discussed below.

STUDENT NEEDED A PRAGMATIC LANGUAGE GOAL

Student showed that he needed a pragmatic language goal in the January 15, 2020, and February 17, 2021 IEPs. Student's speech and language expert Schnee conducted an independent speech and language assessment of Student in June 2021. Schnee was qualified to conduct a speech and language assessment based on her education, training, and experience. Schnee agreed with Ventura that Student met the special education eligibility for speech and language impairment based on standardized testing, a school observation, and her review of Student's records including Ventura's assessment reports and IEPs. Schnee concluded that Student scored low in all major language areas including language comprehension, language expression, semantics, or language meaning, syntax, word retrieval and social pragmatics. Ventura agreed with Schnee as to most areas of Student's speech and language deficits, but disputed Schnee's findings that Student had pragmatic language deficits.

School psychologists Woodruff's and Peterson's opinions at hearing that Student had no pragmatic language deficits were unpersuasive because neither Woodruff, nor Peterson, were speech and language pathologists. Further, Ventura never assessed Student with standardized assessments in pragmatic language. Ventura's conclusion in the January 15, 2020 and February 17, 2021 IEP team meetings that Student did not have pragmatic language deficits were based on informal staff observations. Therefore, Ventura's conclusion that pragmatic language was not an area of need for Student was

not as persuasive as speech and language pathologist Schnee's opinion. Schnee not only observed Student as part of her evaluation, but also assessed him in pragmatic language using standardized tests and a language sample.

Schnee opined that based on what Ventura knew of Student's extensive verbal and nonverbal deficits as documented in every IEP team meeting and triennial assessment reports since 2012, Ventura should have concluded that Student had pragmatic language deficits. May did not testify at hearing and did not rebut Schnee's opinion. Ventura's January 15, 2020 IEP team documented that Student had oral language in the low average to well below average range and continued to find Student eligible for speech and language impairment. Based on the 2021 triennial assessment results which found that Student exhibited deficits in all areas of language, Ventura's February 17, 2021 IEP team also found Student eligible for speech and language impairment. However, Ventura's February 17, 2021 IEP team unpersuasively concluded, without standardized testing, that Student's pragmatic language skills were in the average range.

Schnee was convincing when she disagreed with Ventura's 2021 IEP team's conclusion that Student's pragmatic language skills were in the average range because it was not supported with standardized assessments. Schnee was also convincing when she opined that Student had difficulty adapting appropriate language to the situation and context and hindered his education access which Ventura's January 15, 2020 and February 17, 2021 IEP teams should have been aware. For example, Schnee found Student had significant difficulty with conversational skills, and had difficulty articulating questions when he did not understand a subject. It was not credible that Ventura's speech and language pathologist was unaware of Student's difficulty with

conversational skills, and had difficulty articulating questions when he did not understand a subject. Ventura's speech and language pathologists did not rebut Schnee's opinions and conclusions at hearing. Therefore, Student proved that Ventura committed a procedural violation by not offering a goal to address Student's pragmatic language needs.

This procedural violation caused a deprivation of educational benefits and impeded Student's right to a FAPE in the IEPs between April 8, 2019 to August 10, 2021 because it prevented the IEP team from creating effective communication strategies. The failure to offer a pragmatic language goal denied Student the opportunity to work on communication skills such as the ability to articulate questions in academic classes when Student did not understand a concept. Further, the IEP team had no information to track and objectively measure Student's specific pragmatic language skills to address these deficits.

Student proved that Ventura denied him a FAPE by not offering a goal to address his pragmatic language challenges in the January 15, 2020, and February 17, 2021 IEPs. Student's remedy is discussed below.

STUDENT DID NOT NEED SOCIAL SKILLS, BEHAVIOR, ADAPTIVE SKILLS, AND ATYPICALITY GOALS

Student did not show that Ventura was required to offer Student a goal to address social skills, behavior, adaptive skills, and atypicality in the January 15, 2020, or February 17, 2021 IEPs. Student did not define or distinguish amongst the term social skills, behavior, adaptive skills, or atypicality. Based on the evidence presented at hearing, this Decision treated social skills, behavior, and atypicality as inappropriate

social skills for peer or adult interaction, and/or maladaptive behaviors impacting education. This Decision also treated adaptive skills as self-care and independent living documented on Student's January 15, 2020, and February 17, 2021 IEPs.

Although Student proved he had pragmatic language difficulties, he did not prove he needed any goals to address social skills beyond the pragmatic language goal discussed above. Schnee shared that Student knew enough to pass as socially appropriate by laughing when others laughed even if he did not understand the conversation or joke. This testimony was persuasive to show that Student required pragmatic language assistance, but did not necessarily require a social skills goal. Schnee's opinion Student needed goals to address social skills, adaptive skills, maladaptive, and atypical behaviors was not persuasive because these areas were outside her expertise as a speech and language pathologist. Even in Schnee's example where Student laughed to feign conversational comprehension showed that Student had appropriate social skills for peer interaction including adapting his behavior to fit in with peers at school.

Student's expert Freeman opined that Student needed goals every year from 2012 to 2021 to address inappropriate behaviors such as blurting out responses, rubbing surfaces, rocking back and forth, engaging in inappropriate conversation. However, the maladaptive behaviors Freeman identified did not occur during the April 8, 2019 to August 10, 2021 period. Therefore, Freeman's opinions regarding a goal to address these maladaptive behaviors was unpersuasive in challenging Ventura's failure to offer goals to address these behaviors in the January 2020 and February 2021 IEPs.

Ventura successfully rebutted Students unsupported arguments by showing that Student engaged appropriately with peers and adults in class, and at school, during the

April 8, 2019 to August 10, 2021 period. Parent reported that Student had no friends outside of school. Teachers also reported that Student sometimes acted immaturely. However, Student did not show that his lack of friends outside of school, or his immature behavior prevented him from accessing his education. For example, even Freeman acknowledged that Student behaved and engaged with peers appropriately when she observed him in physical education class during her June 2021 assessment. Freeman observed Student standing with a group of students, and redirected him to play basketball. Student complied and shot basketball with a friend for 40 minutes. Freeman also observed Student intermittently interacting with a group of friends. Freeman opined that Student had friends, was engaged, and accessed his class appropriately by playing basketball. Freeman did not observe, or opine, that Student engaged in any inappropriate social interactions during her school observation of Student.

Ventura's witnesses successfully rebutted Student's claims that Student required goals for behavior, adaptive skills, social skills, atypicality with teachers' reports that Student did not demonstrate deficits in those areas. Teachers Zahn, Gaeta, Perry, and Litton opined that Student did not have any social challenges, inappropriate social interactions, or any maladaptive behaviors impacting his education. Zahn opined that Student interacted and engaged with teachers, paraeducators, and peers appropriately in her class. Zahn observed Student building friendships, planning activities, and helping his peers. Gaeta observed Student interacting with peers including sharing with the class that his dog made him happy. Gaeta also opined that sometimes Student acted immaturely during distance learning such as babbling to his dog, and lying on the bed with his pajamas and shorts instead of sitting up at a desk. However, Student was responsive to Gaeta's request to sit up and stop talking to the dog during instruction.

When Student returned to school in-person in 2021, Gaeta observed Student multiple times each week lunching and socializing with five to six other students. Gaeta also shared that Student had a couple of good friends with whom Student interacted and socialized in class to such a great extent that Gaeta had to separate Student and his friends so they could attend and work.

Likewise, both Perry and Litton opined that Student demonstrated socially appropriate class behaviors. Although Perry shared that Student did not generally socialize in his distance learning class, Student engaged well with Perry and the math paraeducator. Student often complained about doing math work during distance learning such as "I don't want to do this. Why do I have to do this?" However, Perry opined that Student's complaints were typical complaints from students about math. Litton described Student as friendly to peers in his class, and when asked to volunteer to read in class Student often responded with an appropriate "No, thank you". The preponderance of the evidence showed that Student's behaviors and social skills were appropriate and did not impact his education access.

Freeman also opined that Student needed transitional behavioral goals that addressed social skills, behavior, and ability to function in the community as Student transitioned into adulthood. However, Freeman's opinion was inapplicable to Student's receipt of a FAPE from Ventura at the IEPs during the April 8, 2019 to August 10, 2021 period. Transition goals, behavioral, or otherwise, were required as part of a special education student's high school transition plan after a transition assessment when a student turned 16. Student was only 14 at the time of the February 2020 IEP; and 15 at the time 2021 at the time of the February 2021 IEP at the time of the hearing. (See 20 U.S.C. § 1414(d)(1)(A)(i)(VIII); Ed. Code, § 56345, subd. (a)(8) [An IEP that will be in effect when a student turns 16 is required to contain an Individual Transition Plan. The

Individual Transition Plan must include appropriate measurable postsecondary goals based upon transition assessments related to training, education, and employment and independent living skills if appropriate.]) Ventura was not required to offer transition goals at the February 2020 IEP. Ventura offered Student transition goals in the February 2021 IEP because Student was set to turn 16 years old during the time the February 2021 IEP was in effect. However, Parents did not consent to the February 2021 IEP with transition goals, leaving the February 2020 IEP, where transition goals were not required to be offered, as the effective IEP.

Ventura's witnesses also successfully rebutted Student's unsupported claims by showing that he exhibited proper social emotional/behavioral function toward his peers and teachers. Ventura's standardized assessment results also showed that Student's adaptive skills were not an area of need. Student attended class and was capable of independent and self-care at all times and during the relevant period, and did not require additional goals to address social skills, behavior, adaptive skills, or atypicality at the time of the January 2020 and February 2021 IEPs.

Student did not prove that Ventura denied him a FAPE by not offering goals to address social skills, behavior, adaptive skills, and atypicality in the January 15, 2020, or February 17, 2021 IEPs.

STUDENT DID NOT NEED A FINE MOTOR GOAL

Student did not offer any evidence at hearing to support that Student needed a fine motor skills goal other than his attorney's unsupported closing argument. No experts qualified to opine in the area of occupational therapy testified at hearing to support Student's argument on this issue. Student attorney's argument was not

evidence. Therefore, Student did not prove that Ventura denied him a FAPE by not offering a goal to address fine motor skills in the January 15, 2020, and February 17, 2021 IEPs.

ISSUES 3b(i) AND (ii), AND 3c(i) AND (ii): DID VENTURA DENY STUDENT A FAPE BY FAILING TO OFFER APPROPRIATE SERVICES IN THE BEHAVIOR, ATTENTION, WORK COMPLETION, ADAPTIVE SKILLS, PRAGMATIC LANGUAGE, SOCIAL SKILLS, ATYPICALITY, FINE MOTOR, AND DYSLEXIA AREAS OF NEED IN IEPs FROM APRIL 8, 2019 TO AUGUST 10, 2021?

Student contends Ventura failed to offer Student appropriate services to address

- behavior,
- attention,
- work completion,
- adaptive skills,
- pragmatic language,
- social skills,
- atypicality,
- fine motor, and
- dyslexia

in the January 15, 2020, and February 17, 2021 IEPs. Ventura contends it offered Student appropriate services and a FAPE in all IEPs.

STUDENT NEEDED SERVICES FOR WORK COMPLETION/ATTENTION AND PRAGMATIC LANGUAGE

Based on the same analysis under Issues 2b(i), 2b(ii), 2c(i), and 2c(ii) above, Student proved that Ventura denied him a FAPE by not offering services to address his work completion/attention and pragmatic language challenges in the January 15, 2020, and February 17, 2021 IEPs.

COMPLETION/ATTENTION SERVICES

Student proved that he needed a combination of individual and small group services to understand, attend, and complete work at the time of the January 15, 2020 and February 17, 2021 IEPs. The term attention discussed in Issues 3(b)(i), and 3(c)(i) describes Student's attention challenges, and not an attention deficit hyperactivity disorder. Ventura offered Student specialized academic instruction in a self-contained class, and speech and language services, along with accommodations in his January 15, 2020, and February 17, 2021 IEPs. The accommodations included read aloud for passages, speech-to-text, and simplified test directions to aid comprehension.

Ventura was aware of Student's work completion/attention challenges at the time of the IEPs during the April 8, 2019 to August 10, 2021 period. The February 5, 2019 IEP team documented that Student had trouble keeping up with class, did not complete required work, complained work was too hard, had a short attention span, was easily distracted, and often played with school supplies and other objects instead of paying attention in class. Although Student earned passing grades in most classes since April 8, 2019, Student's grades fluctuated, and some dropped to Ds and Fs, because he did not complete work and was distracted. Although the January 15, 2020 IEP noted that

Student started assignments with decreased prompting, the evidence at hearing showed that he still had significant difficulties completing work. The February 17, 2021 IEP noted that Student had significant work completion difficulties. During the 2020-2021 school year, Perry also observed Student completed more work when Perry, or a paraeducator explained the work to Student individually, or in a small break-out group from the class. Student's attention waned when he did not receive consistent help to understand and complete work.

Parent emailed and was in constant communication with Student's teachers during the April 2019 through August 2021 period reporting that Student was overwhelmed, and had trouble understanding and completing work. Teachers Zahn and Gaeta observed and opined at hearing that Student required extra assistance, significant prompting, explanations, instructions, rewording, and rechecking for understanding. Teachers Zahn and Gaeta knew Student needed more help to access the curriculum than the type of services offered in Student's January 2020 and February 2021 IEPs. Zahn and Gaeta informally provided Student extra help before and after school when their schedules permitted. Both Zahn and Gaeta conceded they were unable to provide, and did not provide, the extra informal individual support consistently during the April 2019 through August 2021 period. Student's academic progress was minimal from April 8, 2019 to August 10, 2021.

All the teachers opined at hearing that Student engaged more and completed work when prompted during small group and individual support sessions. However, Ventura did not offer the combination of individual and small group support on the January 15, 2020, or the February 17, 2021 IEPs that Student needed to understand,

attend, and complete the work necessary to access his education. Ventura denied Student a FAPE by failing to offer appropriate services to address work completion and attention.

PRAGMATIC LANGUAGE SERVICES

Student proved he needed pragmatic language services at the time of the January 2020 and February 2021 IEPs. Student's expert, speech and language pathologist Schnee, opined that Student had significant difficulty with conversational skills, and had difficulty articulating questions when he did not understand a subject. Schnee also opined that Student had difficulty adapting appropriate language to the situation and context. According to Schnee, Ventura's January 15, 2020 and February 17, 2021 IEP teams should have been aware of Student's pragmatic language deficits based on Ventura's 2018 and 2021 triennial speech and language assessment reports that Student had difficulty following complex spoken directions which resulted in Student not performing tasks correctly. Ventura's speech and language pathologists did not rebut Schnee's opinions and conclusions at hearing with persuasive evidence. Ventura offered only its conclusion that Student had average pragmatic language skills without the support of standardized assessment in that area.

Further, Ventura knew that Student had extensive verbal/nonverbal deficits as documented in every IEP team meeting and triennial assessment reports since 2012. Student scored below-average in his expressive and receptive language scores in the 2018 and 2021 speech and language standardized assessments. Student had difficulties

in all major language areas including language comprehension, language expression, semantics, or language meaning, syntax, and word retrieval. Ventura's January 15, 2020 IEP team documented that Student had oral language in the low average to well below average range and continued to find Student eligible for speech and language impairment. Ventura's February 17, 2021 IEP team persuasively concluded Student exhibited deficits in all areas of language because the conclusion was supported by the 2021 triennial standardized assessment results. However, the February 17, 2021 Ventura IEP team's conclusion that Student had average pragmatic language skills was not credible because it was based on informal observations, without any standardized assessment in pragmatic language. Based on what Ventura knew about Student's language challenges by the time of the January 15, 2020 IEP, it should have concluded that Student had pragmatic language deficits.

Ventura did not successfully rebut Student's showing that it was wrong in concluding Student did not have pragmatic language challenges at the time of the January 2020 and February 2021 IEPs. Therefore, Ventura was unpersuasive in arguing Student did not need more than the two hours of monthly small group speech and language services offered in the January 15, 2020 and February 17, 2021 IEPs. Ventura should have offered more speech and language services to address Student's significant speech and language, including pragmatic language, deficits.

Student proved that Ventura denied him a FAPE by not offering appropriate pragmatic language services in the January 15, 2020 and February 17, 2021 IEPs. Student's remedy is discussed below.

STUDENT DID NOT NEED SERVICES FOR SOCIAL SKILLS, BEHAVIOR, ADAPTIVE SKILLS, ATYPICALITY AND FINE MOTOR SKILLS

Based on the same analysis under Issues, 2b(ii), and 2c(ii) above, Student did not prove that he needed social skills, behavior, adaptive skills, atypicality and fine motor skills services and supports to access his education. Freeman and Parent opined that Student needed those services and supports to make friends and develop independence as an adult in the community. However, Student did not prove those were areas of need impacting his education at the time of the IEPs from April 8, 2019 to August 10, 2021. Zahn, Gaeta, Litton, and Perry opined at hearing that Student appropriately interacted with peers and adults and did not exhibit any maladaptive behaviors impacting his education from April 8, 2019 to August 10, 2021. The January 15, 2020 and February 17, 2021 IEPs stated there were no concerns with Student's adaptive skills such as self-care and independent living. Further, Student did not offer any evidence at hearing to support Student's claim that he needed services to address his fine motor skills. Attorney's argument was not evidence.

Therefore, Student did not prove that Ventura denied him a FAPE by not offering services specifically to address social skills, behavior, adaptive skills, atypicality, and fine motor in the January 15, 2020, or February 17, 2021 IEPs.

STUDENT NEEDED SERVICES FOR READING/DYSLEXIA

Student showed that he needed reading services, including those to address dyslexia to access his education at the time of the January 2020 and February 2021 IEPs. Student's reading expert Gorey assessed Student in June 2021 with the Academic Achievement Battery, a standardized test, to evaluate his basic literacy skills. Gorey

opined that Student was significantly delayed in reading, and identified the same reading difficulties Ventura identified in their triennial and academic assessments from 2019 to 2021. The February 5, 2019 Ventura IEP team concluded that Student decoded passages at a level one—pre-primer, non-reader reading level. Student identified 115 sight words and could distinguish between long and short vowels, reversed letters “b” and “d”, and had difficulty with beginning sounds with “th, sh, and ch” in February 2019. The January 15, 2020 Ventura IEP team concluded that Student decoded passages at level two—also a pre-primer non-reader level. The February 17, 2021 IEP team concluded that Student demonstrated deficits in phonemic awareness, particularly with multisyllabic words and that, despite making some academic progress, Student’s reading level remained at a beginning non-reader level. Ventura was aware that Student’s reading level stayed the same for years but did not offer any intensive reading services, to help him read and understand his work.

Ventura argued that it offered Student appropriate reading services embedded in the specialized academic instruction services in the January 15, 2020 and February 17, 2021 IEPs. Student had access to the Denise Lee, Read 180, and Moby Max programs in Student’s English classes each year. The three reading programs evaluated Student’s academic level and offered targeted supports to help Student read and understand material. The three reading programs also had read aloud videos and books to address Student’s reading deficits. However, the evidence showed that the reading supports including the various reading programs and reading aloud, text-to-speech, and other IEP accommodations Ventura offered to Student were insufficient to address his reading deficits.

Specifically, Student was average cognitively and capable of academic reading progress. Student made significant progress in reading when Gorey provided him with

intensive reading services in 2021. Student required a combination of small group and individual support on a consistent basis to read, understand, and access his education. Like Ventura's February 5, 2019 IEP team, Gorey also found that in 2021 Student still reversed "b" and "d" and had difficulty with blended letters such as "bl". Gorey attributed Student's difficulties to dyslexia.

Although Ventura did not label Student's reading difficulties as dyslexia, it was well aware of Student's reading deficits and needs. Ventura's reports of Student's reading profile showed minimal progress from 2019 to 2021. Ventura identified Student with similar significant reading deficiencies in 2020 and 2021 as Gorey did in 2021. However, despite Student's noted deficiencies and lack of progress in reading, Ventura offered only the imbedded reading programs in the specialized academic instruction class and accommodations year-to-year between 2019 and 2021.

Gorey opined that after working intensively with Student for 69 hours between June and September 2021 targeting Student's reading deficits, Student's reading skills improved from the kindergarten non-reader level to a level two-to-three according to the Academic Achievement Battery score. At hearing, Ventura did not rebut Gorey's opinion that Student had dyslexia, or that Student's reading skills improved over three months of intensive reading intervention. The weight of evidence established that Ventura did not offer Student appropriate reading services to target his reading deficits, including dyslexia.

Student proved that Ventura denied him a FAPE by not offering appropriate reading services, including those to address dyslexia, in the January 15, 2020, and February 17, 2021 IEPs. Student's remedy is discussed below.

ISSUE 4c: DID VENTURA DENY STUDENT A FAPE BY MISREPRESENTING MATERIAL FACTS TO PARENTS REGARDING WHETHER STUDENT HAD AUTISM, OTHER HEALTH IMPAIRMENT, AND PRAGMATIC LANGUAGE IMPAIRMENT AS SUSPECTED DISABILITIES FROM APRIL 8, 2019 TO AUGUST 10, 2021?

Student contends Ventura misrepresented material facts to Parents and withheld information regarding Student's suspected disabilities in the areas of autism, attention deficit hyperactivity disorder/other health impairment, and pragmatic language between April 8, 2019 to August 10, 2021. Ventura contends it did not make any misrepresentations to, or withheld material facts to Student, but concluded differently as to Student's suspected disabilities based on its assessment findings.

Student did not present evidence to show Ventura made any false representations to Parents about autism, pragmatic language, or attention deficit hyperactivity disorder/other health impairment about findings in the 2021 triennial assessments, during the 2021 IEP, or at any point from April 8, 2019 to August 10, 2021. After the 2021 assessments, Ventura concluded autism, and attention deficit hyperactivity disorder/other health impairment were not areas of suspected disability, and Student did not have pragmatic language deficits. The 2021 psychoeducational report stated that Student's attention was average. The Ventura February 17, 2021 IEP team specifically explained to Parent and documented that:

The psychologist reviewed the [a]utism eligibility criteria and noted that while specific rating forms/questionnaires related to autism were not included as part of this assessment, current results do not suggest

[Student] indicates characteristics of [a]utism (based on observations teachers and service provider reports, and formal social emotional/behavioral rating forms). Concerns were not reported at [the] start of the assessment. Speech pathologist reviews that although [Student] does demonstrate expressive and receptive language difficulties, his pragmatic and social skills are within the average range and he does not demonstrate verbal or nonverbal difficulties often associated with students with [a]utism. This was not an area of consideration at this time, nor has it been of concern in the past]. (See February 17, 2021 IEP team meeting notes.)

Ventura also provided Parents with the 2021 psychoeducational report which concluded that Student was eligible for special education under specific learning disability and speech and language impairment.

Student's expert Freeman agreed with Ventura's conclusion that Student did not have an attention deficit hyperactivity disorder. However, Freeman and Schnee disagreed with Ventura's conclusions, and opined that Student had autism and pragmatic language deficits. As discussed above, Ventura should have used standardized assessments for autism and pragmatic language, and its failure to do so rendered its conclusions not credible regarding those two areas.

Ventura's representations to Parents were consistent with Ventura's 2021 assessment findings and what it believed to be correct conclusions at the time. Although Student's experts disagreed with Ventura's conclusions, this did not establish that Ventura's representations to Parents were false. Neither a mistaken conclusion, nor a difference in experts' opinions equated to misrepresentations by Ventura about

Student's areas of suspected disability. Student did not prove that Ventura made any false representations in the 2021 IEP document, at the 2021 IEP team meetings, or in the 2021 evaluation reports regarding autism, attention deficit hyperactivity disorder/other health impairment, or pragmatic language as not being suspected disabilities.

Student unpersuasively argued that Ventura's assessors should have discussed the import of parental rating of "clinically significant" on questions about autism on the behavior rating scale, and Ventura's failure to do so constituted a misrepresentation as to whether Student had autism as a suspected disability. However, Student failed to cite any law supporting his attorney's argument that Ventura was required to discuss each "clinically significant" rating from Parent. None of Student's experts opined that discussion of every parental response on a rating scale was standard practice, or required, of assessors. Student did not present any evidence, that Ventura was required to discuss each Parent response or that the failure to do so amounted to a material misrepresentation, or withholding of information Ventura was required to provide to Parents. Attorney's argument was not evidence.

School psychologists Llano, Woodruff, and Peterson opined that it was standard practice for assessors to evaluate parents' and teachers' responses on behavior rating scales and determine if the raters' responses, along with the totality of all the assessment results supported a recommendation of special education eligibility. Llano, Woodruff, and Peterson also opined it was not standard practice for an assessor to discuss the significance of each rater's response in each standardized assessment with Parents.

The law required assessors to make recommendations and summarize their findings based on their professional judgment. (See Ed. Code, §§ 56320, 56327

[Assessors required to be knowledgeable regarding a student's unique needs; select appropriate assessments; administer assessments accurately to reflect a student's achievement level; and prepare a written report summarizing assessment findings, and make recommendations regarding a student's educationally related needs, and special education eligibility].) Nothing in Education Code section 56327 required the assessors to discuss each of Parent's responses on each rating scale. Ventura's assessors' opinions were persuasive because they were undisputed, reasonable, and supported by law.

Student did not show that Ventura denied Student a FAPE by misrepresenting material facts to Parents regarding autism, attention deficit hyperactivity disorder/other health impairment, or pragmatic language as suspected disabilities, or withheld information regarding these areas, from April 8, 2019 to August 10, 2021.

ISSUE 5a(i)(ii): DID VENTURA DENY STUDENT A FAPE BY FAILING TO IMPLEMENT THE JANUARY 15, 2020 IEP, FROM APRIL 13, 2020 THROUGH JUNE 10, 2021, DURING THE COVID-19 SCHOOL CLOSURE?

Student contends Ventura did not implement Student's January 15, 2020 IEP during COVID-19 school closure from April 13, 2020 to June 10, 2021, specifically the specialized academic instruction and speech and language services. Ventura contends that it did the best it could and materially implemented Student's January 15, 2020 IEP during the COVID-19 school closures.

Minor failures by a school district in implementing an IEP are not automatically violations of the IDEA. (*Van Duyn v. Baker School District* (9th Cir. 2007) 502 F.3d 811, 821 (*Van Duyn*).) Rather, the failure to implement an IEP must be material to constitute a violation of the IDEA. "A material failure occurs when there is more than a minor

discrepancy between the services a school provides to a disabled child and the services required by the child's IEP." (*Id.* at p. 822.) "[T]he materiality standard does not require that the child suffer demonstrable educational harm in order to prevail." (*Ibid.*) In *N.D. v. Hawaii Department of Education* (9th Cir. 2010) 600 F.3d 1104 (*N.D.*), the Ninth Circuit Court of Appeals explicitly found that school closures related to a fiscal crisis did not constitute a change of placement. However, although addressing a claim for "stay put" under title 20 United States Code section 1415(j), the Court acknowledged that a school closure caused by furloughs due to a state fiscal crisis could support a claim of "material failure to implement an IEP." (*Id.* at p. 1117.)

FEDERAL AND STATE SCHOOL CLOSURE ORDERS AFTER MARCH 2020

The United States Department of Education initially issued guidance on the issue of the school shutdowns in March 2020 in response to the universal 2020 COVID-19 pandemic. A local education authority which offers "distance learning" opportunities for its general education students has a concomitant duty to "make every effort to provide special education and related services to the child in accordance with the child's individualized education program." (*United States Department of Education, Questions and Answers on Providing Services to Children with Disabilities During the Coronavirus Disease 2019 Outbreak* (March 12, 2020) at p. 2.) School districts must "ensure that students with disabilities also have equal access to the same opportunities [as general education students], including the provision of FAPE," and, "to the greatest extent possible, each student with a disability can be provided the special education and related services identified in the student's IEP developed under IDEA." (*Id.*)

California's Governor Gavin Newsom issued an executive order on March 22, 2020, granting local educational agencies the authority to close schools, accompanied by a directive to the California Department of Education to develop guidance that

included “ensuring students with disabilities” receive a FAPE consistent with their IEP, and for local educational agencies to meet other procedural requirements under the IDEA.

The California Department of Education, called the CDE, issued guidance on March 20, 2020, and April 9, 2020. (*California Department of Education, Special Education Guidance for COVID-19* (March 20, 2020); *California Department of Education, Special Education Guidance for COVID-19, COVID-19 School Closures and Services to Students with Disabilities* (April 9, 2020).). The CDE advised that if a local educational agency can continue providing special education and related services as outlined in the IEP, or an agreed upon amendment to the existing IEP through a distance learning model, it should do so. (*CDE Guidance* (March 20, 2020), *supra*, at Point 1.) The local educational agency could also consider alternative service delivery options such as in-home service delivery, meeting with individual students at school sites, or other appropriate locations to deliver services. The CDE also encouraged local educational agencies to work collaboratively with nonpublic schools and agencies to ensure continuity of services, including moving to virtual platforms for service delivery to the extent feasible and appropriate. (*Ibid.*)

On April 27, 2020, U.S. Secretary of Education Betsy DeVos announced through a Department of Education press release that she was “not recommending Congress pass any additional waiver authority” concerning the FAPE and least restrictive environment requirements of the IDEA, noting again that “learning must continue for all students during the COVID-19 national emergency.” (*United States Department of Education, Secretary DeVos Reiterates Learning Must Continue for All Students, Declines to Seek Congressional Waivers to FAPE, LRE Requirements of IDEA*, April 27, 2020 Press Release). Finally, the California legislature did not require local education agencies to

describe in IEPs how the IEPs will be implemented in emergency situations until June 29, 2020. (Ed. Code, § 56345, subd. (a)(9), as added Statutes 2020, Ch. 24 (S.B. 98), § 66.)

Local education agencies must include how the IEPs will be implemented in emergency situations in the development of each student's initial IEP, or during the next regularly scheduled revision of students' IEPs, such as at the annual IEP. (*Ibid.*)

The Office of Special Education and Resource services, known as OSERS, recognized that educational institutions are "straining to address the challenges of this national emergency." (OSERS, *Supplemental Fact Sheet Addressing the Risk of COVID-19 in Preschool, Elementary and Secondary Schools While Serving Children with Disabilities*, (March 21, 2020) at p. 1.) OSERS assured school districts that "ensuring compliance with the IDEA should not prevent any school from offering educational programs through distance instruction." (*Ibid.*). OSERS noted the provision of FAPE may include, as appropriate, special education and related services provided through distance instruction provided virtually, online, or telephonically." (*Id.* at pp. 1-2.) OSERS reiterated its March 12, 2020 guidance on compensatory education. "Where, due to the global pandemic and resulting closures of schools, there has been an inevitable delay in providing services" IEP teams must make an individualized determination "whether and to what extent compensatory services may be needed when schools resume normal operations." (*Id.* at p. 2.) Local educational agencies may consider the use of accessible distance technology, instructional phone calls, and other curriculum-based activities that have been "scaffolded" based on student need. (*Id.*, at p. 2.)

California Senate Bill 98, Chapter 24, Section 34, defined distance learning in the 2020-2021 school year under Education Code section 43500, subdivision (a). "Distance learning" means instruction in which the pupil and instructor are in different locations

and pupils are under the general supervision of a certificated employee of the local educational agency. Distance learning may include, but is not limited to, all of the following:

1. Interaction, instruction, and check-ins between teachers and pupils through the use of a computer or communications technology.
2. Video or audio instruction in which the primary mode of communication between the pupil and certificated employee is online interaction, instructional television, video, telecourses, or other instruction that relies on computer or communications technology.
3. The use of print materials incorporating assignments that are the subject of written or oral feedback. (Ed. Code, § 43500, subd. (a), as added Stats. 2020, Ch. 24 (S.B. 98), § 34.)

California Senate Bill 98, Chapter 24, Section 34, defines in-person instruction in the 2020-2021 school year under Education Code section 43500, subdivision (b) as "instruction under the immediate physical supervision and control of a certificated employee of the local educational agency while engaged in educational activities required of the pupil." (Ed. Code, § 43500, subd. (b), as added Stats. 2020, Ch. 24 (S.B. 98), § 34.)

VENTURA MATERIALLY FAILED TO IMPLEMENT STUDENT'S IEP FROM APRIL 13, 2020 TO JUNE 11, 2020

Student showed that Ventura materially failed to implement his operative IEP during part of the COVID-19 school closures from April 13, 2020 to June 11, 2020, for eight school weeks. Ventura's last day of the 2020-2021 school year was June 11, 2020.

Student's January 15, 2020 offered him 67 percent of special education which consisted of 1,140 minutes per week of specialized academic instruction for a total of five periods, excluding physical education; and 120 minutes per month of small group, speech and language services with a speech pathologist. The January 15, 2020 IEP also offered physical education, lunch, and school-wide activities and assemblies as a part of the 33 percent of general education. Ventura offered Student accommodations and supports to access his education. The relevant accommodations at hearing included text-to-speech reading, reading aloud passages, and teachers' instructions such as

- on-task reminders,
- directions given one at a time,
- simplified test instructions,
- frequent checks for understanding,
- note-taking assistance,
- seating close to source of instruction and away from distraction.

Parent consented to the January 15, 2020 IEP on January 21, 2020.

As a result of the COVID-19 pandemic, Ventura stopped in-person learning on March 16, 2020. On April 2, 2020, Ventura sent a prior written notice letter and offered Student significantly fewer hours of service than required by the January 15, 2020 IEP. The April 2, 2020 letter offered a minimum of 30 minutes three times per week of specialized academic instruction consultation during office hours. Additionally, Ventura offered Student distance learning platforms embedded with Student's IEP accommodations such as Edgenuity and Read 180. Ventura also offered Student asynchronous speech and language services which consisted of 15 minutes per week of activities based on the speech pathologist's recommended activities on Google Classroom platform that Student completed at his own pace and time. Ventura's spring

break was from April 6th through 10th, 2020. Ventura's distance learning started on April 13, 2020. There were eight school weeks between April 13, 2020 and June 11, 2020.

Student proved that Ventura did not implement at least 17.5 hours of the 19 hours of weekly specialized academic instruction required by the January 15, 2020 IEP, from April 13, 2020 to June 11, 2020, for each of the eight school weeks. The weight of evidence proved Student received no more than the minimum 90 weekly minutes of specialized academic instruction offered in the April 2, 2020 letter. Therefore, Ventura failed to implement 92 percent of Student's specialized academic instruction on Student's January 15, 2020 IEP from April 13, 2020 to June 11, 2020. This failure to implement was material because the specialized academic instruction provided to Student fell significantly short of the specialized academic instruction required by Student's January 15, 2020 IEP. Student proved Ventura denied him a FAPE by materially failing to implement the specialized academic instruction required by the January 15, 2020 IEP.

Student proved that Ventura did not implement any of the speech and language services required by the January 15, 2020 IEP, from April 13, 2020 to June 11, 2020, for eight school weeks. The self-directed speech activities Ventura offered in the April 2, 2020 letter were not equivalent to the small group speech and language services with a speech and language pathologist offered in the January 15, 2020 IEP. By definition, self-directed services were not small group services with a speech and language pathologist. Ventura did not implement any part of the 120 minutes of monthly small group speech and language services. This failure was material because Student did not

receive any speech and language services specified in the January 15, 2020 IEP. Student proved Ventura denied him a FAPE by materially failing to implement the speech and language services on his January 15, 2020 IEP.

Student proved that Ventura materially failed to implement Student's January 2020 IEP for the period from April 13, 2020 to June 11, 2020.

VENTURA DID NOT MATERIALLY FAIL TO IMPLEMENT STUDENT'S IEP FROM JUNE 12, 2020 TO AUGUST 17, 2020

Ventura was on summer break from June 12, 2020 to August 17, 2020. Student's January 15, 2020 IEP did not include any extended school year services. Student did not offer any evidence to prove he was entitled to any services during Ventura's summer break. Therefore, Student did not prove Ventura materially failed to implement Student's January 15, 2020 IEP for the period from June 12, 2020 to August 17, 2020.

VENTURA MATERIALLY FAILED TO IMPLEMENT STUDENT'S IEP FROM AUGUST 18, 2020 TO APRIL 1, 2021

Student proved that Ventura materially failed to implement his IEP during the COVID-19 school closures from August 18, 2020 to April 1, 2021, for 29 school weeks.

Ventura's first day of the 2020-2021 school year was August 18, 2020. On August 26, 2020, Ventura sent Student a prior written notice and offered Student 912 minutes weekly of specialized academic instruction with a combination of synchronous and asynchronous teaching, and 120 minutes monthly of group or individual speech and language services online by the speech pathologist. Synchronous teaching consisted of live teaching through Zoom through a combination of whole

class, small group, or individual teaching by a teacher and paraprofessional. Asynchronous teaching was self-work and study through the Canvas and Google Classroom platforms. There were five school days between August 18, 2020 and August 26, 2020, the date of Ventura's prior written notice. However, neither party presented any evidence at hearing showing that Student received services that were different than that offered in the August 26, 2020 letter during the preceding five school days. Therefore, this Decision did not distinguish the services Student received during five school days between August 18, 2020 and August 26, 2020.

The February 17, 2021 IEP considered Student's educational needs during the continuing COVID-19 pandemic, and included how the IEP would be implemented in emergency situations in accordance with Education Code section 56345. (See Ed. Code, § 56345, subd. (a)(9), as add Stats. 2020, Ch. 24 (S.B. 98), § 66.) The February 17, 2021 IEP offered Student 63 percent of special education which consisted of 1,335 minutes per week of specialized academic instruction consisting of five periods, excluding physical education; and 120 minutes per month of small group, speech and language services with a speech pathologist. The February 17, 2021 IEP also offered physical education, lunch, and school-wide activities and assemblies as a part of the 37 percent of general education. However, Parent did not consent to the February 17, 2021 IEP. Therefore, the January 15, 2020 IEP remained the operative IEP from April 13, 2020 through June 10, 2021.

Student's last day of distance learning was April 1, 2021. Ventura's spring break was from April 5th through 9th, 2021. Ventura offered the option of a hybrid of in-person, and online learning starting April 12, 2021. Student accepted the hybrid option and returned to school for hybrid learning on April 12, 2021.

Between August 18, 2020 and April 1, 2021, Ventura provided Student with 15.2 hours per week of specialized academic instruction. Student proved that Ventura did not implement 3.8 hours weekly, or 20 percent, of specialized academic instruction required by Student's January 15, 2020 IEP, during each of the 29 school weeks from August 18, 2020 to April 1, 2021. Further, Student also had difficulty participating in online learning, requiring significant prompting and help from Parent to sign-on to on-line platforms to participate and complete work. This failure to implement was material because the specialized academic instruction provided to Student fell significantly short of the specialized academic instruction required by Student's January 15, 2020 IEP. Student proved Ventura denied him a FAPE by materially failing to implement the specialized academic instruction required by the January 15, 2020 IEP.

Between August 18, 2020 and April 1, 2021, Ventura provided Student with the speech and language services on his January 15, 2020 IEP. Student did not prove that Ventura materially failed to implement his speech and language services from August 18, 2020 to April 1, 2021. Ventura's August 26, 2020 letter offer of 120 minutes monthly group or individual speech and language services online, by the speech pathologist, was the equivalent of the speech and language services offered in Student's January 15, 2020 IEP. The speech and language pathologist worked online with Student, in a small group, which was in conformity with his January 15, 2020 IEP. Ventura implemented all of Student's speech and language services required by Student's January 15, 2020 IEP from August 18, 2020 to April 1, 2021.

Student was not credible in his claim that because he was unable to access online platforms for distance learning without parental assistance, he was left without any academic instruction or speech and language services until spring of 2021. Although Student needed significant prompting and help from Parent to sign onto online

platforms, mostly in Zahn's English class, when distance learning started, he did so successfully. Teachers Zahn and Gaeta opined that Student was adept with computer use for online learning. Further, Student's arguments that attendance taking discrepancies amongst teachers inaccurately reflected the actual instruction and services Student received during the COVID-19 related school closures were not credible. These arguments were based solely on Student attorney's arguments. Attorney's argument was not evidence. As discussed in Issues 2b(i) 2c(i), 3b(i), and 3c(i), the weight of the evidence showed that the lack of work completion/attention and pragmatic language goals and services, together with the lack of appropriate reading services impacted Student's educational access. The evidence did not support that online learning impacted Student's educational access.

Under the IDEA, Ventura remained responsible for implementing Student's operative IEP despite the school closure, even if by alternate methods such as distance learning. Therefore, Ventura was responsible for any compensatory education owed as a result of its material failure to implement Student's IEP.

Student's remedy for Ventura's FAPE denial in materially failing to implement his January 15, 2020 IEP from April 13, 2020 to June 11, 2020, and from August 18, 2020 to April 1, 2021 is discussed below.

VENTURA DID NOT MATERIALLY FAIL TO IMPLEMENT STUDENT'S IEP FROM APRIL 2, 2021 TO APRIL 11, 2021

Ventura's spring break was from April 2, 2021 to April 11, 2021. Student did not prove that Ventura was required to implement, or that it materially failed to implement Student's IEP during spring break.

VENTURA DID NOT MATERIALLY FAIL TO IMPLEMENT STUDENT'S IEP FROM APRIL 12, 2021 TO JUNE 10, 2021

Student did not prove Ventura failed to implement any portion of his operative IEP from April 12, 2021 to June 10, 2021, when he was in hybrid learning. Student returned to hybrid learning on April 12, 2021, and remained in hybrid learning until June 10, 2021, the last day of Ventura's 2020-2021 school year. Student did not present evidence that Ventura did not implement any portion of Student's January 15, 2020 IEP during the hybrid learning period. Ventura implemented Student's January 15, 2020 IEP in its entirety including delivering all specialized academic instruction and speech and language service minutes once he started hybrid learning.

Student did not prove that Ventura materially failed to implement Student's January 15, 2020 IEP from April 12, 2021 to June 10, 2021 when he was in hybrid learning.

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 1a:

Ventura did not deny Student a FAPE by failing to assess in all areas of disability, specifically autism and other health impairment in May 2012.

Ventura prevailed on Issue 1a.

Issue 1b:

Ventura did not deny Student a FAPE by failing to assess in all areas of disability, specifically autism in March 2015.

Ventura prevailed on Issue 1b.

Issue 1c:

Ventura did not deny Student a FAPE by failing to assess in all areas of disability, specifically autism in February 2018.

Ventura prevailed on Issue 1c.

Issue 1d(i):

Ventura denied Student a FAPE by failing to assess in all areas of disability, specifically autism, and pragmatic language from April 8, 2019 to August 10, 2021.

Student prevailed on Issue 1d(i).

Issue 1d(ii):

Ventura did not deny Student a FAPE by failing to assess in all areas of disability, specifically other health impairment from April 8, 2019 to August 10, 2021.

Ventura prevailed on Issue 1d(ii).

Issue 2a:

Ventura did not deny Student a FAPE by failing to offer appropriate goals in attention, work completion, pragmatic language, behavior, adaptive skills, social skills, atypicality, and fine motor in the February 5, 2019 IEP.

Ventura prevailed on Issue 2a.

Issue 2b(i):

Ventura denied Student a FAPE by failing to offer appropriate goals in attention, work completion, and pragmatic language in the January 15, 2020 IEP.

Student prevailed on Issue 2b(i).

Issue 2b(ii):

Ventura did not deny Student a FAPE by failing to offer appropriate goals in behavior, adaptive skills, social skills, atypicality, and fine motor in the January 15, 2020 IEP.

Ventura prevailed on Issue 2b(ii).

Issue 2c(i):

Ventura denied Student a FAPE by failing to offer appropriate goals in attention, work completion, and pragmatic language in the February 17, 2021 IEP.

Student prevailed on Issue 2c(i).

Issue 2c(ii):

Ventura did not deny Student a FAPE by failing to offer appropriate goals in behavior, adaptive skills, social skills, atypicality, and fine motor in the February 17, 2021 IEP.

Ventura prevailed on Issue 2c(ii).

Issue 3a:

Ventura did not deny Student a FAPE by failing to offer appropriate work completion, attention, pragmatic language, dyslexia, behavior, adaptive skills, social skills, atypicality, and fine motor services in the February 5, 2019 IEP.

Ventura prevailed on Issue 3a.

Issue 3b(i):

Ventura denied Student a FAPE by failing to offer appropriate work completion, attention, pragmatic language, and dyslexia services in the January 15, 2020 IEP.

Student prevailed on Issue 3b(i).

Issue 3b(ii):

Ventura did not deny Student a FAPE by failing to offer appropriate behavior, adaptive skills, social skills, atypicality, and fine motor services in the January 15, 2020 IEP.

Ventura prevailed on Issue 3b(ii).

Issue 3c(i):

Ventura denied Student a FAPE by failing to offer appropriate work completion, attention, pragmatic language, and dyslexia services in the February 17, 2021 IEP.

Student prevailed on Issue 3c(i).

Issue 3c(ii):

Ventura did not deny Student a FAPE by failing to offer appropriate behavior, adaptive skills, social skills, atypicality, and fine motor services in the February 17, 2021 IEP.

Ventura prevailed on Issue 3c(ii).

Issue 4a:

Ventura did not deny Student a FAPE by misrepresenting material facts to Parents regarding whether Student had autism and other health impairment as suspected disabilities in May 2012.

Ventura prevailed on Issue 4a.

ISSUE 4B:

Ventura did not deny Student a FAPE by misrepresenting material facts to Parents regarding whether Student had autism as a suspected disability in March 2015, and February 2018.

Ventura prevailed on Issue 4b.

Issue 4c:

Ventura did not deny Student a FAPE by misrepresenting material facts to Parents regarding whether Student had autism, other health impairment, and pragmatic language impairment as suspected disabilities from April 8, 2019 to August 10, 2021.

Ventura prevailed on Issue 4c.

Issue 5a(i):

Ventura denied Student a FAPE by failing to implement the January 15, 2020 IEP from April 13, 2020 through June 2021 during the COVID-19 school closure: from April 13, 2020 to June 11, 2020; and from August 18, 2020 to April 1, 2021.

Student prevailed on Issue 5a(i).

Issue 5a(ii):

Ventura did not deny Student a FAPE by failing to implement the January 15, 2020 IEP from April 13, 2020 through June 2021 during the COVID-19 school closure: from June 12, 2020 to August 17, 2020; April 2, 2021 to June 10, 2021.

Ventura prevailed on Issue 5a(ii).

Issue 5b:

Ventura did not deny Student a FAPE by failing to implement the February 14, 2017 IEP regarding an elective.

Ventura prevailed on Issue 5b.

Issue 6:

Ventura did not deny Student a FAPE by changing Student's placement outside the IEP process regarding an elective and a reduction in general education time in the February 14, 2017 IEP.

Ventura prevailed on Issue 6.

REMEDIES

Student requests that Ventura pay, or reimburse, private educational evaluations conducted in June 2021 by Freeman, and Schnee, and compensatory education,

including reimbursement, for the reading support services Gorey provided to Student for Ventura's FAPE denials. Ventura contends Student did not meet her burden on any issue, and should not be entitled to any remedy.

ALJ's have broad latitude to fashion appropriate equitable remedies for FAPE denials. (*School Community of Burlington v. Department of Education* (1985) 471 U.S. 359, 370 [105 S.Ct. 1996, 85 L.Ed.2d 385] (*Burlington*); *Parents of Student W. v. Puyallup School District, No. 3* (9th Cir. 1994) 31 F.3d 1489, 1496 (*Puyallup*).) In remedying a FAPE denial, the student is entitled to relief that is "appropriate" in light of the purposes of the IDEA. (20 U.S.C. § 1415(i)(2)(C)(iii); 34 C.F.R. § 300.516(c)(3)(2006).) Appropriate relief means "relief designed to ensure that the student is appropriately educated within the meaning of the IDEA." (*Puyallup, supra*, 31 F.3d. at p. 1497.)

Compensatory education is an equitable remedy that depends upon a fact-specific and individualized assessment of a student's current needs. (*Puyallup, supra*, 31 F.3d at p. 1496; *Reid v. District of Columbia* (D.C.Cir. 2005) 401 F.3d 516, 524.) The award must 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". (*Id.*, 401 F.3d at p. 524; *R.P. ex rel. C.P. v. Prescott Unified School District* (9th Cir. 2011) 631 F.3d 1117, 1125.). However, hour-for-hour relief for a denial of FAPE is not required. (*Puyallup, supra*, 31 F.3d at p. 1497.) "[E]quitable considerations are relevant in fashioning relief." (*Burlington, supra*, 471 U.S. at p. 374.)

Student is entitled to remedies from Ventura's FAPE denials for Issues 1d(i), 2b(i), 2c(i), 3b(i), 3c(i), and 5a(i). Student is entitled to have Ventura fund, or reimburse, private educational evaluations and compensatory education as discussed below.

PRIVATE ASSESSMENT REMEDY

As a remedy under Issue 1d(i), Ventura shall reimburse, or pay, for Freeman's and Schnee's 2021 evaluations for its failure to assess Student in the areas of autism and pragmatic language from April 8, 2019 to August 10, 2021. The evidence showed that Freeman agreed to accept Ventura's special education local plan area for psychoeducational evaluation guideline amount for Student's June 2021 private autism evaluation. However, neither party presented evidence at hearing about the actual amount agreed to between Ventura and Freeman. Ventura shall pay, or reimburse, the previously agreed to special education local plan area guideline amount for psychoeducational evaluations for Freeman's autism evaluation of Student.

Ventura shall also pay, or reimburse, the \$3,500 amount that it contracted with Schnee on June 29, 2021 to conduct a speech and language evaluation of Student. Schnee started her evaluation of Student in May 2021 and completed her report on June 21, 2021. On June 29, 2021, after Schnee completed the assessment of Student, Ventura contracted with Schnee to pay \$3,500 for the speech and language evaluation Schnee had already conducted. Although Schnee subsequently raised her fee to \$4,000 for a speech and language assessment, and rescinded her June 29, 2021 contract with Ventura, Ventura should not be responsible to pay more than the \$3,500 contracted amount for Student's speech and language evaluation. The \$3,500 amount Ventura agreed to pay Schnee was already above Ventura's special education local plan area guideline amount for speech and language evaluations.

Ventura's witnesses were uncertain whether Ventura had paid, or was in the process of facilitating payment to Freeman and Schnee. The evidence at hearing was also unclear if Student's attorney paid Freeman and/or Schnee for the assessments.

Therefore, upon a showing of proof of payment by Student's attorney to Freeman and/or Schnee, Ventura shall reimburse Student's attorney within 10 business days for the amount:

1. agreed to between Freeman and Ventura for Freeman's June 2021 assessment of Student under Ventura's special education local plan area guideline for psychoeducational evaluations; and
2. up to \$3,500 for Schnee's June 2021 speech and language assessment of Student.

Alternatively, if Freeman and/or Schnee had not been paid, Ventura shall pay them within 10 business days of the date of this Decision.

COMPENSATORY EDUCATION REMEDY

Student is entitled to compensatory education for Ventura's FAPE denials under Issues 2b(i), 2c(i), 3b(i), 3c(i), and 5a(i). There was a total of approximately 72 school weeks from April 8, 2019 to August 10, 2021, the relevant period of FAPE denials under these issues. Student would be entitled to receive 152 compensatory education hours for Ventura's FAPE denials from April 8, 2019 to August 10, 2021.

Student is entitled to compensatory education for Ventura's failure to offer appropriate work completion/attention and pragmatic language goals from January 15, 2020 to August 10, 2021 under Issues 2b(i), and 2c(i). Student is further entitled to remedies for Ventura's failure to offer appropriate work completion/attention, pragmatic language, and reading services from January 15, 2020 to August 10, 2021 under Issues 3b(i), and 3c(i).

Student is also entitled to compensatory education for Ventura's material failure to implement Student's January 15, 2020 IEP from April 13, 2020 to April 1, 2021 during the COVID-19 school closure under Issue 5a(i). Ventura failed to implement 17.5 hours per week of Student's specialized academic instruction minutes, and two hours per month of group speech and language services required by the January 15, 2020 IEP for school eight weeks, from April 13, 2020 to June 11, 2020. Ventura also did not implement 20 percent, or 3.8 hours weekly, of Student's specialized academic instruction minutes from the January 15, 2020 IEP for 29 school weeks, from August 18, 2020 to April 1, 2021. The compensatory education hours awarded in this Decision also considered Student required significant prompting and help from Parent to sign onto online platforms during distance learning to access his education.

The compensatory education hours for the 64 weeks from April 8, 2019 to August 10, 2021, excluding the eight school weeks from April 13, 2020 to June 11, 2020, was calculated at two hours per week for a total of 128 compensatory education hours. This amount was reasonable considering the IEP services Ventura offered, Student's deficits, and FAPE denials. The compensatory education hours for the eight school weeks from April 13, 2020 to June 11, 2020, was calculated at three hours per week for a total of 24 compensatory service hours. Student shall receive more compensatory service hours for the eight school weeks where he received very little academic services and no speech and language services from Ventura.

This calculation for compensatory education hours was not an hour-for-hour relief, but equitable based Ventura's FAPE denials, and Student's demonstrated needs. (See *Puyallup*, *supra*, 31 F.3d at p. 1497; *Burlington*, *supra*, 471 U.S. at p. 374.) Student's

remedies for FAPE denials under 2b(i), 2c(i), 3b(i), 3c(i), and 5a(i) shall consist of a total of 152 compensatory education hours to be used at Parents' election toward academic tutoring/intensive reading services and/or speech and language services.

Gorey recommended one-to-one intensive reading support with a reading specialist certified and trained in the Orton-Gillingham and Lindamood-Bell methodologies. Gorey was trained in the Orton-Gillingham and Lindamood-Bell methodologies. She opined these methodologies were effective in teaching reading. Gorey was persuasive in her recommendation of a one-to-one intensive reading specialist support for compensatory education. Gorey provided 69 hours of intensive one-to-one reading support to Student from June to September 2021. Student demonstrated increased reading abilities by improving approximately two reading levels after three months of intensive intervention with Gorey.

Schnee credibly opined that the Lindamood-Bell visualization and verbalization program and speech and language therapy will be effective in remediating Student's significant language delays. Schnee testified she was familiar with, trained in, and qualified to teach the Lindamood-Bell program. Schnee opined that the Lindamood-Bell program could remediate a few years of reading deficits in a short time for students who had basic language knowledge and visualization abilities. Schnee opined Student had difficulties responding to questions because of his processing deficits. She observed Student softly repeating questions and directions to himself for remembering and processing information during class. Student also relied on visual information presented on a screen to reference and process auditory information. Based on Schnee's observations of Student, she concluded that Student had sufficient language knowledge and visualization abilities to benefit from the visualization and

verbalization program. Schnee also explained that a speech and language pathologist could address Student's deficits in conversation comprehension, appropriate use of tone, gestures, and help Student develop language to formulate age-appropriate questions and responses.

Freeman's recommendation of a comprehensive behavior assessment, transition services, training on how to make friends, and social adaptive functioning services to develop community and daily living skills until Student turned 22-years old were not appropriate remedies for Ventura's FAPE denials. Student did not prove he had deficits in social adaptive function, or behavior. Student did not have general social skills deficits impacting his educational access. The UCLA PEERS social skills program Freeman recommended was therefore inappropriate to award as compensatory education.

Student shall receive 152 compensatory education hours for Ventura's FAPE denials from April 8, 2019 to August 10, 2021. Therefore, Ventura shall reimburse Parents and whoever paid for Student's compensatory education an amount not exceeding \$19,000, calculated at 152 hours of compensatory education at a rate of \$125 per hour. Compensatory education for Student includes academic tutoring/intensive reading services, and/or speech and language services. The hourly rate was reasonable because it was the same hourly rate Gorey charged for the reading services she provided to Student. Parents shall have the option of applying the \$19,000 toward reimbursement for past educationally related services including the \$8,625 for the intensive one-to-one reading services Gorey provided. Compensatory services shall be delivered by an individual certified in the Orton-Gillingham, Lindamood-Bell methodologies, or a licensed speech and language pathologist. Gorey

was trained in the Orton-Gillingham and Lindamood-Bell methodologies which proved effective in helping Student improve his reading level during the June to September 2021 period.

ORDER

1. Ventura shall pay, or reimburse, for Freeman's June 2021 evaluation of Student in the amount Ventura and Freeman agreed to as stated under Ventura's special education local plan area guidelines for psychoeducational evaluation. Ventura shall pay, or reimburse, within 10 business days of the submission of Freeman's invoice, and either: a proof of payment if reimbursement is sought; or a signed statement under the penalty of perjury by Parents that Freeman has not been paid, and a statement that Ventura pay Freeman directly.
2. Ventura shall pay, or reimburse, for Schnee's June 2021 speech and language evaluation of Student in the amount of \$3,500. Ventura shall pay, or reimburse, within 10 business days of the submission of Schnee's invoice, and either: a proof of payment if reimbursement is sought; or a signed statement under the penalty of perjury by Parents that Schnee has not been paid, and a statement that Ventura pay Schnee directly.
3. Ventura shall reimburse Parents or whoever who paid for Student's compensatory education services, an amount not to exceed \$19,000 for academic tutoring/intensive reading services with someone certified in and trained in the Orton-Gillingham or Lindamood-Bell methodologies; a Lindamood-Bell verbalization and visualization program; and speech and language services with a licensed speech and language pathologist. All

requests for reimbursement shall comply with Ventura's reimbursement policies including the provision of invoice, and proof of payment.

Compensatory education awarded by this Decision shall be used and reimbursement requests submitted to Ventura no later than June 30, 2024. Any amounts not used and submitted for reimbursement by June 20, 2024 shall be forfeited. Ventura shall reimburse for compensatory education services within the timeframe set forth in accordance with its reimbursement guidelines.

4. All other requests for relief are denied.

RIGHT TO APPEAL THIS DECISION

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

/s/

Sabrina Kong

Administrative Law Judge

Office of Administrative Hearings