

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

PARENTS ON BEHALF OF STUDENT,

v.

SADDLEBACK VALLEY UNIFIED SCHOOL DISTRICT.

CASE NO. 2022120468

DECISION

JUNE 19, 2023

On December 14, 2022, the Office of Administrative Hearings, called OAH, received a due process hearing request from Student, naming Saddleback Valley Unified School District. Saddleback Valley Unified School District is called Saddleback Valley. Administrative Law Judge Laurie Gorsline heard this matter by videoconference on April 11, 12, 13, 18, 19 and 20, 2023.

Kathleen Loyer represented Student. Parents attended all hearing days. Student did not attend the hearing. Daniel Harbottle represented Saddleback Valley. Diane Clark, Director of Special Education, and Shawn Beese, Saddleback Valley Coordinator, attended some of the hearing days on Saddleback Valley's behalf.

At the parties' request the matter was continued to May 15, 2023 for written closing briefs. The record was closed, and the matter was submitted on May 15, 2023.

ISSUES

The issues at hearing are stated below. A free appropriate public education is called a FAPE. An individualized education program is called an IEP.

In Student's complaint, she erroneously referred to a January 28, 2022 IEP, instead of the January 18, 2022 IEP, which neither party objected to or otherwise brought to the ALJ's attention after the Order Following Prehearing Conference was issued. At hearing, both parties litigated the appropriateness of the January 18, 2022. This Decision addresses the January 18, 2022 IEP. (See *M.C. v. Antelope Valley Union High School Dist.* (9th Cir. 2017) 858 F.3d 1189.)

1. Did Saddleback Valley deny Student a FAPE by failing to appropriately assess Student in all known/suspected areas of need, specifically:
 - A. Failing to conduct an assistive technology assessment between December 14, 2020, and December 14, 2022?
 - B. Failing to conduct a vision assessment between December 14, 2020, and October 2022?
 - C. Failing to assess in the area sensory integration/hyperactivity between December 14, 2020, and December 14, 2022?
 - D. Failing to conduct a functional behavior analysis assessment between December 14, 2020, and December 14, 2022?

- E. Failing to conduct a health assessment between December 14, 2020, and December 14, 2022, given Student's eye surgeries and health issues?
 - F. Failing to assess in the area of social emotional functioning between December 14, 2020, and December 14, 2022?
2. Did Saddleback Valley deny Student a FAPE by failing to develop a comprehensive IEP to address Student's needs, specifically,
- A. In the February 24, 2021 IEP:
 - i. Failing to develop valid or accurate present levels of performance?
 - ii. Failing to offer appropriate levels of individual and small group speech language therapy?
 - iii. Failing to offer appropriate levels of applied behavior analysis therapy within the educational environment?
 - iv. Failing to offer appropriate levels of occupational therapy to address fine motor and sensory integration deficits?
 - v. Failing to offer appropriate levels of auditory processing therapy?
 - vi. Failing to offer appropriate levels of vision therapy?
 - vii. Failing to offer appropriate levels of social skills training?
 - viii. Failing to offer appropriate levels of assistive technology support and training?

- B. In the January 18, 2022 IEP:
- i. Failing to develop valid or accurate present levels of performance?
 - ii. Failing to offer appropriate levels of individual and small group speech language therapy?
 - iii. Failing to offer appropriate levels of applied behavior analysis therapy within the educational environment?
 - iv. Failing to offer appropriate levels of occupational therapy to address fine motor and sensory integration deficits?
 - v. Failing to offer appropriate levels of auditory processing therapy?
 - vi. Failing to offer appropriate levels of vision therapy?
 - vii. Failing to offer appropriate levels of social skills training?
 - viii. Failing to offer appropriate levels of assistive technology support and training?
- C. In the September 12, 2022 IEP, failing to offer appropriate levels of applied behavior analysis therapy within the educational environment?
- D. In the October 14, 2022 IEP, failing to offer appropriate levels of vision therapy?

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).)

In this case, Student had the burden of proof. The factual statements in this Decision constitute the written findings of fact required by the IDEA and state law. (20 U.S.C. § 1415(h)(4); Ed. Code, § 56505, subd. (e)(5).)

Student was nine years old and in third grade at the time of hearing. Student resided with her Parents within the Saddleback Valley's geographic boundaries at all relevant times. Student attended school at Saddleback Valley's Robinson Elementary School since kindergarten. Student was first eligible for special education and related services on March 30, 2017. Student was eligible for special education under the primary category of autism and the secondary category of speech or language impairment. Robinson Elementary School is referred to as Robinson Elementary.

BACKGROUND

STUDENT'S HISTORY OF DISTANCE LEARNING AND IN-PERSON LEARNING FOLLOWING COVID-19 DURING THE 2020-2021, 2021-2022 AND 2022-2023 SCHOOL YEARS

Student attended school in-person for most of her kindergarten 2019-2020 school year. She participated in distance learning between March 2020 and the end of that school year.

For the 2020-2021 school year, Student's first-grade year, she participated in distance learning in August 2020, and a hybrid of in-person and distance learning between September and December 2020. In December 2020, Student's pediatrician

recommended Parents place Student back in distance learning because of COVID-19 health concerns, including asthma, so between December 2020 and June 2021, Student participated in distance learning.

For the 2021-2022 school year, Student did not attend school in person between August 16 and mid-September 2021 because Saddleback Valley personnel did not confirm until mid-September 2021 that Student had the additional classroom support required by her IEP. During that approximately one-month period, Student did unspecified work at home. For the 2021-2022 school year, and for the 2022-2023, school year, Student attended school in person between September 2021 and June 2022 for second grade, and between August 2022 through the hearing, for third grade.

Student received private applied behavior analysis services in the home at various times between 2016 and the hearing. Distance learning was defined at hearing as consisting of a combination of live on-line instruction, called synchronous instruction, and work completed at home, referred to as asynchronous instruction. During distance learning, Mother provided some support for Student in completing her work.

SADDLEBACK VALLEY CONDUCTED THREE EVALUATIONS PRIOR TO THE DECEMBER 2020 THROUGH DECEMBER 2022 PERIOD AT ISSUE

Neither party sought to admit into evidence the operative IEP at the time of Saddleback Valley's 2019-2020 evaluations discussed below, or otherwise fully establish its contents. Based on the evidence that was admitted, at the time of Saddleback Valley's evaluations, Student was in kindergarten in a general education classroom. Her current IEP as of January 29, 2020, offered 60 minutes of daily push in specialized academic

instruction support, a total of 30 minutes of weekly speech and language services, and 15 minutes per week of physical therapy. Aide support was available in the classroom for at least portions of the day and there was a classroom reinforcement system, a visual schedule, and sensory breaks. On October 21, 2019, Student was offered 30-minutes of pull-out small group specialized academic instruction three times per week which was pending consent from Parents. Saddleback Valley conducted three assessments during the 2019-2020 school year, a special circumstance instructional assistant assessment, a functional behavior assessment, and a multidisciplinary triennial assessment.

SADDLEBACK VALLEY'S DECEMBER 2019 SPECIAL CIRCUMSTANCE INSTRUCTIONAL ASSISTANT ASSESSMENT

In November and December 2019, Saddleback Valley conducted a special circumstance instructional assistant assessment to determine if Student required additional staff support to be successful in the classroom. The assessment and its findings were documented in a report dated December 16, 2019. The assessment was conducted by Saddleback Valley school psychologist, David Houten, with the collaboration of Saddleback Valley's autism specialist and board-certified behavior analyst, Kristy Branham. The assessment included a health and developmental history completed by Mother on December 5, 2019, a record review, interviews with Parent and Student's teachers, along with observations in various settings.

Mother told the assessors Student had a happy, joyful, and loving disposition. She had been successful in her private behavior program at home with one-on-one direction. Student loved to learn new things when she could focus in a structured setting, and she enjoyed being involved in social settings. Mother did not believe Student was prepared to transition from a 14-student maximum special day preschool

classroom with a teacher and two aides, to a 32-student maximum general education classroom with one teacher, one classroom aide and one aide for one child. Mother wanted Student to receive one-to-one aide support in the classroom, during lunch and on the playground. Mother thought Student did well with the one-on-one behavior instruction she got at home, and believed Student needed individual aide support to initiate tasks, focus and sustain attention, and interact with peers because she tended to stim, “zone out” or flap her arms, and not pay attention due to noise, or overstimulation. Mother had concerns about Student’s safety outside the classroom due to her vision issues, stimming and “zoning out.” At hearing, Mother described “zoning out” as Student being in a thought bubble and not alert to her surroundings, such as staring off, looking up, or laughing to herself.

Student’s teachers reported she was successful academically with frequent reminders to focus and attend but had difficulty initiating tasks without prompting. Student worked well with prompting and redirection by adults and peers and responded well to positive reinforcement. Large group settings were more difficult for Student where she tended to lose focus and attentiveness. Student’s teacher had no safety concerns. Student played appropriately with other girls on the playground and did not wander, although her social interaction was less advanced than her peers.

In determining whether Student required additional support Saddleback Valley considered four areas: health/personal care, behavior support, instruction, and inclusion/mainstreaming. Saddleback Valley concluded while Student had a varying degree of needs in all areas, she did not require additional classroom support to address her educational needs. Instead, Saddleback Valley recommended that the existing embedded classroom instructional assistant continue to provide additional support

to Student, and that the instructional assistant be trained by the autism and behavior support staff. The report noted that a permanent aide had been added to the kindergarten classroom.

SADDLEBACK VALLEY'S JANUARY 29, 2020 FUNCTIONAL BEHAVIOR ASSESSMENT

Houten and Branham also conducted a functional behavior assessment between November 2019 through January 2020, and documented the results of their assessment in a report dated January 29, 2020. Student was referred for a functional behavior assessment because of Parents' concerns about Student's attention to task. The purpose of the assessment was to determine if Student's behavior was impacting her ability to access the curriculum and to determine if a behavior support plan was required.

The assessment included a record review, input/interviews with Parent and Student's teachers, along with observations in various settings, and data collection on Student, and on peers for comparison. Specifically, the assessment included a screening tool which identified social and environmental variables that could impact behavior, and a measure designed specifically for direct observation of academic skills.

Mother reported Student got frustrated at times when she was not able to complete tasks on time, was overstimulated, could not focus, or express what she needed. Mother also reported Student got along with peers when she was one-on-one and when she could focus but needed assistance with initiating and maintaining interactions with her peers.

Mother thought Student needed assistance in the classroom and on the playground where Student had difficulty attending and focusing due to overstimulation, noise, larger classroom size and whole group instruction.

Student's off-task behavior occurred significantly more often in large group activities or whole group instruction. Student's teacher reported Student benefitted from warnings regarding changes in routine and schedule, that Student liked a soft positive voice, and intense or loud noises could bother her. Student responded well to adult direction and benefitted from subtle prompts to encourage initiation and completion of tasks and positive reinforcement.

Houten and Branham determined that although multiple functions were indicated on the screening tool, direct observations and interviews indicated automatic reinforcement or sensory stimulation to be the most likely function of Student's off-task behavior, and escape a secondary function because Student's off-task behavior reliably resulted in temporary avoidance of work. Attention was not a central function of Student's behavior based on observation and interviews. They concluded Student demonstrated rates of off-task behaviors that were comparable or slightly elevated as compared to her peers. They recommended against a behavior intervention plan because the Tier 1 and the more targeted Tier 2 interventions, which were available to all students, were sufficient to redirect and manage Student's behaviors, particularly prompting and repeating directions.

SADDLEBACK VALLEY'S TRIENNIAL MULTIDISCIPLINARY ASSESSMENT
REPORT DATED JANUARY 30, 2020

In December 2019 and January 2020, Saddleback Valley conducted a triennial multidisciplinary assessment of Student, which included

- a speech language assessment,
- an occupational therapy assessment in the areas of
 - fine motor,
 - sensory processing,
 - fine and visual motor skills,
- an assessment of functional fine motor skills,
- a gross motor-physical therapy assessment, and
- evaluation in the areas of
 - intellectual functioning/ cognition,
 - academic achievement,
 - social/emotional and
 - behavioral.

The members of the assessment team included

- school psychologist Houten,
- a speech language pathologist,
- a special education teacher,
- an occupational therapist,
- a physical therapist, and
- a school nurse.

The assessment consisted of a records review, interviews, multiple observations in various settings and both standardized and non-standardized testing measures. The results of the multidisciplinary assessment were contained in a report dated January 30, 2020.

Student had an average intellectual ability. In academic achievement, Student's overall scores in reading, and basic reading skills and written language were in the average range, and in the low average range in mathematics.

Student's general education teacher noted Student was kind, well behaved, liked doing her work, and very creative. She was becoming more assertive, had improved on expressing herself and in taking care of her own personal needs. Her teacher's areas of concern were Student's focus and attention issues. She continued to require adult support, redirection, and guidance to stay on task, was inconsistent in following group instruction, working independently and completing work.

Student's expressive language skills were higher than her receptive language skills. Student's receptive language disorder was deemed part of her autism presentation. Student had social communication deficits, also deemed to be part of her autism and language disorder. Student demonstrated age-appropriate fine motor skills and visual motor integration. Although Student generated humming and singing, and a moderate degree of movement, her sensory seeking behaviors appeared to be for regulating her attention most of the time. She could become visually distracted, but otherwise her overall processing was within typical function on the instrument administered for the standardized assessment of sensory processing issues. Student demonstrated good functional abilities in the classroom and playground environments.

Student benefitted from educationally based physical therapy interventions. Student demonstrated adequate postural and motor control to perform tasks required in the school setting, she could perform transitional movements without loss of balance, and she was able to walk and run across a variety of substrates without difficulty. She could negotiate stairs safely and used playground ladders but needed verbal cues for platform transitioning and new or complex ladders. She had mild impairments in motor planning, and postural insecurities influenced her independence at recess.

The report concluded that Student continued to qualify for special education under autism and speech language impairment. Student's areas of need were listed as receptive language and pragmatics, also called social communication.

STUDENT FAILED TO SEEK TO HAVE ALL RELEVANT IEPs ADMITTED INTO EVIDENCE

Student did not offer into evidence any of the IEPs covering the period prior to the February 24, 2021 IEP. In fact, the only IEPs in evidence were the February 24, 2021, May 10, 2021, September 12, 2022, and the October 14, 2022 IEPs. Student's failure to admit all relevant IEPs into evidence, including the January 2020 IEP, and the January 18, 2022 IEP, or sufficiently establish what occurred or what was offered in these other IEPs negatively impacted the ability of Student to meet her burden of proof as discussed below.

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ISSUE 1A: DID SADDLEBACK VALLEY DENY STUDENT A FAPE BY FAILING TO CONDUCT AN ASSISTIVE TECHNOLOGY ASSESSMENT BETWEEN DECEMBER 14, 2020 AND DECEMBER 14, 2022?

At hearing, Student contended Saddleback Valley denied her a FAPE by failing to assess Student's assistive technology needs between December 14, 2020 and December 14, 2022. Student argued Saddleback Valley never conducted an assessment in this area, but checked the box on the February 24, 2021 IEP that Student did not need assistive technology services/devices, without discussing it with Parents. In her closing brief, Student argues Saddleback Valley knew or should have known Student needed assistive technology based on her eye surgeries, and her handwriting issues, pointing to a March 2023 psychoeducational assessment Parents privately obtained. Student contends that had she been assessed by an "assistive technology specialist" she could have been earlier provided with a slant board and speech to text software.

Saddleback Valley contended at hearing there was neither a need for, nor a request by Parents for an assistive technology assessment. It argued Student had assistive technology in the classroom and she demonstrated appropriate use of assistive technology. Saddleback Valley argued it was immaterial that the box on the February 24, 2021 IEP was checked "no" for requiring assistive technology services or devices because there was no evidence she needed assistive technology to progress in the educational environment. In its closing brief, Saddleback Valley argues Student presented no evidence she had needs in this area that were not being met in the general education environment to make meaningful educational progress, as evidenced by the testimony of Student's teachers and her report cards documenting Student's progress and competency with her tablet and classroom technology use. Saddleback Valley contends that not only

did Parents never question this element of Student's IEP, but when it tried to reevaluate Student in fall 2022, Parents refused to consent to assessment for six months, and never requested a separate assistive technology assessment be added to the assessment plan.

A FAPE is 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 IEP for an eligible student based upon state law and the IDEA. (20 U.S.C. §§ 1401(14), 1414(d)(1); and see Ed. Code, §§ 56031, 56032, 56341, 56345, subd. (a) and 56363, subd. (a); 34 C.F.R. §§ 300.320, 300.321, and 300.501.)

In general, a child eligible for special education must be provided access to specialized instruction and related services which are individually designed to provide educational benefit through an IEP reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances. (*Board of Education of the Hendrick Hudson Central School Dist. v. Rowley* (1982) 458 U.S. 176, 201-204 (*Rowley*); *Endrew F. v. Douglas County School Dist. RE-1* (2017) 580 U.S. 386, 403 [137 S.Ct. 988, 1000].)

School district evaluations of students with disabilities under the IDEA serve two purposes: (1) identifying students who need specialized instruction and related services because of an IDEA-eligible disability, and (2) helping IEP teams identify the special education and related services the student requires. (34 C.F.R. §§ 300.301 and 300.303.) The first refers to the initial evaluation to determine if the child has a disability under the IDEA, while the latter refers to the follow-up or repeat evaluations that occur throughout the course of the student's educational career. (See 71 Fed. Reg. 46,640 (Aug. 14, 2006).)

The IDEA provides for reevaluations (referred to as reassessments in California) to be conducted not more frequently than once a year unless the parent and school district agree otherwise, but at least once every three years unless the parent and school 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 must be conducted if the school district determines that the educational or related services needs, including improved academic achievement and functional performance, of the pupil warrant a reassessment, or if the pupil's parents or teacher requests a reassessment. (20 U.S.C. § 1414(a)(2)(A)(i) & (ii); 34 C.F.R. § 300.303(a)(1) & (2); Ed. Code, § 56381, subd. (a)(1).)

When developing an IEP, the IEP team must consider whether the student requires assistive technology devices and services. (20 U.S.C. § 1414(d)(3)(B)(v); 34 C.F.R. § 300.324(a)(2)(v); Ed. Code, § 56341.1, subd. (b)(5).) A school district is required to provide any assistive technology device that is needed to provide a FAPE to a child with a disability. (20 U.S.C. § 1412(a)(12)(B)(i); 34 C.F.R. § 300.105; Ed. Code, § 56341.1, subd. (b)(5).) Assistive technology device is defined as any item, piece of equipment or product system, other than a medical device, that is used to increase, maintain, or improve functional capabilities of an individual with exceptional needs. (20 U.S.C. § 1401(1); 34 C.F.R. § 300.5; Ed. Code, § 56020.5.) Assistive technology services are any service that directly assists a student in the selection or use of an assistive technology device that is educationally necessary and performed by qualified personnel. (20 U.S.C. § 1401(2); 34 C.F.R. § 300.6; Cal. Code Regs., tit. 5, § 3051.19.)

The IDEA does not mandate that a public agency administer additional testing as part of a reevaluation. (See 20 U.S.C. § 1414(c)(4); 34 C.F.R. § 300.305(d); see also *Z.B. v. District of Columbia* (D.C. Cir. 2018) 888 F.3d 515, 523 [The IEP evaluation does not

always require a school to conduct additional testing.) The reevaluation of a child with a disability must be sufficiently comprehensive to identify all the child's special education and related services needs whether or not commonly linked to the disability category in which the child has been classified. (34 C.F.R. § 300.304(c)(6). A school district must assess a student in all areas of suspected disability. (34 C.F.R. § 300.304(c)(4).) However, a parent may not select the assessments for a school district. The types of assessments to be employed in a reevaluation are within the reasonable discretion of the school district. (*Idea Public Charter School v. Belton* (D.D.C., July 19, 2007, No. 05-467) 2007 WL 2071668; *Mackey v. Board of Education* (S.D.N.Y. 2005) 373 F. Supp.2d 292, 299 [IDEA does not compel a school district to perform every sort of test that would arguably be helpful before devising an IEP for a student.].)

Reassessment generally requires parental consent. (20 U.S.C. § 1414(c)(3); Ed. Code, § 56381, subd. (f)(1).) To start the process of obtaining parental consent for a reassessment, the school district must provide proper notice to the student and his or her parents. (20 U.S.C. §§ 1414(b)(1) & (c)(3), 1415(b)(3) & (c)(1); Ed. Code, § 56321, subd. (a).) The notice consists of the proposed assessment plan and a copy of parental rights and procedural safeguards under the IDEA and companion state law. (20 U.S.C. § 1415(c)(1); Ed. Code, § 56321, subd. (a).) The school district must give the parent 15 days to review, sign, and return the proposed assessment plan. (Ed. Code, § 56321, subd. (a).) If a parent does not consent to an assessment plan, the school district may request a due process hearing to obtain permission to conduct the reassessment without parental consent by establishing that the assessment is necessary and that it is lawfully entitled to do so. (34 C.F.R. § 300.300(c)(ii); Ed. Code, §§ 56381, subd. (f)(3), 56501, subd. (a)(3), 56506 subd. (e).)

A school district's failure to assess a child may constitute a procedural violation of the IDEA. (*D.K. v. Abington School Dist.* (3rd Cir. 2012) 696 F.3d 233, 249; see also *Park v. Anaheim Union High School Dist., et.al.* (9th Cir. 2006) 464 F.3d 1025, 1032 [A failure to properly assess is a procedural violation of the IDEA.].) However, 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); 34 C.F.R. § 300.513(a)(2); Ed. Code, § 56505, subd. (f)(2); *W.G., et al. v. Board of Trustees of Target Range School Dist., etc.* (9th Cir. 1992) 960 F.2d 1479, 1484 (*Target Range*), superseded in part by statute on other grounds.)

STUDENT FAILED TO PROVE SADDLEBACK VALLEY WAS REQUIRED TO CONDUCT AN ASSISTIVE TECHNOLOGY ASSESSMENT

Here, Student's three-year multidisciplinary reevaluation was completed in January 2020. Student did not and could not challenge the sufficiency of Saddleback Valley's three-year reevaluation, which challenge was barred by the two-year statute of limitations. (20 U.S.C. § 1415(f)(3)(C) & (D); Ed. Code, § 56505, subd. (j).)

THERE WAS NO REQUEST FOR ASSESSMENT BY A PARENT OR TEACHER

Student's next three-year evaluation was not due until January 2023. Saddleback Valley was not required to conduct a reevaluation of Student unless it determined Student's educational or related services needs, including improved academic achievement and

functional performance, warranted a reassessment, or if a Parent or teacher requested a reassessment. (20 U.S.C. § 1414(a)(2)(A)(i) & (ii); 34 C.F.R. § 300.303(a)(1) & (2); Ed. Code, § 56381, subd. (a)(1); *M.S. v. Lake Elsinore Unified School District* (9th Cir. 2017) 678 Fed. Appx. 543, 544 (*Lake Elsinore*) (nonpub. opn.).)

The underlying case in *Lake Elsinore* concerned a student who brought an action challenging the school district's failure to identify all the student's disabilities or suspected disabilities, where the student's behaviors had become progressively more aggressive and posed a threat to her health and safety. At a 2011 IEP team meeting, the parents expressed their concern the student had become more aggressive at home and with tutors, and she sometimes attacked strangers in public. She had also begun ripping off her toenails and fingernails, had a one-inch bald spot on her scalp from pulling out her own hair, manipulated her fingers, and violently scratched, pinched, and grabbed people's necks. She also screamed and cursed at random intervals. At a May 2012 IEP team meeting, the parents further noted student exhibited significant echolalia and perseveration and had developed other troubling behavior such as swiping objects off a table and breaking them. At a July 2012 IEP team meeting even the school district concluded the student's behaviors had worsened and were not being addressed sufficiently by the behavior plan that had been in place up until that time. (*M.S. v. Lake Elsinore* (C.D. Cal., July 24, 2015, Case No. 13-CV-01484-CAS (SPx) 2015 WL 4511947, at *7.) The district court held that the school district denied Student a FAPE by failing to assess Student's behavior during the period at issue, because Student's functional performance warranted a reevaluation. (*Id.* at *8.)

The Ninth Circuit reversed. It held that the school district had no duty to conduct a reevaluation of the student because the local educational agency did not determine that reevaluation was necessary, the student's parents had not requested a reevaluation,

the student's teacher had not requested a reevaluation, and fewer than three years had elapsed since the student's last evaluation. The court held the district court erred in holding that the school district had a duty to reevaluate the student under these circumstances, and the school district had not procedurally violated the IDEA by failing to do so. (*Lake Elsinore, supra*, 678 Fed. Appx. at p. 544.)

Here, for the period between December 14, 2020 through September 12, 2022 Student did not prove there was a request for an assistive technology assessment by a Parent or teacher, or that Saddleback Valley determined Student's educational or related services needs warranted reevaluation. In fact, the evidence established none of those events occurred.

It was undisputed that none of Student's teachers requested an assistive technology assessment. In addition, there was no specific evidence that Parents, their lay advocate, or their attorney, ever requested an assistive technology assessment prior to December 14, 2022. Student's lay advocate attended the February 24 and May 10, 2021 IEP team meetings, and Student's attorney had been involved since at least June 2022, and attended the September 12 and October 14, 2022 IEP team meetings. Although a district must honor a parent's request for a reevaluation if it hasn't evaluated the student in the previous 12 months, this obligation hinges on the parents making such a request. (*Lake Elsinore, supra*, 678 Fed. Appx. at p. 544.)

Saddleback Valley never determined Student's educational or related services needs warranted a reassessment until September 12, 2022 when it proposed a reevaluation and on September 13, 2022 sent Parents an assessment plan for the upcoming January 2023 three-year reevaluation.

SADDLEBACK VALLEY DETERMINED REASSESSMENT WAS NECESSARY ON
SEPTEMBER 12, 2022

On September 12, 2022, an IEP amendment team meeting was held to review a private functional behavior assessment report obtained by Parents, and discuss changes to the January 18, 2022 IEP. In reviewing the recommendations in Student's privately obtained functional behavior assessment report, Saddleback Valley recommended that Student's three-year review be moved up to November 2022. Student's attorney objected. Saddleback Valley's attorney again asked for Parent's agreement to assess Student.

On September 13, 2022, Saddleback Valley sent a three-year assessment plan to Parents, which included proposed assessments in

- academic achievement,
- health,
- intellectual development,
- language/speech communication development,
- motor development,
- social emotional/behavior, and
- functional vision.

Parents were also provided with a health history form, release of information and a copy of parent's procedural rights. The same day, Mother acknowledged, in writing, her receipt of the documents, including the assessment plan, and stated she had forwarded them to Student's attorney to review with Parents. On September 15, 2022, Student's

attorney informed Saddleback Valley Parents would not agree to an early triennial assessment and demanded the recommendations of Student's private behavior assessors be implemented by a mutually agreeable board-certified behavior analyst.

On October 14, 2022, an IEP amendment team meeting was held to review a vision assessment conducted by a developmental optometrist which was privately obtained by Parents, and discuss changes to the January 18, 2022 IEP. Saddleback Valley informed Parents it did not have a signed assessment plan from Parents. Mother stated she did not recall getting the assessment plan. Saddleback Valley agreed to resend the assessment plan.

On October 21, 2022, Student's attorney reiterated to Saddleback Valley that Parents were not agreeable to the assessment plan, "where nearly every box was checked," and requested that the recommendations of Student's private assessors be fully implemented.

On November 4, 2022, Saddleback Valley sent a new assessment plan to Parents for Student's triennial review due January 2023, which included assessments in the areas of

- academic achievement,
- health,
- intellectual development,
- language/speech communication development,
- motor development,
- social/emotional/behavior,
- adaptive behavior,

- functional vision by a vision specialist, adding a clinical optometry assessment by a doctor of optometry, and a
- special circumstance instructional assistant assessment to the assessments already proposed in the September 13, 2022 assessment plan.

On December 9, 2022, Saddleback Valley's counsel contacted Student's attorney about the November 4, 2022 assessment plan, specifically asking whether Parents consented to the proposed assessment. Student's attorney did not respond. On December 22, 2022, Saddleback Valley's attorney followed up again, stating he had not received a response to his email and requested a response by December 23, 2022. Student's attorney never responded.

On January 10, 2023, Saddleback Valley's attorney asked Student's attorney to explain Parents' failure to cooperate with Saddleback Valley's proposed assessments. Student's attorney responded, again informing Saddleback Valley that Parents were not agreeable to an early triennial evaluation. On March 8, 2023, Parents consented to the November 4, 2022 assessment plan and returned the signed assessment plan to Saddleback Valley.

PARENT'S REFUSAL TO CONSENT TO REASSESSMENT RELIEVED SADDLEBACK VALLEY OF ANY OBLIGATION TO ASSESS STUDENT

Saddleback Valley was required to obtain Parents' consent to the three-year reevaluation and could not assess Student without a Parent's consent. (20 U.S.C. § 1414(c)(3); Ed. Code, § 56381, subd. (f)(1).) The September 13, 2022 three-year assessment plans sent to Parents on September 13, 2022 and November 4, 2022 were both comprehensive assessment plans and would have been used by Student's IEP

team to determine the special education, related services, and supplementary aids and services for Student to be involved in and make progress in the general education curriculum, including her assistive technology needs.

The only specific assistive technology devices Student claims to have needed besides a tablet, was speech to text software, and a slant board. However, Student failed to prove that any specific assessment beyond those proposed was required to determine whether Student needed any of these devices or what she meant by an “assistive technology specialist.” There was no sufficient testimony from anyone on these specific points, including Student’s experts. Student failed to establish that the assessments proposed in the September 13 and November 4, 2022 assessment plans would not have considered use of a slant board or other assistive technology devices or services within the assessment areas proposed.

There was no persuasive evidence justifying Parents’ refusal to consent to the assessment plan. Mother’s testimony that Parents delayed signing the assessment plan until March 2023 because they opposed an early triennial did not make sense, as Student’s three-year IEP review was due January 2023, and given the failure to assess claims in this case. Likewise, Mother’s testimony that she wanted to discuss the assessment plan at an IEP team meeting prior to consenting to the assessment plan was also unconvincing to justify the refusal or the long delay. In addition, there was no contemporaneous evidence Parents requested a meeting for purposes of discussing the assessment plan prior to Student attorney’s March 8, 2023, letter attaching Mother’s consent to the November 4, 2022 assessment plan. None of the other correspondence

admitted into evidence mentioned a meeting to discuss the assessment plan other than a January 2023 email to Saddleback Valley from Student's attorney making passing mention that the assessment could be discussed at the post-filing mediation.

Indeed, there was at least one IEP team meeting between the date Saddleback Valley first sent the triennial assessment plan to Parents on September 13, 2022 and December 14, 2022, the end of the statutory period for this claim. Parents could have discussed their concerns about the assessment plan at the October 14, 2022 IEP team meeting or requested another IEP team meeting. Instead, Mother claimed at the October 14, 2022 IEP team meeting that she did not recall receiving the assessment plan despite having earlier acknowledged receipt in writing.

Parents refused to sign consent for the proposed assessments until March 8, 2023. Regardless of Parents' motives in refusing to consent to reevaluation, Parents' failure to consent negated any obligation for Saddleback Valley to assess Student's assistive technology needs. Parents' refusal to consent to further assessment of Student relieved Saddleback Valley of its obligation to assess Student from September 13, 2022 through December 14, 2022.

Student relied on Saddleback Valley's checking the box on the February 24, 2021 IEP that Student did not need assistive technology support. However, regardless of the box being checked, Student had the burden of establishing an assistive technology assessment was legally required, which she failed to do. Moreover, while Student argues she had vision and handwriting issues obligating Saddleback Valley to conduct an assistive technology assessment, she completely ignores the statutory conditions necessary to trigger that obligation prior to Student's three-year review and Parents'

admitted refusal to consent to reassessment. Saddleback Valley was not required to conduct an assistive technology assessment between December 14, 2020 and December 14, 2022.

Saddleback Valley did not deny Student a FAPE by failing to conduct an assistive technology assessment between December 14, 2020 and December 14, 2022.

ISSUE 1B: DID SADDLEBACK VALLEY DENY STUDENT A FAPE BY FAILING TO CONDUCT A VISION ASSESSMENT BETWEEN DECEMBER 14, 2020 AND OCTOBER 2022?

Student contended at hearing Saddleback Valley was obligated to conduct a vision assessment because it knew Student had significant vision issues impacting her in the classroom. In her closing brief, Student maintains Saddleback Valley was aware of Student's eye surgeries, vision deficits and possible need for vision therapy based on the information from Student's ophthalmologist and Saddleback Valley's physical therapist in the 2020 multidisciplinary assessment. Student claims the 2022 private functional behavior assessment obtained by Parents noted Student's issues with writing and Student provided Saddleback Valley with the 2022 private vision evaluation on September 14, 2022. Student argues Saddleback Valley knew or should have known Student's vision was a suspected disability that impacted her access to education, but it never referred her for a functional vision assessment or vision screening.

Saddleback Valley contended at hearing it had no reason to assess Student's vision before September 2022, and sent Parents an assessment plan for a vision assessment in September and November 2022. Saddleback Valley argued six months went by before Parents consented to assessment in March 2023, casting doubt on the

validity of Student's claim. In the closing brief, Saddleback Valley argues it had no reason to assess Student's vision given her documented progress in the general education setting. It argues Student's ophthalmologists never recommended any further assessment of Student or vision therapy, and Student did not call her ophthalmologist as a witness. Saddleback Valley argues the private vision assessor did not conclude Student was eligible for special education under the category of vision impairment, and Parents improperly refused its attempts to assess Student because they thought the assessment plan was too comprehensive.

The 2020 multidisciplinary assessment considered a January 14, 2020 report from Student's treating ophthalmologist, Dr. Lingua, at the University of California at Irvine School of Medicine advising Student had residual difficulties following eye surgeries in 2015 and 2019 for eye alignment disorders, including suboptimal tracking and suppressed central vision in one eye. It stated Student's eye convergence would be corrected at some point, and she would likely benefit from ongoing spectacle use as well as "potentially helpful vision therapy" as Student's autism would allow. It stated Student's vision corrected to 20/30 in each eye and patching was not required. The report listed the assistance Student needed in the classroom as preferential seating, and additional time to complete tasks requiring tracking/reading, and that Student be encouraged to wear her glasses. The doctor's recommendations did not include any assessments.

The January 2020 multidisciplinary evaluation also considered input from Saddleback Valley's physical therapist. The physical therapist noted Student tended to leap instead of jump, possibly due to visual deficits in addition to postural insecurities, and visual deficits may have contributed to difficulties with complex activities such as ladder climbing.

The January 2020 IEP containing the education program developed after the three-year review was not admitted into evidence and the evidence did not otherwise fully establish the contents of that IEP.

Student's annual IEP team meeting was convened on February 24, 2021. Saddleback Valley's February 24, 2021 IEP documented Student failed her vision test on November 4, 2019 and that Student should wear her corrective lenses. The February 24, 2021 IEP present levels of performance noted Student's eye surgeries in 2015 and 2019, and the same information from Dr. Lingua's January 14, 2020 report considered as part of Student's January 2020 three-year reevaluation. The present levels of performance also included the physical therapist's information from January 2020 multidisciplinary evaluation that Student used the kindergarten playground ladders without physical assist, but needed cues for transition, and visual deficits might be contributing to difficulties with ladder climbing.

The IEP documented Student had two more eye surgeries in June 2020 and December 2020 to address a disorder characterized by slow upward drifting of one eye when the individual fixates with the other eye. Parents reported Student's vision continued to be a concern, Student used one pair of glasses for the computer and another pair for strengthening her eyes and for clarity, and Student was supposed to wear her glasses more often. Mother and Student's advocate attended the February 24, 2021 IEP team meeting, but did not request an assessment.

On May 11, 2021, an IEP team meeting was held, to discuss Student's transition from distance learning to an in-person classroom in fall 2021. Parents and Student's advocate attended the May 11, 2021 IEP team meeting, and did not request a vision assessment. Student's vision was not discussed.

On May 25, 2021, Student's ophthalmologist, Charlotte Gore., M.D., wrote a letter reiterating that Student had had multiple eye surgeries, had sub-optimal control of her eyes, suppression in one eye at all times, and would benefit from full-time use of her eyeglasses and potentially from vision therapy. Dr. Gore recommended accommodations at school, specifically preferential seating, additional time for tasks, care with physical therapy and use of equipment. Dr. Gore did not recommend any assessments. Student did not establish when Saddleback Valley got a copy of Dr. Gore's May 2021 letter.

NEITHER PARENT NOR TEACHER REQUESTED A VISION ASSESSMENT AND SADDLEBACK VALLEY DID NOT DETERMINE A REEVALUATION WAS NECESSARY

Although Student's vision issues were an ongoing concern for Parents, this was insufficient to trigger an obligation to assess Student in the area of vision. Student had to prove that a Parent or teacher requested a vision assessment or Saddleback Valley determined that Student's educational or related services needs warranted reevaluation. (20 U.S.C. § 1414(a)(2)(A)(i) & (ii); see also Ed. Code, § 56381, subd. (a)(1); *Lake Elsinore, supra*, 678 Fed. Appx. at p. 544.)

Saddleback Valley determined Student's educational or related services needs warranted reevaluation when it proposed a reevaluation at the September 12, 2022 IEP team meeting and sent Parents an assessment plan which included a vision assessment on September 13, 2022. However, for the period between December 14, 2020 through September 12, 2022, Student did not prove there was a request for a vision assessment by a Parent or teacher, or that Saddleback Valley determined Student's educational or related services needs warranted reevaluation before Student's three-year review due in January 2023. In fact, the evidence established none of those events occurred.

No teacher requested Student's vision be assessed. Saddleback Valley made no determination that Student required a reevaluation including a vision assessment, prior to it proposing an early three-year reevaluation at the September 12, 2022 IEP team meeting and sending the September 13, 2022 assessment plan to Parents. Moreover, Parents did not request a vision assessment prior to September 13, 2022, when Saddleback Valley sent them the first of two comprehensive assessment plans. At both the February 2021 and May 2021 IEP team meetings, Parents were accompanied by a lay advocate, and no request for an assessment was made by Parents or the lay advocate.

At some point prior to June 2022, Parents retained a special education attorney, but not only was no request for assessment made, Parents thereafter refused to consent to Saddleback Valley's vision assessment plans until March 8, 2023. Regardless of Parents' motives in refusing to consent to a vision assessment by Saddleback Valley for six months, Parents' failure to consent negated any obligation for Saddleback Valley to conduct a vision assessment after September 13, 2022.

Again, Student argues she had vision and handwriting issues requiring Saddleback Valley to conduct a vision assessment prior to Student's three-year review, but she failed to prove any of the statutory conditions for reassessment occurred. Saddleback Valley was not required to conduct a vision assessment between December 14, 2020 and October 2022.

Saddleback Valley did not deny Student a FAPE by failing to conduct a vision assessment between December 14, 2020, and October 2022.

ISSUE 1C: DID SADDLEBACK VALLEY DENY STUDENT A FAPE BY FAILING TO ASSESS IN THE AREA OF SENSORY INTEGRATION/HYPERACTIVITY BETWEEN DECEMBER 14, 2020 AND DECEMBER 14, 2022?

Student contended at hearing she exhibited sensory issues and hyperactivity that impacted her access to education, and she was never assessed in this area. Student's closing brief addressing this issue consists of two sentences without any analysis. It states that assessments were not done, despite comments in the January 2020 multidisciplinary report regarding Student's distractibility, overstimulation, dysregulation, stimming, and inability to sustain attention, which Student does not specify.

Saddleback Valley contended at hearing that Student was assessed in this area in the December 2019 special circumstance instructional assistant assessment, the January 2020 functional behavioral assessment, and the January 2020 multidisciplinary reevaluation, and there was no need for a further assessment. It maintains Student's needs in this area were well known and addressed in Student's IEP. In its closing brief, Saddleback Valley argues it offered to conduct a triennial evaluation in September 2022, but Parents refused to consent to assessment until March 2023. It also argues that Student's scores on the January 2020 multidisciplinary assessment sensory processing measure were largely typical, and Student did not present any testimony from an occupational therapist or anyone else to discuss an area of sensory integration/hyperactivity Student needed to have assessed. Saddleback Valley asserts that it addressed Student's sensory needs with accommodations in the February 24, 2021 IEP, particularly breaks involving sensory activities.

Student failed to explain or point to any specific evidence demonstrating how the January 2020 multidisciplinary assessment was deficient in assessing sensory processing

deficits or hyperactivity. Regardless, to the extent Saddleback Valley was required to conduct certain assessments as part of Student's triennial review and did not, Student's claims are time-barred. (20 U.S.C. § 1415(f)(3)(C) & (D); Ed. Code, § 56505, subd. (J).)

Student argues she exhibited sensory and hyperactivity issues which required Saddleback Valley to assess in this area prior to Student's three-year review due in January 2023, but she failed to prove any of the statutory conditions for reassessment occurred. (See 20 U.S.C. § 1414(a)(2)(A)(i) & (ii); see also Ed. Code, § 56381, subd. (a)(1).) Saddleback Valley was not required to conduct a reevaluation of Student and assess in the area of sensory integration/hyperactivity between December 14, 2020 and December 14, 2022.

Saddleback Valley determined Student's educational or related services needs warranted reevaluation by proposing a reevaluation of Student at the September 12, 2022 IEP team meeting and sending Parents the comprehensive September 13 and November 4, 2022 assessment plans. There was no persuasive evidence Saddleback Valley determined that Student's educational or related services needs warranted a reevaluation in the area of sensory integration/hyperactivity prior to September 12, 2022, or that a Parent or teacher requested a reassessment prior to Saddleback Valley proposing an early three-year evaluation at the September 12, 2022 IEP team meeting and sending Parents the September 13, 2022 assessment plan.

Despite receiving the comprehensive September 13 and November 4, 2022 assessment plans, Parents refused to consent to further assessment of Student until March 8, 2023. Parents' refusal to consent to a reevaluation of Student excused Saddleback Valley from any obligation to assess Student in the area of sensory integration/hyperactivity through at least December 14, 2022.

Student failed to prove the assessment plans offered to Parents on September 13 and November 4, 2022, would not have covered these alleged “sensory integration/hyperactivity” areas of concern. Student failed to either sufficiently explain or establish what she meant by “sensory integration/hyperactivity.” Student’s closing brief is devoid of any analysis discussing this issue. Student’s one-line cursory reference to Student’s distractibility, overstimulation, dysregulation, stimming, and inability to sustain attention was insufficient. (See e.g., *Kraim v. Virginia, et al.* (S.D.W. Va. July 26, 2021, No. 3:21-cv-00326) 2021 WL 3612305, at *7 [“[J]udges are not pigs searching for truffles,” and not required to be “mind readers.”]; see also, *In Re: Out of Network Substance Use Disorder Claims Against UnitedHealthcare* (C.D. Cal., October 14, 2022, 8:19-cv-02075-JVS(DFMx)) 2022 WL 17080378, fn. 2 (*In Re: Out of Network*) [“The Court ‘is not a pig searching for truffles in a forest,’ and will ‘not perform the work of representing parties.’”]; *Agarwal v. Oregon Mutual Insurance Company* (D. Nev. January 18, 2013, No. 2:11-cv-01384-LDG) 2013 WL 211093, at *3 [“[I]t is not the responsibility of the judiciary ‘to sift through scattered papers in order to manufacture arguments for the parties.’”].)

Saddleback Valley did not deny Student a FAPE by failing to assess Student in the area of sensory integration/hyperactivity between December 14, 2020 and December 14, 2022.

ISSUE 1D: DID SADDLEBACK VALLEY DENY STUDENT A FAPE BY FAILING TO CONDUCT A FUNCTIONAL BEHAVIOR ANALYSIS ASSESSMENT BETWEEN DECEMBER 14, 2020 AND DECEMBER 14, 2022?

At hearing, Student contended Saddleback Valley’s 2019 functional behavior analysis assessment should have been updated and conducted by a board-certified behavior analyst. In her closing brief, Student argues Saddleback Valley refused Parents

request for an independent functional behavior assessment, so Parents obtained a private functional behavior assessment, which resulted in a private report reviewed at the September 12, 2022 IEP team meeting. Student argues that the IEP team failed to act upon any of the recommendations in the report. The rest of Student's closing brief on this issue mainly clones portions of the 2022 private behavior assessment, but does not address how this established that Saddleback Valley was required to conduct a functional behavior analysis assessment during the period at issue.

Saddleback Valley contended at hearing there was no need for another functional behavior assessment, Parents never requested an assessment, and the law did not require a board-certified behavior analyst conduct a functional behavior assessment. It also argued that its board-certified behavior analyst Branham collaborated on the 2020 behavior assessment. Saddleback Valley also criticized Student's 2022 privately obtained behavior assessment as lacking independence and failing to comply with proper procedures. In its closing brief, Saddleback Valley also argues that the appropriateness of the January 2020 functional behavior assessment is not an issue in this case. Saddleback Valley contends Student's off task behaviors were able to be managed with Tier 1 and 2 interventions and strategies recommended by Saddleback Valley's board-certified behavior analyst, and Student's failure to put the January 2022 IEP into evidence prevents Student from proving what Saddleback Valley offered Student. It argues Student's progress on goals between January 2020 and February 24, 2021, and her grade-to-grade advancement, demonstrated Student did not require a reevaluation of her behavior, and when it tried to reassess Student in fall 2022, Parents refused to consent. Saddleback Valley asserts that the 2022 private behavior assessment was flawed because it lacked critical information and failed to consider typical peer behavior.

As an initial matter, Student's argument regarding Saddleback Valley's failure to agree to an independent functional behavior assessment is irrelevant because that was not an issue in this case. As such, it will not be addressed in this Decision.

STUDENT'S CHALLENGES TO THE JANUARY 2020 FUNCTIONAL BEHAVIOR ASSESSMENT ARE BARRED BY THE STATUTE OF LIMITATIONS

As discussed earlier in this Decision, school psychologist Houten and board-certified behavior analyst Branham conducted a functional behavior assessment and summarized the results of that evaluation in a report dated January 29, 2020.

Houten had a bachelor's degree in psychology and a master's degree in educational psychology and was a credentialed school psychologist for over 25 years. At the time of the hearing, he had performed over one thousand assessments. He had experience and training as a behavior intervention case manager and was trained to perform functional behavior assessments. He developed, implemented, and evaluated behavior intervention programs and conducted social skills groups for autistic children.

Board certified behavior analyst Branham had a bachelor's degree in psychology and a master's degree in education. She worked with students with autism since 1997 in both the private and public sectors. She worked as a preschool teacher, an autism specialist, an inclusion teacher, and a behavior consultant. She conducted functional behavior assessments, and developed behavior intervention plans and data collection systems, and analyzed data to inform instruction and behavioral programs. She trained teachers and staff on principles of applied behavior analysis as instructional and behavioral methodologies.

Student's assertion that Saddleback Valley should have conducted a new functional behavior assessment within the statutory period because the January 2020 assessment was not performed by a board-certified behavior analyst or was otherwise deficient is time-barred. Student had two years to challenge the appropriateness of the 2020 functional behavior assessment and did not. Saddleback Valley's assessments performed prior to December 14, 2020, are outside the applicable two-year statute of limitations period and the IDEA does not recognize a "continuing violation" exception to the statute of limitations. (See 20 U.S.C § 1415(b)(6)(B) & (f)(3)(D); see also *J.L. v. Ambridge Area School Dist.* (W.D. Pa. 2008) 622 F. Supp. 2d 257, 268-269 (*Ambridge*) [there is no continuing violation exception under the IDEA]; *White v. District of Columbia* (D.C. Cir., March 31, 2022, No. 20-cv-3821 (APM)) 2022 WL 971330, at *4-5, (*White*) [student's challenge to a reevaluation time-barred because there is no ongoing obligation to assess the sufficiency of a reevaluation].)

In addition, there is no IDEA requirement that a board-certified behavior analyst conduct a functional behavior analysis unless state law imposes such a requirement. (*Letter to Janssen*, Office of Special Education and Rehabilitative Services (June 5, 2008).) California does not require behavior assessments to be conducted by a board-certified behavior analyst. (Ed. Code, § 56525.) Accordingly, Houten not being a board-certified behavior analyst did not warrant another functional behavior assessment, particularly where board-certified behavior analyst Branham collaborated on the 2020 assessment.

THE LAW DID NOT REQUIRE SADDLEBACK VALLEY TO CONDUCT A NEW FUNCTIONAL BEHAVIOR ANALYSIS ASSESSMENT

Student did not prove Saddleback Valley was required to perform a new functional behavior assessment or reassess Student's behavior prior to Student's 2023 three-year

review. The IDEA regulations only require a functional behavior assessment in certain disciplinary situations. (34 C.F.R. § 300.530(d)(1)(ii) and (f)(1)(i).) Instead, the IDEA requires a school district to consider the use of positive behavioral interventions and supports, and other strategies when a child's behavior impedes the child's own learning or that of others. (20 U.S.C. § 1414(d)(3)(B)(i).)

Here, there was no evidence of any disciplinary situation mandating a functional behavior assessment. Moreover, Saddleback Valley already conducted a functional behavior assessment in January 2020, a special circumstance instructional assistant assessment in 2019, and the three-year multidisciplinary assessment in January 2020, each of which included an evaluation of Student's behavior. Having assessed Student's behavior in December 2019 and January 2020, Saddleback Valley was not required to conduct an updated behavior evaluation for at least three years, absent its determination that reassessment was warranted, or a Parent or teacher requested Student's behavior be reevaluated. (See e.g., *Lake Elsinore, supra*, 678 Fed. Appx. at p. 544.)

By sending the September 13, 2022 and November 4, 2022 assessment plans to Parents, Saddleback Valley determined that Student's educational or related services needs warranted reassessment. Saddleback Valley made no determination that Student's educational or related services needs warranted reassessment prior to the September 12, 2022 IEP team meeting where it proposed a reevaluation and sending the September 13, 2022 assessment plan to Parents the next day. Moreover, there was no evidence that a teacher or a Parent requested Saddleback Valley conduct a functional behavior assessment between December 14, 2020, and December 14, 2022, or that there was an agreement between Parents and Saddleback Valley to conduct a reevaluation of Student prior to March 8, 2023, when Parents signed the assessment plan. On the contrary, for approximately six months beginning in September 2022, Saddleback Valley

repeatedly sought to obtain Parents' consent to conduct a comprehensive reevaluation of Student, but Parents refused. The assessments proposed in the September 13, 2022 and November 4, 2022 assessments plans included an evaluation of Student's behavior. There was no evidence behavior concerns would not have been addressed by the assessments proposed.

Student's claim that Saddleback Valley denied Student a FAPE by failing to conduct a functional behavior analysis assessment after September 13, 2022, is negated by Parent's repeated refusal to sign the assessment plans. Significantly, Student has failed to justify, let alone explain, the blatant inconsistency between Parents' refusal to sign the three-year assessment plans, and Student's claim that Saddleback Valley failed to assess Student's behavior. While Student contends Parents had no legal obligation to consent to an early three-year review, Saddleback Valley cannot be faulted for having failed to assess Student when Parents refused to consent to the assessments. This same reasoning applies to Student's other failure to assess claims in Issues 1A, 1B, 1C, IE and IF. Saddleback Valley was not required to conduct a functional behavior assessment between December 14, 2020 and December 14, 2022.

Saddleback Valley did not deny Student a FAPE by failing to conduct a functional behavior assessment between December 14, 2020 and December 14, 2022.

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ISSUE 1E: DID SADDLEBACK VALLEY DENY STUDENT A FAPE BY FAILING TO CONDUCT A HEALTH ASSESSMENT BETWEEN DECEMBER 14, 2020 AND DECEMBER 14, 2022, GIVEN STUDENT'S EYE SURGERIES AND HEALTH ISSUES?

Student contended at hearing that Saddleback Valley should have, but did not, conduct a health assessment during the 2020 multidisciplinary evaluation. Student's closing brief argument consists of one sentence devoid of analysis, that Saddleback Valley did not conduct a health assessment during the two-year period at issue despite Student's multiple surgeries, seizure activity, asthma, and the impact on a student's access to their education as well as their social emotional well-being.

Saddleback Valley contended there was insufficient evidence about health issues to warrant reassessment, and when it offered an assessment in this area in September and November 2022, Parents would not consent. It maintained Student had no health crisis warranting a reevaluation, and there was little or no evidence about Student's seizures. Saddleback Valley argued this issue seemed to be related to Student's eye surgeries, and the only recommendations actually made by Student's treating ophthalmologist were, things Saddleback Valley was already implementing. In its closing brief, Saddleback Valley contends Parents' voluntary delay in consenting to its comprehensive assessment demonstrated a lack of urgency in their asserted need for additional assessments. Saddleback Valley argues Student never called her doctors to testify and no material evidence was presented regarding Student's allergies and seizure issues or whether further assessment beyond that which was offered in fall 2022 was required.

Saddleback Valley's 2020 multidisciplinary evaluation team included a school nurse and a health, developmental, and medical history was taken for that assessment. It also contained information about Student's medical diagnosis of autism, and information about Student's eye surgeries and her vision acuity. It contained her ophthalmologist's recommendation that Student always wear her glasses and the accommodations Student needed in the classroom.

Student failed to explain why the January 2020 evaluation was not, as contended by Student, a health assessment. Regardless, any challenge to the adequacy of the January 2020 multidisciplinary assessment or any measures used to assess Student's health were required to be filed within two years but were not. There is no continuing violation for failing to assess. (See 20 U.S.C § 1415(b)(6)(B) & (f)(3)(D); see also *Ambridge, supra*, 622 F.Supp.2d at pp. 268-269; *White, supra*, 2022 WL 971330, at *4-5.) As such, those claims are time-barred.

Student failed to explain how the claim in Issue 1B regarding the alleged failure to assess Student's vision is different from the claim in Issue 1E, regarding the alleged failure to assess Student's health, regarding her eye surgeries. To the extent that the claim in Issue 1E pertains to Student's vision issues, it is duplicative of the claim in Issue 1B, which has been fully addressed above and will not be repeated here. Therefore, Issue 1E only addresses Saddleback Valley's alleged failure to conduct a health assessment separate and apart from Student's vision issues.

STUDENT FAILED TO PROVE THAT SADDLEBACK VALLEY WAS REQUIRED TO ASSESS STUDENT'S HEALTH BETWEEN DECEMBER 14, 2020 AND DECEMBER 14, 2022

Student failed to prove a Parent or a teacher requested a reevaluation, or that Saddleback Valley determined Student's educational or related services needs warranted reassessment prior to Saddleback Valley proposing an early three-year evaluation at the September 12, 2022 IEP team meeting and sending Parents assessment plans on September 13, 2022 and November 4, 2022, both of which included a proposed health evaluation.

By sending the September 13, 2022 and November 4, 2022 assessment plans to Parents, Saddleback Valley determined that Student's educational or related services needs warranted reassessment. However, Parents did not consent to assessment until March 8, 2023. Parents' failure to consent to the assessment plans negated any obligation for Saddleback Valley to assess Student's health after September 13, 2022 through at least December 14, 2022.

Saddleback Valley was not required to conduct a reevaluation of Student's health between December 14, 2020, and December 14, 2022, including but not limited to her health issues pertaining to seizures and asthma, the only two ailments Student specifically identified in her closing brief addressing this issue, other than her vision issues and the vague and non-specific reference to social-emotional well-being. Student's claim that Saddleback Valley was required to assess Student's social - emotional functioning during the two-year period at issue is addressed in Issue 1F below.

Saddleback Valley did not deny Student a FAPE by failing to conduct a health assessment between December 14, 2020 and December 14, 2022.

ISSUE 1F: DID SADDLEBACK VALLEY DENY STUDENT A FAPE BY FAILING TO ASSESS IN THE AREA OF SOCIAL EMOTIONAL FUNCTIONING BETWEEN DECEMBER 14, 2020 AND DECEMBER 14, 2022?

At hearing, Student contended Saddleback Valley did not assess Student's social emotional functioning as part of the January 2020 multidisciplinary assessment, and therefore it had an obligation to assess in that area between December 14, 2020 and December 14, 2022. Student claimed that a child's chronic illness can have mental health effects, and Saddleback Valley disregarded Student's plight. In her closing brief, Student's argument consists of one sentence without analysis, that Student's social emotional functioning was never assessed by Saddleback Valley.

At hearing, Saddleback Valley contended it assessed Student's social emotional functioning as part of its 2020 multidisciplinary evaluation, and there was no need to reassess in this area. Saddleback Valley also argued Parents never requested an assessment and refused to consent to the fall 2022 triennial assessment plans. In its closing brief, Saddleback Valley argues that since September 13, 2022, it tried to assess Student's social emotional functioning as part of her three-year review, and that there was no material evidence suggesting that a prior reassessment ought to have been proposed. It contends that the 2020 multidisciplinary evaluation report documents that Student was happy joyful child, who appeared to enjoy school and engaging with peers and adults. Saddleback Valley also argues that to provide social support for Student, it offered Student a pragmatics goal in the February 2021 IEP, and specialized academic instruction and speech language services in a group setting, to address her needs.

THE JANUARY 2020 MULTIDISCIPLINARY ASSESSMENT OF SOCIAL EMOTIONAL FUNCTIONING

Mother reported to the January 2020 multidisciplinary assessment team that Student had a happy, joyful, and loving disposition. She enjoyed being involved in social settings, and she got along with peers when she was one-to-one and when she could focus but needed assistance with initiating and maintaining peer interactions. Student got frustrated at times when she was unable to complete tasks on time, was overstimulated, or could not focus or express her needs. Student was a friendly and happy child who appeared to enjoy school and engaging with peers and adults.

The 2020 evaluation included observations across a variety of school settings in December 2019 and January 2020, and interviews of Mother and Student's special education and general education teachers. During observation on the playground, Student interacted with her peers, including

- holding hands,
- hugging,
- taking turns,
- joining other children, and
- playing together in small groups.

She ran over to some girls on the playground and remained with them, talking and playing. She sat with friends during lunch that she played with on the playground, had group hugs, and laughed with peers. In contrast, Parent reported Student isolated herself outside, needed to build relationships with peers, and could not sustain on topic

reciprocal conversations. Parent also reported Student needed assistance with reading social cues from adults and peers. Both Parent and Student's special education teacher reported they wanted to see Student develop appropriate social skills.

The January 2020 multidisciplinary assessment included a pragmatics, or social language, component. It identified verbal and nonverbal pragmatic deficits that might negatively influence social and academic communication. Student was rated by her kindergarten teacher and Mother as below average in communication. Student's expressive language skills were better than her receptive language skills. The results of a social emotional and behavior measure showed very elevated behaviors consistent with autism.

The assessment report concluded Student's social/emotional and behavioral functioning appeared to impact school performance across multiple settings. It also concluded Student had a receptive language disorder as part of her autism presentation. Student's discrepancy in pragmatics of language and social communication deficits were found to be part of Student's autism and language disorders. There was no evidence of an emotional disturbance.

Student failed to explain or point to any specific evidence demonstrating how the January 2020 multidisciplinary assessment was deficient in assessing her social emotional functioning. Regardless, to the extent Saddleback Valley was required to conduct certain assessments as part of Student's triennial review and did not, Student's claims are time-barred. (20 U.S.C. § 1415(f)(3)(C) & (D); Ed. Code, § 56505, subd. (/).)

SADDLEBACK VALLEY WAS NOT REQUIRED TO CONDUCT A SOCIAL/EMOTIONAL REEVALUATION

Student failed to establish that Saddleback Val was required to assess Student's social emotional functioning between December 14, 2020 and December 14, 2022. Saddleback Valley was not required to assess Student's social emotional functioning until her 2023 three-year review, absent its determination that Student's educational and related services needs warranted reassessment, or a Parent or teacher requested that Student be reevaluated in that area. (20 U.S.C. § 1414(a)(2)(A) & (B); 34 C.F.R. § 300.303(a) & (b); Ed. Code, § 56381, subd. (a)(1) & (2).) Student failed to prove any of those things occurred prior to Saddleback Valley proposing a reevaluation at the September 12, 2022 IEP team meeting and sending the September 13, 2022 assessment plan to Parents the following day. Specifically, by proposing the reevaluation at the September 12, 2022 IEP team meeting and sending the September 13, 2022 assessment plan, Saddleback Valley determined that Student's needs required reevaluation. Saddleback Valley did not make that determination until then. Moreover, there was no evidence Parents or Student's teachers made a request for social emotional evaluation at any time between December 14, 2020 and December 14, 2022.

The September 13, 2022 and November 4, 2022 assessment plans included a social emotional assessment. Parents refused to consent to that assessment or sign the assessment plans. They did not consent to a further assessment of Student until March 8, 2023. Parents' failure to consent to assessment relieved Saddleback Valley of any obligation to assess Student's social emotional functioning after September 13, 2022 through at least December 14, 2022. Saddleback Valley was not required to assess Student between December 14, 2020 and December 14, 2022.

Saddleback Valley did not deny Student a FAPE by failing to assess Student in the area of social emotional functioning between December 14, 2020 and December 14, 2022.

ISSUE 2Ai: DID SADDLEBACK VALLEY DENY STUDENT A FAPE IN THE FEBRUARY 24, 2021 IEP BY FAILING TO DEVELOP VALID/ACCURATE PRESENT LEVELS OF PERFORMANCE?

At hearing, Student contended that the goals offered in the February 24, 2021 IEP were faulty in the areas of attention, initiation, and processing because the IEP team relied on invalid or inaccurate present levels of performance. Student argued when staff was questioned at hearing about the goals, they provided very little information, and that one of Saddleback Valley's behaviorists admitted she did not know what supervision was or conduct data analysis, which "plays into" the present levels of performance. In her closing brief, Student claims Saddleback Valley has continually misstated Student's progress and proficiencies, comparing some of Student's 2020 testing scores to Student's 2023 scores from a March 2023 privately obtained academic and cognitive functioning evaluation. With regard to the present levels of performance in the February 24, 2021 IEP Student focuses her specific arguments to challenging only the baselines for the six goals offered at that IEP.

Saddleback Valley contends the present levels are very comprehensive, were sufficient to provide a broad picture of Student's levels of functioning and covered all areas of unique need and suspected disability. Saddleback Valley argues there was no material challenge to the present levels of performance through the evidence admitted at hearing.

An IEP is a written document for each child with a disability that includes: a statement of the child's present levels of academic achievement and functional performance. (20 U.S.C. § 1414(d)(1)(A); 34 C.F.R. § 300.320 (a)(1); Ed. Code, § 56345 subd. (a)(1).) An IEP must contain a statement of the special education and related services and supplementary aids and services to be provided to the pupil, or on behalf of the pupil, and a statement of the program modifications or supports for school personnel that will be provided to enable the student to advance appropriately toward attaining the annual goals and to be involved in and make progress in the regular education curriculum and participate in nonacademic activities, and to be educated and participate with other individuals with exceptional needs and nondisabled pupils. (20 U.S.C. § 1414(d)(1)(A)(i)(IV); Ed. Code, § 56345, subd. (a)(4).)

In developing the IEP, the IEP team shall consider

- the strengths of the child,
- the concerns of the parents for enhancing the education of their child,
- the results of the initial evaluation or most recent evaluation of the child and
- the academic, functional, and developmental needs of the child. (20 U.S.C. § 1414(d)(3)(A).)

For each area in which a special education student has an identified need, the IEP team must develop annual goals that are based upon the child's present levels of academic achievement and functional performance. (Ed. Code, § 56345, subd. (a)(2); *Letter to Butler*, Office of Special Education and Rehabilitative Services (March 25, 1988).)

As an initial matter, Student did not show by a preponderance of evidence that Saddleback Valley had continually misstated Student's progress and proficiencies.

Student offers no cogent argument explaining how the testing done in March 2023 established that anything in the January 2020 multidisciplinary assessment was misstated, much less prove that any of the goal baselines on the February 24, 2021 IEP was invalid or inaccurate.

Further, Student fails to persuasively explain how the questioning of staff at hearing about the goals or the unidentified behaviorist's testimony "plays into" the present levels of performance in the February 24, 2021 IEP. Student did not identify the staff or the specific testimony with which she took issue. Student's comments regarding the behaviorist seem refer to Lisa Gayou. However, because Gayou did not have any responsibilities with regard to Student until after October 2021, any issues with Gayou's testimony had no bearing on the validity or accuracy of the baselines for the goals Student challenged in Student's February 24, 2021 IEP.

BASELINE FOR GOAL NO. 1-PHYSICAL THERAPY (POSTURAL CONTROL AND STABILITY, MOTOR PLANNING-SEQUENCING)

At the time of the February 24, 2021 IEP, Student had been in hybrid learning between September and December 2020, which included some in-person instruction. She was in distance learning since mid-December 2020, receiving 30 minutes of specialized academic instruction services daily in a pull-out setting and her core instruction in the general education classroom. An IEP team meeting was convened on February 24, 2021 to develop Student's IEP for the remainder of the year, and when she returned to school in-person. Each of the six goals offered in that IEP included a baseline of Student's present levels of performance in the skill targeted by that goal.

Goal No. 1 required Student to access the elementary play structure by way of at least three different ladder combinations with standby assistance. The baseline for Goal No. 1 stated that access to ladders was restricted because of COVID-19 since the beginning of the school year, and then gives a description of the other activities Student participated in during recess, including running games, "freeze" dance or chase in large group, covering her ears when girls screamed, and that she appeared to prefer playing with small groups of one or two peers and did well at gross motor tasks.

It also stated that based on prior performance on play equipment, Student required verbal prompting with standby assistance to negotiate the kinder playground spiral ladder for foot and hand placement because she often tried to make the transition before she had climbed high enough, and she was more hesitant when there were a lot of peers on it.

It also stated that postural insecurities were present. On the elementary school playground, Student preferred to use stairs, rather than slides. She climbed the sloped ladder, needed minimal assistance or 25 percent assistance to transition from the platform to the spiral ladder, including one to two verbal cues to climb down without physical assistance, and she initiated but then retreated to the platform on the horizontal ladder. She was more hesitant when there were lots more children around.

Student contends that the baseline was not adequate because it did not make clear what standby assistance was, did not provide data on the frequency with which Student required assistance, did not define "lots of kids," or clearly define the impact on her functionality on the playground/equipment where the use of her hands could impact her functionality.

Student failed to prove that the baseline for Goal No. 1 was invalid or inaccurate. At hearing, Student neither called any witnesses nor examined any witnesses about this goal or its objectives, or the baseline and its adequacy. No physical therapists testified at hearing and closing argument is not evidence. Contrary to Student's argument, the baseline does state some of the frequencies with which Student required assistance. Moreover, the impact on Student's functionality on the equipment was clear on its face and there was no testimony from Parent or anyone else, or other sufficient evidence to establish that the IEP team lacked the information necessary to develop Goal No. 1.

In any event, even if the baseline to Goal No. 1 failed to include all of the information Student claims was missing and resulted in procedural violation, Student did not offer any argument, much less prove by a preponderance of evidence that this failure

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), 34 C.F.R. § 300.513(a)(2); Ed. Code, § 56505, subd. (f)(2).)

BASELINE FOR GOAL NO. 2-SPECIALIZED ACADEMIC INSTRUCTION

GOAL 1 (TASK COMPLETION)

The baseline for Goal No. 2 stated that data was taken over a 15-day period in groups of 2 to 10 students during distance learning, that Student needed an average of eight gestural prompts (ranging from 2 to 22) to begin a given task, and other prompting was "unobserved" during distance learning. The baseline also stated that

during hybrid learning, data was taken over two weeks (nine days) in the classroom and that Student required an average of 12 prompts (whole class, visual, verbal, and model) to begin a given task. Goal No. 2 required Student to follow instructions in large and small group settings by completing the assigned task with no more than four adult prompts, asking for clarification, if needed, with 80 percent accuracy across two consecutive weeks.

Student contends on her prior January 2020 IEP task initiation and completion goal, her teacher reported that prompting and asking for clarification had been difficult to measure over Zoom because students were muted during whole class instruction and cues were often unable to be seen. Therefore, Student contends the baseline was inadequate because it was unclear where the data came from, who took it and how, and if done during distance learning.

Student had the burden of proving the baseline for Goal No. 2 was invalid or inaccurate, and Saddleback Valley was not required to prove that it was valid or accurate. Although the progress note reported on the February 24, 2021 IEP that it was difficult to take data on Student's January 2020 IEP task initiation and completion goal, that did not establish that no data was taken.

In fact, the goal progress reports indicate that data was taken, albeit limited, and the November 2020 progress report was close enough in time to be relied upon by the IEP team in developing baseline information for the IEP. The baseline for Goal No. 2 makes clear on its face where baseline data for the new goal came from, specifically, that it was taken during both hybrid and distance learning.

Student cites no authority requiring the baseline to state who collected the supporting data. Student's confusion as to how the baselines were developed did not prove they were inaccurate or invalid.

BASELINE FOR GOAL NO. 3-SPECIALIZED ACADEMIC INSTRUCTION GOAL 2 (INITIATING WRITING TASKS)

Goal No. 3 required Student when given a writing task with supports (graphic organizers, sentence frames, and visual supports) to begin the task with no more than two verbal prompts and produce simple sentences with 80 percent accuracy.

The baseline for Goal No. 3 stated that Goal No. 3 was developed during distance learning, and that when working one-to-one with the specialized academic instruction teacher, Student needed only one verbal prompt to begin a writing task. But in large group settings or during asynchronous work time, Student demonstrated resistance to writing tasks. Based on observations across multiple settings, Student needed verbal prompting and adult assistance to begin a writing task and produce simple sentences. She was observed to avoid starting a task and needing multiple prompts to begin.

Student contends that the baseline for Goal No. 3 was deficient because it failed to include baseline data as to the large group setting and asynchronous work time, it was unclear how data was taken across multiple settings, did not quantify "needs verbal prompting" or provide data sheets, and the baseline did not relate to the goal. Student argues the baseline refers to initiation and Goal No. 3 refers to writing two to three simple sentences.

Student does not comprehensively or persuasively explain why it was unclear how data was collected across multiple settings. Student was in hybrid-learning until

December 2020 and then resumed distance learning with pull-out specialized academic instruction 30 minutes a day. On its face, it is clear the information was obtained when Student worked with the special education teacher one-on-one, when Student worked in a large group setting and during asynchronous instruction.

Student's assertion that the baseline is not related to the goal is not entirely accurate. Both Goal No. 3 and its baseline, relate to initiation of writing. However, Goal No. 3 also includes a writing task in addition to initiation for which no specific baseline data has been provided on Student's ability to initiate and produce simple sentences in large group setting and asynchronous work, other than needing multiple prompts to begin.

Notwithstanding this, Student did not establish these claimed deficiencies in the baseline prevented the IEP team from developing an appropriate Goal No. 3. Student called no witnesses to specifically testify about the alleged inadequacy of Goal No. 3's baseline. Nor does Student point to any testimony or other evidence which established that the IEP team lacked the information necessary to develop Goal No. 3.

In fact, Mother's edits to the February 24, 2021 notes indicated that there was a specific discussion held to formulate the writing goal at the IEP team meeting between Mother, special education teacher Jessica Cerise, general education teacher Nicole Sawyer, and Student's lay advocate, regarding Student's ability to initiate and produce three sentences. (See *O'Toole v. Olathe Dist. Schools Unified School Dist. No. 233* (10th Cir. 1998) 144 F.3d 692, 703-704 (*O'Toole*) [no procedural violation even if the IEP did not properly convey student's present levels of performance if parent was otherwise aware of student's abilities and discussed them in formulating the IEP].) In any event, even if the

baseline to Goal No. 3 failed to include all of the information Student argues was missing and resulted in a procedural violation, Student did not offer any persuasive argument, or prove by a preponderance of evidence that this deficiency

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 education benefits. (20 U.S.C. § 1415(f)(3)(E)(ii), 34 C.F.R. § 300.513(a)(2); Ed. Code, § 56505, subd. (f)(2).)

BASELINE FOR GOAL NO. 4-SPECIALIZED ACADEMIC INSTRUCTION

GOAL 3 (TASK INITIATION)

The baseline for Goal No. 4 stated that based on observation during hybrid learning, Student required multiple verbal prompts to initiate a task. It also stated that Student was observed "zoning" before starting a task, which could lead to multiple prompts to initiate a task. Goal No. 4 required Student to independently start an activity within one minute following a verbal direction from teacher/staff across a two-week period as measured by observation and teacher/speech language pathologist data.

Student proffers no argument in her closing brief regarding the baseline for Goal No. 4 addressing task initiation, the third specialized academic instruction goal in Student's February 24, 2021 IEP. Because Student has either abandoned this claim or neglected to discuss it, this Decision is not required to address it. Again, it is not the ALJ's responsibility to construct or develop a party's argument. (See *Loewen v. Berryhill* (9th Cir. 2017) 707 Fed. Appx. 907, 908 (nonpub. opn.) (*Loewen*), citing *Carmickle v. Commissioner* (9th Cir. 2008) 533 F.3d 1155, 1161, fn. 2 (*Carmickle*) [the court is not

required to address arguments made without specificity]; *In Re: Out of Network, supra*, 2022 WL 17080378, at fn. 2 [the court will not perform the work of representing parties].)

Student failed to establish that the baseline for Goal No. 4 was invalid or inaccurate, and even if defective, failed to prove any deficiency in the baseline (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); 34 C.F.R. § 300.513(a)(2); Ed. Code, § 56505, subd. (f)(2).)

BASELINE FOR GOAL NO. 5-SPECIALIZED ACADEMIC INSTRUCTION

GOAL. 4 (ASKING FOR CLARIFICATION)

The baseline for Goal No. 5 stated Student waited for adult prompting to ask for assistance with a task or to get clarification for verbal directions given by staff across school settings. It also stated Student needed to ask for assistance or get clarification from staff with less prompting. Goal No. 5 stated Student will ask for assistance to complete a task or get clarification for verbal directions across school settings with no verbal prompting in 80 percent of opportunities as measured by data sampling over two consecutive weeks.

Student contends the baseline fails to include any data as to large group setting and asynchronous work time, and it was unclear how data was taken across multiple settings given the hybrid model and "previous notations."

Student does not explain what “previous notations” means. Nor does Student sufficiently explain why it was unclear or establish that data could not be collected across multiple settings. Student was in hybrid-learning between September and December 2020 and then resumed distance learning with pull-out specialized academic instruction 30 minutes a day. This made data collection in various settings possible prior to the February 24, 2021 IEP team meeting. Student failed to establish that the baseline for Goal No. 5 was invalid or inaccurate because multiple settings were not available for obtaining data before February 2021.

Although the baseline did not include data regarding large group and asynchronous work time, Student did not establish that the information in the baseline of Goal No. 5 was so invalid or inaccurate as to prevent the IEP team from developing an appropriate Goal No. 5. Student called no witnesses to specifically testify about the alleged inadequacy of Goal No. 5’s baseline. Nor does Student point to any testimony or other evidence which established the inadequacy of the baseline such that the IEP team lacked the information necessary to develop Goal No. 5. (See *O’Toole, supra*, 144 F.3d at pp. 703-704.) Further, even if the baseline should have included the information Student argues was missing resulting in a procedural violation, Student did not offer any persuasive argument, or prove by a preponderance of evidence that this deficiency

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); 34 C.F.R. § 300.513(a)(2); Ed. Code, § 56505, subd. (f)(2).)

BASELINE FOR GOAL NO. 6-SPEECH AND LANGUAGE (PRAGMATICS)

The baseline to Goal No. 6 stated based on observation in the classroom and during speech sessions, Student had difficulty maintaining conversation, facing toward peers, and commenting and asking follow-up questions for non-preferred topics of discussion. It stated Student required two to three verbal prompts to ask a question and make comments to a communication partner. Goals No. 6 required Student to initiate interaction with peers and complete two to three exchanges while maintaining attention, facing toward peer, during conversation on a non-preferred topic while commenting/asking a question in four of five opportunities with one or less verbal prompts.

Student contends, without analysis or proper citation to the record, that because Saddleback Valley reported Student's January 2020 IEP pragmatics goal as having been met with peers or adults on preferred topics but still had difficulty with non-preferred topics, it was unclear as to when and how the baseline data for Goal No. 6 was collected.

Student failed to prove the baseline for Goal No. 6 was invalid or inaccurate. Although Student met her January 2020 pragmatics goal in maintaining conversations with peers and adults, that goal did not specify that it included conversations on non-preferred topics. At the time of the February 24, 2021, Student still had difficulty maintaining conversations on non-preferred topics, which the February 24, 2021 pragmatics Goal No. 6 addressed. No witnesses testified that this baseline was erroneously reported to the February 24, 2021 IEP team or the reporting on the prior year's goal did not accurately inform Student's IEP team of her present levels of performance. The baseline expressly stated the data was collected during observation in

the classroom and during speech sessions. As such, Student's argument that when and how the data was collected rendered the baseline invalid or inaccurate, is without merit.

In summary, Saddleback Valley did not deny Student a FAPE by failing to develop valid/accurate present levels of performance in the February 24, 2021 IEP.

ISSUE 2Aii: DID SADDLEBACK VALLEY DENY STUDENT A FAPE IN THE FEBRUARY 24, 2021 IEP BY FAILING TO OFFER APPROPRIATE LEVELS OF INDIVIDUAL AND SMALL GROUP SPEECH LANGUAGE THERAPY?

On the last day of hearing, Student withdrew Issue 2Aii. Accordingly, Issue 2Aii is dismissed.

A party may dismiss a claim with or without prejudice prior to the actual hearing commencing. (See Code of Civ. Proc. § 581, subd. (c).) However, the withdrawal of a claim after the hearing commences, constitutes a dismissal with prejudice unless all parties consent to dismissal without prejudice or the ALJ finds good cause for dismissal without prejudice. (See Code Civ. Proc. § 581, subd. (e).)

The dismissal of Issue 2Aii is with prejudice. There was no agreement between the parties to dismissal of Issue 2Aii without prejudice, and the ALJ finds no good cause for dismissal without prejudice.

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ISSUE 2Aiii: DID SADDLEBACK VALLEY DENY STUDENT A FAPE IN THE FEBRUARY 24, 2021 IEP BY FAILING TO OFFER APPROPRIATE LEVELS OF APPLIED BEHAVIOR ANALYSIS THERAPY WITHIN THE EDUCATIONAL ENVIRONMENT?

Student contended at hearing her experts were world-renowned who gave explicit and credible opinions that the way Student's behavioral intervention was structured was counterproductive. Student claimed Parent declined Saddleback Valley's fall 2022 assessment plan because Parents had no obligation to cooperate with an early three-year evaluation and were justified in not consenting to Saddleback Valley's assessment plan because Student was already being privately assessed. In her closing brief, Student argues the IEP did not include any behavioral therapy services. Student asserts she presented Saddleback Valley with a comprehensive functional behavior assessment in fall 2022, but it refused to act on the recommendations made by the private assessors despite its failure to demonstrate a competent functional behavior analysis evaluation had been done in 2020. Instead, Student argues, Saddleback Valley demanded to conduct its own assessment, delaying the process another 60 days.

Saddleback Valley contended at hearing that Student's 2022 private functional behavior assessment lacked specificity about the reported behavior problems, specifically their frequency, intensity, and duration. Saddleback Valley argued the private assessment sharply contrasted with its assessments where detailed data was documented. Saddleback Valley asserted there was no evidence of any significant maladaptive behaviors that interfered with Student's ability to make progress. It claimed it considered the private assessment at the September 12, 2022 IEP team

meeting, added behavior consultation to the IEP, and proposed conducting an early triennial evaluation which Student rejected. In its closing brief, Saddleback Valley argues Student's applied behavior analysis therapy claim fails for multiple reasons. It argues

- Student was making progress,
- Student's private behavior assessment was conducted a year after the February 24, 2021 IEP and it did not recommend a one-to-one aide, and
- that Student failed to establish she needed a one-on-one aide or that applied behavior analysis therapy was necessary.

A student's unique needs that must be addressed under the IDEA may include behavior, social-emotional functioning, and mental health. (*County of San Diego v. California Special Education Hearing Office* (9th Cir. 1996) 93 F.3d 1458, 1467-1468.) School districts are required to consider the use of positive behavioral interventions and supports, and other strategies when a child's behavior impedes the child's own learning or that of others. (20 U.S.C. § 1414(d)(3)(B)(i).) Courts have held that a school district satisfies this requirement, even in the absence of a functional behavior assessment, in cases where a student's IEP adequately identifies a student's behavioral impediments and implements strategies to address that behavior. (*B.S. v. Waxahachie Independent School Dist.* (5th Cir., March 23, 2023, No. 22-10443) 2023 WL 2609320, fn. 27 (*Waxahachie*), quoting *M.W. ex rel. S.W. v. N.Y.C. Dept. of Education* (2d Cir. 2013) 725 F.3d 131, 140.) The IDEA does not entitle a student to an IEP that remediates the student's behavioral problems in every instance. (*Waxahachie, supra*, 2023 WL 2609320, at *10.) An IEP must simply "aim to enable a child to make progress," and "the 'standard is not perfection.'" (*Ibid.*)

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As discussed above, Saddleback Valley conducted a special circumstance instructional assistant assessment in December 2019, a functional behavior assessment in January 2020, and the three-year multidisciplinary assessment in January 2020, each of which included an evaluation of Student's behavior. The assessments, but particularly the 2020 functional behavior assessment, was adequate to inform Student's IEP teams, including Parents, of critical information about Student's behaviors impacting her ability to access her education. It identified the problem behavior, noted past interventions, identified antecedents of the behavior, and suggested strategies to assist Student in controlling the behavior.

THE FEBRUARY 24, 2021 IEP OFFER OF SPECIAL EDUCATION AND RELATED SERVICES

Saddleback Valley's offer of special education and related services in the February 24, 2021 IEP consisted of the following:

- Specialized academic instruction in three 30-minute sessions per week in a group setting outside of the general education classroom;
- Specialized academic instruction of 120 minutes per day push-in services;
- Speech and language services in a group setting for 30 minutes per week; and
- Physical therapy services, 20 sessions per year for 30 minutes each.

The push-in specialized academic instruction meant a special education teacher would be in the general education classroom to help Student with her goals during instruction and assignments. This service was offered in lieu of additional classroom support which had been in Student's prior IEP. The February 2021 FAPE offer also included consultation between the speech language pathologist and the special education/general education staff for 15 minutes, twice a month. Saddleback Valley offered Student 86 percent of her school day in the general education classroom and 14 percent of her time outside of that setting. Saddleback Valley also offered numerous accommodations as part of Student's IEP, including:

- Obtain Student's attention before speaking;
- Preferential seating to aid in auditory and visual access (facing instruction when possible);
- Repetition of information/direction;

- Periodically check for understanding and listening;
- More frequent prompts;
- Positively reinforce on-task behaviors;
- Non-verbal cues;
- Provide verbal or non-verbal cues before instructions are given to the large group;
- Provide opportunities for motor movement during lengthy group instruction;
- Break down lengthy tasks into smaller steps;
- Gain attention of the group prior to small group work;
- Remind the group of expectations;
- Provide a review of instructions to the group for multi-tasks, checking for understanding by having Student repeat instructions;
- Allow Student at least five seconds to initiate a task, providing subtle non-verbal cues if needed;
- Use visual representations of the steps of a task as well as model of the finished product;
- Use auditory cues to signal transitions;
- Provide visual cues to indicate the next activity;
- Communicate clear expectations for transitions;
- Use non-verbal cues if necessary for Student to initiate transition;
- Provide opportunities for breaks involving sensory activities that are incompatible with off-task motor behavior (e.g. get a drink of water, take a deep breath, etc.);
- Access to a soft lead pencil; and
- Standby assistance on playground.

The offer also included an Emergency Conditions Plan of distance learning. The IEP stated that California had permitted parents of all students to elect distance learning for the 2020-2021 school year where COVID-19 health concerns existed. For distance learning, Student was offered:

- Specialized academic instruction five times a week in 30-minute sessions in a small group setting outside of the general education classroom;
- Speech and language services in a group setting for 30 minutes per week;
- Physical therapy, 30 minutes monthly consultation with Parent, providing activities to address motor planning and motor sequencing; and
- Accommodations in the IEP.

STUDENT'S PRIVATELY OBTAINED 2022 FUNCTIONAL BEHAVIOR ASSESSMENT

Parents obtained a private functional behavior assessment, and the results were documented in a report dated April 20, 2022, but was not sent to Saddleback Valley until August 12, 2022, or reviewed at an IEP team meeting until September 12, 2022.

The assessment was jointly conducted by licensed clinical psychologist Laura Hernandez, Psy.D., and licensed clinical psychologist and board-certified behavior analyst Elizabeth Hughes, Ph.D. The purpose of the evaluation was to assist Student in securing the educational services and programming to enable her to develop and use "her full capabilities," to "maximize" the efficacy of educational opportunities that could be made available to her, and to enable her to develop and use her capabilities for more

independent functioning and more productive activity “than her current plan presently permits.” The report stated the assessors were asked to focus on off-task behaviors and inattention, and recommendations for handling them, including

- Failing to respond to instructions,
- initiating activities,
- engaging in activities other than those instructed,
- fidgeting with items to the exclusion of participating in appropriate activities and
- looking away from tasks or stopping tasks and not restarting them.

The private assessment included interviews, observations, and a review of some of Student’s educational records. The assessment identified the target behavior as nonparticipation. This included

- active nonparticipation specifically, pushing away materials, verbal refusal or engaging in activity other than the assignment, and
- passive nonparticipation defined as failing to independently respond to instructions within 10 seconds, stopping before activity was completed and not independently returning to the activity within 30 seconds, or
- engaging in repetitive behaviors rather than the assignment for 30 seconds or more.

The assessment stated Student engaged in active nonparticipation an average of two times per assignment, and passive nonparticipation 87 percent of the time. The report identified Student's behaviors as fulfilling an escape function.

The assessors also stated the impact of Student's behaviors appeared to have worsened over time, claiming new topographies had appeared such as inappropriate physical contact/aggression, calling out, and task refusal. Their report documented that Saddleback Valley collected daily behavior data on Student for a variety of topographies and skills related to her behavior and staff's planned reaction to Student's non-participatory behavior was redirection or prompting.

The private report explained that adults might not be able to implement prompting consistently, leading to variable reinforcement, which could be the reason why Student's behavior was not improving and potentially worsening over time. It also stated that because there was not a formal behavior plan in place, there had been no consistent implementation of the accommodations in Student's IEP. It also mentioned that the variable presence of an adult "may be" supporting Student's use of non-participatory behavior over time, and that having someone to consistently provide feedback and implementation of her IEP accommodations would allow for targeting of behavior excesses and deficits in a formal manner. The assessors reported that a consistently implemented reinforcement system targeted at reducing Student's non participatory behavior and increasing replacement behaviors would benefit Student. Examples of positive reinforcers included access to toys, prizes, verbal praise, social attention, and access to preferred computer games. The report specifically mentioned those that could carry out Student's behavior supports were the teaching staff, designated instructional staff and instructional assistant staff.

The report recommended four goals, in the areas of task completion, requesting assistance, on-task/off-task self-monitoring, and redirecting to task. It also recommended

- a consistent adult presence that could be faded out,
- a peer buddy system,
- modeling use of self-monitoring, and
- regulations breaks such as
 - taking a walk around the classroom,
 - taking three sips of water,
 - squeezing a toy,
 - visual supports,
 - consistent staff prompting,
- a formalized support plan with
 - supervision,
 - checks for understanding,
 - alternative writing accommodations,
 - focused support strategies such as reinforcement of replacement behaviors,
 - reactive strategies such as redirection,
 - reminders about reinforcements,
 - replacement skills and
 - self-monitoring systems.

It recommended data collection systems and staff training in applied behavior analysis.

STUDENT FAILED TO PROVE SADDLEBACK VALLEY WAS REQUIRED TO OFFER APPLIED BEHAVIOR ANALYSIS THERAPY AT THE TIME OF THE FEBRUARY 24, 2021 IEP

As a foundational matter, there was no evidence at hearing that adequately defined “applied behavior analysis” therapy. None of the witnesses called to testify specifically explained it or distinguished it from other types of behavior therapy. Student also failed to specifically identify what she meant by “therapy,” and none of the witnesses specifically defined the term “applied behavior analysis therapy” during their testimony. Even disregarding this, Student failed to prove by a preponderance of the evidence that at the time of the February 24, 2021 IEP Saddleback Valley failed to offer appropriate levels of applied behavior analysis therapy within the educational environment.

DRS. HERNANDEZ’S AND HUGHES’S OPINIONS WERE NOT CONVINCING

Student relies on the assessment conducted by Drs. Hernandez and Hughes to establish that Student needed applied behavior analysis therapy at school in February 2021. However, Student did not prove the assessment was reliable. Significantly, although the findings in the report were purportedly based, at least in part, on teacher interviews and observations, the report failed to sufficiently detail any of those interviews and observations, failing to include even the length of specific observations.

Instead, the assessors made numerous conclusory statements about Student’s alleged functioning, without providing sufficient and specific details about each of the individual observations and interviews that were the basis of those statements. In other words, because the interviews and observations were not specifically or individually set

forth in the report, it could not be determined if the conclusions drawn were appropriate, or whether the assessors gave any weight or even considered the input provided by school personnel. This lack of information is pervasive throughout the report. In fact, it appears the private assessors discounted information provided by others. For example, the authors concluded without explaining the basis of their opinion "Despite others' interpretations of her as being a positive social presence, none of these attributes speak to her actual capacity in the social realm."

Drs. Hernandez and Hughes justified their finding as to the increasing gap between Student's social skills levels and that of her peers with conclusory statements about Student's alleged aggression, inappropriate touching of others, calling out, and refusal as part of Student's presentation. However, nowhere was the specific basis for this finding included in the report, including when this behavior allegedly occurred, where it occurred, how often, who said it, who saw it, etc. In fact, Drs. Hernandez and Hughes both testified that the one-time Student grabbed a microphone during observation, it was not aggressive, but impulsive. This was the only time aggression was mentioned during their testimony. Furthermore, the report stated Student's behaviors appeared to be attention seeking, without any data or other specific evidentiary support for this conclusion. Indeed, the private behavior assessment only included data categorized broadly as non-participatory behavior, and the assessors did not administer any specific or standardized tests or instruments to evaluate Student's social skills or behaviors they called "additional topographies."

As such, Drs. Hernandez's and Hughes's conclusion that Student interactions showed a declining social competency based on comparisons between 2020 observational data, and their non-detailed observational data or other non-specific sourced information, was questionable and unpersuasive.

In addition, it was impossible to determine when Student's alleged non-participatory behaviors occurred, because this information was not included in the report. The report included no data pertaining to Student's behaviors occurring during preferred, as opposed to during non-preferred activities, such as writing. Also missing from the report was data pertaining to Student's non participatory behavior as compared to her typical peers.

For these reasons, it could not be determined whether the assessors were imposing a higher standard on Student than was expected of her typical peers. Dr. Hughes's attempts during her testimony to claim the behavior of typical peers was considered were not persuasive, particularly because this information was not specifically included in the report, the alleged data was not part of the evidence Student timely offered at hearing, and Dr. Hughes did not conduct any of the observations. In fact, Dr. Hernandez claimed at the September 12, 2021 IEP team meeting, as discussed in Issue 2C below, Student should not be compared to typical children, which cast doubt on whether peer data was actually ever taken.

The report was also internally inconsistent, vague, and overstated the findings. For example, the report stated both that concerns about yelling out, actively refusing work, and inappropriate contact with peers had been consistent since 2019, yet later the report called these behaviors "more recent topographies." The report stated it was not clear if the prior accommodation recommendations had been followed to date, and that the

failure to appropriately implement the accommodations might be partly responsible for Student's dependence on prompts for attention to, initiation of/completion of tasks/instructions. Yet, later in the report it categorically stated that there has been no consistent implementation of Student's accommodations over time. No specific individual observational or other detailed data was set forth in the report to adequately support that finding or the other findings made about the prompting or redirection Student received. The report also stated that it was not clear why at the time of the 2020 functional behavior assessment why a behavior support plan and behavior supports were reportedly not needed, but that prior assessment did set forth the reasons.

The report hypothesized that Student's non participatory behavior had the function of escape/avoidance, but then states it was also possible Student had times where she may not have been processing or understanding the task or instruction given, which was different from escape-motivated behavior, and it was important to distinguish between the reasons for the behavior. In the report's conclusion, it stated that certain issues were attention seeking behaviors, while others were representative of behavior or skills deficits, and that some concerns may be related to processing deficits or receptive language gaps.

The report stressed the importance of identifying the function of the presenting behaviors, as well as the potential skills deficits associated with these presentations, before designing intervention plans, and that the plan should be reevaluated regularly to ensure functional hypotheses hold. The report fails to comprehensively or persuasively explain if or how Drs. Hernandez and Hughes determined Student's non-participatory behavior was not because of a lack of understanding or a processing issue.

Dr. Hernandez's credibility was negatively affected by her testimony at hearing. At times, she appeared defensive. Dr. Hernandez admitted she was not prepared to discuss anything in the report other than the observations, which she agreed were not separately described in the report. She was unable to specifically identify the length of any particular observation and did not know the length of any particular interview, although she claimed to have personally conducted them. Her estimates about the length of the observations or interviews were not specific or believable. When asked about some of the documents she reviewed, Dr. Hernandez she was unable to provide informed responses.

She was unable to provide any specific information on the frequency, intensity, and duration of the target behaviors during the observations she conducted. She claimed she looked at peer non-participatory behavior but could not recite the data and admitted it was not in the report. She was evasive in some of her responses on this topic and in other places in her testimony.

In all, Dr. Hernandez was not able to comprehensively discuss her report, many things were missing from report, including her notes, and she seemed unfamiliar with the underlying information. She claimed she and Dr. Hughes wrote the report and collaborated on the assessment but could not answer whether Dr. Hughes had ever talked to Student's eye specialists.

Dr. Hernandez's inability to provide the underlying details regarding her observations adversely impacted the trustworthiness of her findings. This, in turn, also negatively affected the weight given Dr. Hughes opinions' because Dr. Hughes based her opinions on the observations conducted by Dr. Hernandez.

Because of the way the report was written, and the way Dr. Hernandez testified, it appeared that Drs. Hernandez and Hughes were acting more as advocates for Parents' position than as independent or neutral experts. Significantly, the stated purpose of the 2022 private functional behavior assessment was at odds with the FAPE standard. (*Rowley, supra*, 458 U.S. at p. 199 [The IDEA does not require every special education service "necessary to maximize each handicapped child's potential."].) The United States Supreme Court has concluded that "states must provide a 'basic floor of opportunity' to disabled students, not a 'potential-maximizing education.'" (*J. L. v. Mercer Island School Dist.* (9th Cir. 2010) 592 F.3d 938, 947, citing *Rowley*, 458 U.S. at p. 197 fn. 21.)

Moreover, neither Drs. Hernandez or Hughes offered a specific and persuasive opinion establishing that at the time of the February 24, 2021 IEP, the recommendations made in their report were necessary for Student to achieve educational benefit, or that without them Student's right to a FAPE was impeded. The April 20, 2022 dated functional behavior report itself stated its recommendations were based on Student's functioning between January and May 2022, not Student's functioning at the time of the February 2021 IEP, a year earlier. Although on the first page of the report, it stated the period of the report was February 1 through April 20, 2022. Despite these discrepancies, by the report's self-imposed limitation to be based on Student's functioning in 2022, the evaluation did not establish that the findings or recommendations in the report were appropriate at the time of the February 24, 2021 IEP.

In fact, although the report attempts to speak to the impact of Student's behavior on her academic progress, the report does not include among the documents reviewed by Drs. Hernandez and Hughes any report cards from Student's first grade year and the assessors never interviewed either of Student's first grade teachers.

At hearing, Dr. Hernandez admitted it would have been “good practice” to review all grade reports. Dr. Hughes testified at one point she did not have an opinion on how Student was performing academically and left that to Student’s teachers to determine. Student never sought to admit more than a few of the documents the assessors reviewed, leaving it unknown what information the documents Drs. Hernandez and Hughes relied upon contained. Moreover, despite the private assessors’ unpersuasive implementation criticisms, many of their recommendations were included in the February 24, 2021 IEP, or addressed through the services/supports in Student’s classroom. The numerous issues affecting the reliability of their findings negatively impacted the weight given to Drs. Hernandez’s and Hughes’s opinions.

DR. NICOLE MURILLO’S OPINIONS

Parents privately obtained a March 15, 2023 psychoeducational assessment conducted by Nicole Murillo, Ph.D. Dr. Murillo was a licensed clinical psychologist in private practice since 2012 and a board-certified behavior analyst since 2019. She performed an academic and cognitive functioning assessment of Student in March 2023. Dr. Murillo summarized the results of her evaluation in a report dated March 15, 2023. There was no evidence this report was provided to Saddleback Valley until disclosed as evidence for hearing.

Dr. Murillo recommended behavior support be provided in the classroom and follow a behavior support plan, but this recommendation appears to be based at least in part on her reading of the flawed April 20, 2022 private functional behavior report conducted by Drs. Hernandez and Hughes. Indeed, Dr. Murillo did not conduct a behavior assessment. Rather, the focus of her psychoeducational assessment was Student’s academic achievement and cognitive functioning as of March 2023. In any

event, Dr. Murillo offered no opinions establishing the inadequacy of applied behavior analysis therapy in Student's IEP at issue. Dr. Murillo's opinions were also unpersuasive for some of the same reasons set forth Issue 2Aiv.

STUDENT DID NOT PROVE BEHAVIOR THERAPY WAS NECESSARY

No one test exists for measuring the adequacy of educational benefits conferred under an IEP. (*Rowley, supra*, 458 U.S. at pp. 202, 203, fn. 25.) A student may derive educational benefit under *Rowley* if some of his goals and objectives are not fully met, or if he makes no progress toward some of them, as long as he makes progress toward others. A student's failure to perform at grade level is not necessarily indicative of a denial of a FAPE, as long as the student is making progress commensurate with his abilities. (*Walczak v. Florida Union Free School Dist.* (2nd Cir. 1998) 142 F.3d 119, 130; *E.S. v. Independent School Dist, No. 196* (8th Cir. 1998) 135 F.3d 566, 569; *In re Conklin* (4th Cir. 1991) 946 F.2d 306, 313; *El Paso Independent School Dist. v. Robert W.* (W.D.Tex. 1995) 898 F.Supp. 442, 449-450; *M.P. v. Poway Unified School Dist.* (S.D.Cal., July 12, 2010, No. 09 CV 1627 JLS(NLS)) 2010 WL 2735759, at *11-12.)

Student failed to prove that she required applied behavior analysis therapy services in the February 24, 2021 IEP to enable her to make appropriate progress appropriate in light of her circumstances. Student failed to put into evidence the January 2020 three-year IEP or otherwise fully establish its contents. Student failed to establish she could not make progress with the combination of goals and other supports offered in the February 24, 2021 IEP to address her behavior. At the time of the February 24, 2021 IEP, Student met half of her eight goals, including her pragmatics

goal, and two of three specialized academic instruction goals, including the goal for following verbal instructions. The evidence established Student made progress on her task initiation and completion goal.

Student met her goal of answering questions about details of a story, going so far as to put herself into the story and getting into the minds of the characters. She was a very strong reader who read fluently with expression. Student's reading had improved such that she was moved to the highest reading group in the general education classroom. At hearing, her first-grade teacher recalled that Student was reading books at a second-grade level by the end of the school year. Student exceeded her goal to read high frequency words, both by the number of words and her accuracy in reading sight words. Student did not meet her goal of initiating and completing assigned tasks in a large group, but she was at home in distance learning for the majority of instruction since March 2020, and had only been in hybrid learning in-person classes between September and December 2020. Nonetheless, Student still made progress, although she still required more than the goal's four-prompt maximum at the time of the February 24, 2021 IEP.

Student's February 24, 2021 IEP included six goals, at least five of which goals specifically addressed behavioral concerns, including

- task completion,
- initiating writing task,
- task initiation,
- asking for clarification, and
- pragmatics.

Autism specialist and board-certified behavior analyst Branham collaborated with Student's special education teacher to develop Student's task completion and task initiation goals. Student also had behavioral support from her general education teacher, her special education teacher, the speech language pathologist, and the standby assistance on the playground, along with numerous accommodations offered in her IEP which Branham helped develop.

Branham provided behavioral training or instruction to staff, including the instructional aide in Student's classroom, and her teacher, which entailed behavioral strategies, the best placement for Student in the classroom, and prompting including subtle prompting and prompting hierarchy. The purpose of the specialized academic instruction in the classroom was to provide Student with additional support in the classroom to access academics, particularly with attention to tasks, initiating and completing tasks, support with transitioning as well as implementing her goals.

The evidence failed to specifically establish Student's progress on her February 24, 2021 IEP goals. As discussed in more detail in Issues 2Bi through 2Bviii, neither party specifically questioned anyone about the January 18, 2022 IEP sufficient to fully establish its contents, or requested that it be admitted into evidence. Student did not prove she was not making progress from February 24, 2021 to the January 2022 IEP, thus, failed to corroborate Drs. Hernandez's and Hughes's opinions.

Notably, Dr. Hernandez testified Student's IEPs had "really great" accommodations in them, and that the issue was not the accommodations, but the lack of implementation of a formal behavior plan. Dr. Hughes had a similar opinion, describing the accommodations in Student's IEPs in 2020, 2021, and 2022 as "all great recommendations" and "appropriate," functionally driven and based on Student's needs.

Student did not prove that at the time of the February 24, 2021 IEP her behaviors were escalating, or that her behaviors were interfering with her access to education to the point that she required applied behavior analysis therapy at school. The fact that Student was able to make grade-to-grade progress, as evidenced by her 2020-2021, 2021-2022, and 2022-2023 report cards and other evidence, corroborated that Student did not require applied behavior analysis therapy at the time of the February 2021 IEP. Student's first grade report card for the 2020-2021 school year only covered the second and third trimesters. There was no evidence clearly explaining why the report card did not include the first trimester or the grades Student received during that period. For the second and third trimesters, Student met all applicable first grade standards in English language arts, English language development, history, and social science, except for one reading literature and information standard she nearly met, and one operations and algebraic thinking standard she exceeded. Student met, or nearly met, grade level standards in all areas graded for the 2021-2022 school year. Student's third grade report card covered the first and second trimesters of the 2022-2023 school year, and Student met or nearly met grade level standards in all areas graded.

Student's argument at hearing that not "much stock" should be placed in Student's grades, was not substantiated by the weight of evidence. Student's first grade teacher Sawyer used a variety of assessments to determine grades and reading levels, including benchmark unit assessments in math and English language arts. Student participated on all days in synchronous and asynchronous learning. In reading, Student did particularly well, moving to the highest reading level between December 2020 and February 24, 2021, even after her latest eye surgeries.

Student points to no evidence demonstrating that her second and third grade teachers report card grades were inaccurate. Although Student's private behavior

experts attempted to characterize Student's behavior as declining, their opinions were not persuasive for the reasons described above and for the additional reasons discussed in Issue 2Avii.

Student failed to prove she required applied behavior analysis therapy beyond the behavior supports she was offered in the February 24, 2021 IEP to access the curriculum and make educational progress.

Saddleback Valley did not deny Student a FAPE in the February 24, 2021 IEP by failing to offer appropriate levels of applied behavior analysis therapy within the educational environment.

ISSUE 2Aiv: DID SADDLEBACK VALLEY DENY STUDENT A FAPE IN THE FEBRUARY 24, 2021 IEP BY FAILING TO OFFER APPROPRIATE LEVELS OF OCCUPATIONAL THERAPY TO ADDRESS FINE MOTOR AND SENSORY INTEGRATION DEFICITS?

Student contended at hearing that the February 24, 2021 IEP failed to address Student's difficulties with writing and sensory integration deficits, including flapping, and self-stimulatory behavior, in any meaningful way. In her closing brief, Student's argument to support her position consists of one sentence: Saddleback Valley failed to provide any occupational therapy services to address the impact of Student's sensory integration deficits on her academic, social and emotional functioning.

Saddleback Valley contended at hearing there was no testimony from anyone that Student presented fine motor needs that rose to the level of requiring occupational therapy services to participate in the general education environment in the relevant

period to support her claim. In its closing brief, Saddleback Valley argues Student failed to call any occupational therapist as a witness and the evidence that was presented at hearing demonstrated Student did not need direct occupational therapy services in the area of fine or sensory processing, relying on its January 2020 multidisciplinary assessment and the lack of evidence demonstrating Student's functioning had materially changed.

The term "related services" means transportation and such developmental, corrective, and other supportive services as are required to assist a child with a disability to benefit from special education. (34 C.F.R. § 300.34(a).) Related services may include other developmental, corrective, or supportive services if they are required to assist a child with a disability to benefit from special education. (71 Fed. Reg. 46,569 (2006).)

The related services required to assist a child with a disability to benefit from special education may include occupational therapy services. (34 C.F.R. § 300.34.)

Saddleback Valley's January 2020 multidisciplinary assessment included an occupational therapy evaluation by an occupational therapist. The occupational therapist did not recommend occupational therapy services. At that time, Student demonstrated good functional abilities in the classroom and playground environments. Student demonstrated age-appropriate fine motor skills and visual motor integration based on standardized testing, classroom observations, and review of classroom work samples.

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Student could be visually distracted, but otherwise, her overall processing was within the typical function range based on the questionnaire completed by Student's teacher that enabled a standardized assessment of sensory processing issues. Student was "typical" in

- hearing,
- touch,
- body awareness,
- balance and motion, and
- planning and ideas.

Although Student generated humming and singing, and a moderate degree of movement, her sensory seeking behaviors appeared to function more for regulating her attention most of the time. Minimal movement seeking behaviors were observed in the classroom, and frequent postural changes did not stand out as being disruptive but needed for attention regulation. No sensitivity in tactile, auditory, or visual modes that negatively impacted behavior was evident.

Test scores were within average on one measure of grasping and visual motor integration, and average on another measure of visual motor integration. Student's work samples demonstrated appropriate letter formation and fine motor control. The occupational therapist who evaluated Student concluded that Student was demonstrating age-appropriate fine motor skills for printing, scissor skills, constructional skills, and other fine motor demands in the classroom. The occupational therapist found no fine motor or visual motor integration deficits with a negative impact was evident at that time, and Student was able to access the general education curriculum.

Student's one-sentence written closing argument points to no specific evidence or testimony which supports the claim that at the time of the February 24, 2021 IEP, Saddleback Valley should have offered Student occupational therapy services. (See *U.S. v. Dunkel* (7th Cir. 1991) 927 F.2d 955, 956 ["Judges are not like pigs, hunting for truffles buried in briefs."]; *U.S. v. Winkelman* (M.D.Pa. Mar. 10, 2008) 548 F. Supp. 2d 142, 150 ["[Judges] are not pigs searching for truffles and are unwilling to search through the massive record that has been developed in this case to find evidence of these alleged violations."].) It is not an ALJ's responsibility to construct or develop a party's argument. (See *Loewen, supra*, 707 Fed. Appx. at p. 908, citing *Carmickle, supra*, 533 F.3d 1155, at fn.2; *Independent Towers of Washington v. Washington* (9th Cir. 2003) 350 F.3d 925, 929 [the court cannot construct arguments for a party, and will only examine issues specifically and distinctly argued in a party's brief].)

Student did not call an occupational therapist to testify at hearing. Student did not present persuasive evidence demonstrating that any of the Saddleback Valley occupational therapist's findings were incorrect, including those portions of the report relied upon by Student's February 24, 2021 IEP team. Student did not present persuasive evidence that Student's functioning at the time of the February 24, 2021 IEP required Saddleback Valley to offer occupational therapy. Notably, none of the witnesses testified Student should have been offered occupational therapy services in the February 24, 2021 IEP. Specifically, Student did not establish Student's functioning with respect to writing or "sensory integration" at the time of the February 24, 2021 IEP required more than the placement, related services, goals, and accommodations offered. Student did not meet her burden of proof on Issue 2Aiv.

Among the supports the February 24, 2021 IEP offered were accommodations to address Student's sensory processing, including opportunities for breaks involving

sensory activities, and opportunities for motor movements during lengthy group discussion. Significantly, during the period in question, Student was achieving or making progress on her January IEP 2020 annual goals and meeting or nearly meeting grade level standards and Student failed to prove that the February 24, 2021 IEP, which included these accommodations, was not reasonably calculated to enable Student to make progress appropriate in light of her circumstances.

Parents reported to the February 24, 2021 IEP team that writing at home was hard for Student, and it could take a long time for Student to complete her homework. The IEP baseline stated that Student only needed one prompt to begin a writing task when working one-on-one with the teacher, but in a large group setting or during asynchronous time, demonstrated resistance to writing tasks. The February 24, 2021 IEP team developed an initiating writing task goal in the February 24, 2021 IEP to address Student's writing needs.

Student appears to improperly conflate handwriting with composition issues. Mother did not testify Student had handwriting issues at the time of the February 24, 2021 IEP, and Student points to no evidence indicating handwriting, as opposed to composition, was a concern for Parents at that time. None of Student's teachers testified Student had issues with handwriting. At the hearing, Student's first grade specialized academic instruction teacher Cerise, could not recall Student's handwriting. However, she recalled Student did not enjoy writing required sentences, but did enjoy creative writing tasks.

Student's second grade teacher, Juliet Stowers, testified that Student was slower at doing writing tasks because it was her least preferred academic subject, but it depended on the writing task and that Student's writing improved over the

202 - 2022 school year. When Stowers' class did emoji writing during the second and third trimesters, where students had to write a sentence "super quick" before the next emoji appeared, Student "was on fire."

Michelle Carter, Student's third grade teacher, testified that writing was the area Student struggled with most, but Student's writing had improved and was approaching third grade standards. Student was able to communicate her thoughts in her writing, her writing was coherent, and Student attempted to organize her thoughts, although there were not a lot of details or organized in the best way. This evidence corroborated Saddleback Valley's position that Student did not require occupational therapy services, as distinct from specialized academic instruction, at the time of the February 24 2021 IEP.

DR. MURILLO'S MARCH 2023 FINDINGS WERE UNCONVINCING

In her March 2023 psychoeducational report, Dr. Murillo concluded that Student's full-scale IQ was in the average range. Her total achievement was in the average range, as were her core composite scores in reading, written expression, and math. The only core composite subtest which was below average was for essay composition, which was in the low average range. Dr. Murillo recommended visual supports throughout the day, along with proactive cues and verbal cues, occupational therapy, and intensive intervention to address Student's letter size. She recommended continued support in the areas of

- reading and decoding,
- visual supports and strategies,

- behavior support and
- prompt fading.

Dr. Murillo concluded that Student's writing was quite immature for her age, but she admitted that academic achievement testing did not test specifically for letter formation and size. Dr. Murillo stated in her report and at hearing that during testing, when Student wanted to write a longer sentence, she cut her sentences short because her letters took up so much space. Significantly, in the exemplar in the report, the amount of space Student was given to write was relatively small, so it was not surprising that Student shorten the written sentences she had originally verbalized. Similarly, Dr. Murillo noted in her report and testified at hearing that during a school observation Student was having difficulty fitting more than one word on the paper when the class was required to write the definitions of each word on one half of a worksheet. However, Dr. Murillo's report also stated that "the area where they needed to write down the definitions was quite small."

In any event, there was no convincing evidence this occurred during the period at issue, much less that it was, as Student argues, impacting Student's ability to complete her classwork at the time of the February 24, 2021 IEP. In fact, as more fully addressed in Issue 2Aiii, the weight of evidence demonstrated Student was able to advance academically without occupational therapy services.

Dr. Murillo's opinions were unpersuasive on Issue 2Aiv for other reasons. Her review of Student's educational records was incomplete. For example, she never reviewed Student's most recent assessment conducted by the school district, specifically, the January 2020 multidisciplinary evaluation. Nor did she review the IEP held to review that evaluation in January 2020. She did not review Student's other IEPs during the period

at issue, specifically, the February 24, 2021. The only IEP she reviewed was the January 18, 2022 IEP, which was not proffered into evidence. Dr. Murillo also did not review all of Student's progress reports during the period in question. Her testimony was unclear on this issue, but at most, she looked at two of them, and only for Student's third grade year. In addition, she only interviewed Student's in-home behavior provider supervisor, and did not interview any of Student's teachers. In fact, Dr. Murillo testified, that her goal was not to look at Student's prior progress, but to determine her functioning in March 2023. These factors negatively impacted the weight given Dr. Murillo's findings because the period at issue was at the time the February 24, 2021 IEP was developed, not Student's functioning as of March 2023.

Saddleback Valley did not deny Student a FAPE in the February 24, 2021 IEP by failing to offer appropriate levels of occupational therapy to address fine motor and sensory integration deficits.

ISSUE 2Av: DID SADDLEBACK VALLEY DENY STUDENT A FAPE IN THE FEBRUARY 24, 2021 IEP BY FAILING TO OFFER APPROPRIATE LEVELS OF AUDITORY PROCESSING THERAPY?

Student contended at hearing Saddleback Valley disregarded Student's complicated neurological makeup and rejected almost every recommendation made by her private assessors. Student asserted she was not following directions, but Saddleback never offered auditory processing services. Student's written closing brief addresses Issue 2Av with one incomplete sentence. Student is apparently referencing the parentally obtained January 2023 audiology assessment conducted by doctor of audiology Maria Abramson, who found Student had deficits in auditory processing and made recommendations for auditory processing therapy.

Saddleback Valley contended at hearing Dr. Abramson's 2023 assessment was conducted well after the February 24, 2021 IEP, and Student failed to prove it had any reason to suspect Student required auditory processing services at the time of the IEP, especially given her progress and successful functioning in the general education environment. In its closing brief, Saddleback Valley contends its actions must be measured based on what it knew at the time of the IEP at issue, and it was never given Dr. Abramson's January 2023 audiology assessment report within the period at issue in this case. It asserts the report was not reliable because Dr. Abramson failed to obtain input from Student's teachers, the recommendations were highly conditional, and the report was never presented to the IEP team to consider.

DR. ABRAMSON'S JANUARY 2023 AUDITORY PROCESSING EVALUATION

In January 2023, Parents obtained a private a central auditory processing evaluation based on a referral from Student's pediatrician and ear, nose and throat specialist. Dr. Abramson conducted the evaluation in January 2023 and results were contained in a written report. The purpose of the evaluation was to determine if Student had any central auditory processing deficits coexisting with having autism and speech and language impairment. Based on the testing, Dr. Abramson concluded that Student had two areas of processing deficits, and five areas of auditory processing that were age appropriate, in the normal range or areas of strength.

In her report, Dr. Abramson recommended the IEP team review her evaluation, including an educational audiologist. She also concluded Student's auditory processing deficits would impact her ability to accurately hear and understand what her teacher said, and her ability to learn "in the moment." Dr. Abramson's report explained when Student was drawing upon her central resources, Student was left with less central

allocation for processing content, or language. Dr. Abramson recommended Student use remote microphone hearing aids, which would have both a therapeutic effect because the auditory system would change and fire faster, and an assistive effect because Student would hear speech clearer with less demands upon attention and memory. However, Dr. Abramson cautioned there was wide variability, and the therapeutic effect could take six months to two years.

Dr. Abramson also recommended Saddleback Valley consult with Student's current in-home private behavior provider so a positive behavior approach could be developed before Student was tested for eligibility for an auditory training program and participated in the training. Dr. Abramson recommended Student use the hearing aids for two to six months before starting the auditory processing program, which consisted of six visits. Dr. Abramson recommended a complete central auditory processing evaluation in one year to monitor growth and progress, along with accommodations and strategies which included

- front-loading before verbal instructions were given,
- stating the purpose of listening first,
- showing the finished product sample first,
- pre-teaching main ideas and vocabulary,
- giving important information at the beginning of class/in writing,
- keeping messages short,
- using clear speech style,
- teaching/taking tests in a quiet room,

- preferential seating,
- encouragement to look at teacher, and
- positive rewards for asking a good question in class.

STUDENT DID NOT PROVE SADDLEBACK VALLEY DENIED STUDENT FAPE BY FAILING TO OFFER AUDITORY PROCESSING THERAPY

Student failed to prove that at the time of the February 24, 2021 IEP Saddleback Valley should have offered auditory processing therapy. Student offered did not prove that as of February 24, 2021, Student had the deficits Dr. Abramson found in January 2023, or that Saddleback Valley knew of auditory processing deficits requiring auditory processing therapy. Dr. Abramson's report was not given to Saddleback Valley until sometime after January 18, 2023, so her findings could not have been known to Saddleback Valley at the time of February 24, 2021 IEP. Moreover, nothing in Dr. Abramson's report or in her testimony demonstrated that at the time of the February 24, 2021, Saddleback Valley knew or should have known Student required auditory processing therapy. In fact, Student did not establish Dr. Abramson had reviewed Saddleback Valley's January 2020 multidisciplinary three-year evaluation or any other educational records from the 2019-2020 or 2020-2021 school years.

Nor does Student otherwise point to any specific or persuasive evidence that demonstrated Saddleback Valley was legally required to offer auditory processing therapy. Student's argument that because Saddleback Valley knew she was not following directions it should have suspected she had auditory processing deficits, was not convincing. There was no persuasive testimony from anyone that established merely not following directions evidenced an auditory processing deficit, particularly in a kindergartener or first-grader, or a child with autism.

Further, the February 24, 2021 IEP documented that Student passed her hearing screening in November 2019, and Student's score for hearing was in the typical range on a 2020 sensory processing measure. Based on observations and the results of the sensory scales for the 2020 multidisciplinary assessment in the area of auditory processing, Student was able to follow directions, and she oriented immediately to the loud sound from the recess horn. None of the other evidence, including Dr. Ballinger's summer 2022 suspicions about Student's auditory processing, proved at the time of the February 24, 2021 IEP, auditory processing therapy should have been offered. Although Student's private functional behavior assessment contained a passing reference to the possibility of auditory processing challenges based on certain measures on Saddleback Valley's 2020 evaluation, this statement was never sufficiently explained at hearing and, in any event, was inadequate to prove Student required auditory processing therapy in February 2021.

Notably, the evidence established Student had ongoing medical care since at least the time of the 2020 multidisciplinary but was not referred to Dr. Abramson for an auditory processing assessment by her pediatrician and ears, nose, and throat specialist until January 2023. Student does not explain why she believes Saddleback Valley should have known about Student's auditory processing issues prior to February 2021, when her doctors apparently did not.

Student did not otherwise prove she required the auditory processing therapy Dr. Abramson recommended, to receive a FAPE in the February 24, 2021 IEP. First, Dr. Abramson's recommendation for the auditory processing therapy was conditional on Student being able to behaviorally access the therapy and on Student first using the hearing aids for an estimated two to six months. Dr. Abramson testified Student was not ready for the auditory processing therapy she was recommending.

Second, Dr. Abramson's assessment was based on limited information. She admitted she did not interview or attempt to interview any of Student's teachers, and she did not conduct or attempt to conduct any school-based observations. There was no showing Dr. Abramson reviewed Student's educational file. The only IEP she apparently reviewed was the January 2022 IEP, which Student did not specifically examine any witness about at hearing or seek to have it admitted into evidence. Accordingly, Student did not establish the full contents of the only IEP Dr. Abramson claimed she read before she made her recommendations.

Significantly, even Dr. Abramson's January 2023 report recommended the IEP team convene to review her findings, specifically mentioning the inclusion of an educational audiologist, but it was not provided to Saddleback Valley until March 8, 2023, so it was never reviewed prior to hearing. Thus, Dr. Abramson, who never reviewed Student's educational file or observed her at school, did not have the benefit of the entire IEP team's input or any individual member's day-to-day knowledge about Student before making her recommendations. All these things negatively impacted the weight given Dr. Abramson's testimony and her report. Clearly, Student's attempt in this litigation to impose Dr. Abramson's January 2023 conditional recommendation for auditory processing therapy on Saddleback Valley without input from her educational providers and before ever presenting Dr. Abramson's report to the IEP team for consideration, was premature.

Saddleback Valley did not deny Student a FAPE by failing to offer appropriate levels of auditory processing therapy in the February 24, 2021 IEP.

ISSUE 2Avi: DID SADDLEBACK VALLEY DENY STUDENT A FAPE IN THE FEBRUARY 24, 2021 IEP BY FAILING TO OFFER APPROPRIATE LEVELS OF VISION THERAPY?

Student contended at hearing Saddleback Valley was “tone deaf” because it knew about her eye surgeries and diagnosis, and how that affected her vision, but it did not address her vision issues despite having a vision specialist on staff and being told vision therapy might be appropriate. In her closing brief, Student argues Saddleback Valley’s failure to assess Student, resulted in the additional failure to offer vision therapy support.

Saddleback Valley contended at hearing that Student’s doctors did not actually recommend vision therapy. It argued the only thing Student’s doctors actually recommended in the educational environment were accommodations, which it provided, and that Student wear her glasses, which she did.

Saddleback Valley argued Student never called her doctors as witnesses to contradict Saddleback Valley’s understanding of their letters. In its closing brief, Saddleback Valley contends Student failed to prove vision therapy was required for her to receive a FAPE. Saddleback Valley asserts Student’s present levels of performance and Parent’s attachment to the February 24, 2021 IEP regarding vision considerations both refer back to Dr. Lingua’s January 14, 2020 report which identified the supports Student required in the classroom, and it did not include vision therapy as a school-based service or as an accommodation.

Related services may include vision therapy services. (See *DeKalb County School Dist. v. M.T.V.* (11th Cir. 2006) 164 Fed. Appx. 900, 901-902 (nonpub. opn.) [student with

a progressively worsening vision condition required vision therapy to receive FAPE]; see also, Cal. Code Regs., tit. 5 § 3051.75 [vision therapy, must be provided by an optometrist, ophthalmologist, or by appropriate qualified school personnel when prescribed by a licensed optometrist, ophthalmologist, or other qualified licensed physician and surgeon].)

Student did not meet her burden of proof on Issue 2Avi. Student failed to prove that at the time of the February 24, 2021 IEP Saddleback Valley was required to offer her vision therapy. Significantly, the portion of the January 2020 report from Dr. Lingua quoted in the 2020 multidisciplinary assessment, and again in the February 24, 2021 IEP, did not include a recommendation for vision therapy. It stated Student would likely benefit from ongoing spectacle use as well as “potentially helpful vision therapy.” On its face, this statement demonstrates Dr. Lingua was unsure if vision therapy would benefit Student since he qualified his statement with the words “potentially helpful.”

Furthermore, Dr. Lingua did not specify if this was a reference to medically-based vision therapy or school-based vision therapy. In fact, where Dr. Lingua’s report listed recommended assistance for Student at school, he repeated that Student be encouraged to always wear her glasses, but vision therapy was not included as a support she required.

Significantly, neither of Student’s treating ophthalmologists, Drs. Lingua or Gore, testified at hearing. Thus, Student presented no evidence to further explain the meaning of Dr. Lingua’s qualified statement or other recommendations.

Student failed to present any other persuasive evidence establishing Saddleback Valley was required to offer vision therapy at the time of the February 24, 2021 IEP.

Dr. Ballinger, the only witness who testified that Student needed vision therapy, did not assess Student until the summer of 2022, and her report was not sent to or reviewed by Saddleback Valley until the fall of 2022. As discussed below, Dr. Ballinger's opinions were unreliable and failed to establish Student required vision therapy at the time of the February 24, 2021 IEP to receive a FAPE.

DR. BALLINGER'S VISION ASSESSMENT REPORT

Dr. Ballinger was a licensed optometrist in private practice, and certified as a non-public agency for 30 years, with over 43 years of experience in vision therapy and vision development. Dr. Ballinger conducted a private vision assessment of Student over the summer of 2022, and reported her results in an undated written report, which was not sent to Saddleback Valley until September 14, 2022, and reviewed at the October 14, 2022 IEP team meeting.

Student's attorney referred Student to Dr. Ballinger to determine if Student's vision could be a factor in her learning. Dr. Ballinger conducted a series tests spanning visual acuity, refraction/glasses, fine visual motor acquisitional ability, including saccadic eye movements, focusing ability, eye teaming, visual perception, including laterality/directionality knowledge, visual-motor integration and organization, auditory attention span for digits, visual information processing. Student was wearing the glasses which had been prescribed by Dr. Gore, and with that prescription, Student's best visual acuity was 20/30 in the right eye and 20/25 in the left eye.

Dr. Ballinger determined that at the time of her 2022 assessment

- Student moved her head more as the demand of a visual task became more complex,
- she lost her place frequently and needed to be redirected to the place where she needed to refixate, and
- she needed a longer time to complete tasks.

When having to transition from top to bottom of the page or from board to near point, Dr. Ballinger concluded Student's variable eye coordination and posture would negatively affect her sustained accuracy with copying tasks. Dr. Ballinger opined Student needed a longer time to complete reading, learning, and copying tasks and she had difficulty sustaining visual attentional control due to her poor visual motor control.

Dr. Ballinger also believed that Student might demonstrate fatigue and off task behavior as an attempt to acquire a visual respite. Student's visual discrimination was inconsistent, and she had to use her finger when counting items. Dr. Ballinger opined that full pages of print could become problematic over the day as Student's visual endurance began to slip. Dr. Ballinger opined that well-spaced larger print was a less confusing visual array that needed to be addressed by optometric visual therapy. She also opined that Student's periphery interfered with her ability to visually attend to her work and that Student had difficulty concentrating if the classroom was noisy. While Student successfully used verbal strategies to remember visual information, Dr. Ballinger believed that poor visual recall and visualization would interfere with Student's ability to hold onto information.

Dr. Ballinger made numerous recommendations in her report to improve Student's visual-motor and perceptual abilities to "more fully benefit" from the visual demands of her academic environment. Among them, she recommended optometric vision therapy in the form of a minimum of 48 in-office visits and seven progress evaluations to work on monocular and binocular activities, in addition to

- visual coordination,
- accuracy,
- control,
- fluency,
- flexibility and
- endurance.

Dr. Ballinger also recommended Student wear her glasses and be seated in the row closest to the boards utilized most often, and centrally, if possible, to the board used most of the time. Dr. Ballinger recommended extraneous information be covered and Student not copy from board to desk, and that instead, the information be provided written out or on an iPad for Student to visually access at her desk. She recommended Student sit a certain distance from her work, that a slant board would be beneficial, along with a physical prompt in the form of string, to maintain proper distance. She also recommended a quiet and movement free environment during academic tasks and test taking, additional time to complete work, and time and a half for test taking. She proposed Student's central auditory processing be evaluated, Saddleback Valley not use certain types of test formats, and Student's homework be directed to daily living activities. Dr. Ballinger recommended preloading Student in advance of the introduction of new information, as well as one-to-one aide assistance to guide her learning.

DR. BALLINGER'S OPINIONS WERE NOT CONVINCING

Dr. Ballinger testified regarding her findings and recommendations. In many parts, her testimony was confusing and hard to follow, and she often used technical jargon that she either did not explain or failed to adequately clarify what it meant. This negatively affected the persuasiveness of her testimony.

Her testimony was not persuasive for other reasons. Dr. Ballinger had many opinions pertaining to the school environment both in her report and during her testimony, including that Student had challenges with her teacher's instruction. However, Dr. Ballinger admitted she had never done any observations in the school environment and had never attempted to conduct any school observations. She was defensive when she was asked about this, claiming school was out of session in June 2022, but she offered no explanation why she did not observe Student at school when school resumed in fall 2022 before she finished her assessment and wrote her report. In fact, Dr. Ballinger seemed unfamiliar with the timeline for preparing her report, claiming at hearing that she sent it to Parents in January 2023 even though she had completed it prior to the October 14, 2022 IEP team meeting held to review it.

Moreover, Dr. Ballinger admitted other than at that October 14, 2022 IEP team meeting, she had never spoken to or tried to speak to any of Student's teachers or educational providers. Again, she provided no explanation for this glaring omission. Conspicuously missing from Dr. Ballinger's report and her testimony was any demonstration that Dr. Ballinger reviewed Student's educational file. The failure to observe Student at school or talk to any school personnel familiar with Student, along

with Student's failure to prove that Dr. Ballinger reviewed Student's educational file, rendered her opinions unreliable because Student did not establish they were based upon complete information.

Dr. Ballinger unpersuasively testified about alleged safety issues on campus to support her recommendation that Student receive vision therapy. Again, there was no showing that Dr. Ballinger had ever observed Student at school. Among other things, Dr. Ballinger was apparently unaware that there were already supports in Student's second grade classroom to enlarge the teacher's lesson materials in the form of an oversized board for all students to reference or that Student's seating had been accommodated to support her needs, because neither of these things were mentioned in Dr. Ballinger's report.

Moreover, Dr. Ballinger admitted at hearing she was unaware of any specific incidents of Student being unsafe at school. Dr. Ballinger brought up similar issues at the October 14, 2022 IEP team meeting. She wondered whether Student had difficulty catching a ball, to which she was informed by the IEP team that Student used a large ball and had applied physical therapy consult on her IEP to address issues of this kind. Dr. Ballinger also asked if Student misjudged space which caused her to trip and was informed by the Saddleback Valley physical therapist that Student did well with surface negotiations, and was able to navigate small curbs, transitions from the blacktop to the play area, and uneven grass. The physical therapist also informed Dr. Ballinger Student did not have to negotiate stairs during her typical day, and she was able to climb up and down three steps in the one area on the playground that had steps.

Dr. Ballinger's questions at the October 14, 2022 IEP demonstrated an unfamiliarity with how vision was affecting Student on the playground, and Student's failure at hearing to contradict the information provided to Dr. Ballinger by the IEP team, undercut Dr. Ballinger's opinions on this point.

Dr. Ballinger testified it was important for Student to receive the recommended vision therapy, claiming that she was not the only one who saw this as being important, referring to Student's ophthalmologists, both Dr. Lingua, and Dr. Gore. However, she was impeached on this point. Neither Dr. Lingua or Dr. Gore had actually recommended vision therapy in the January 2020 report or the May 2021 letter. At hearing, Dr. Ballinger acknowledged Dr. Gore's May 2021 letter only said that Student would benefit from full-time spectacle use and "potentially vision therapy." Dr. Ballinger also conceded that Dr. Gore's November 2022 letter completely omitted the reference to vision therapy. Further, Dr. Ballinger admitted she never spoke to Dr. Gore, sheepishly claiming that she had "tried, but never did." Her testimony that she "tried" was not believable and undermined her overall credibility. She offered no details about these so-called attempts during her testimony, and she did not document or refer to these attempts in her written report.

Dr. Ballinger testified more as an advocate for Student's position, rather than an impartial or independent expert offering a candid opinion based on complete information. Moreover, Dr. Ballinger offered no specific or persuasive opinion that at the time of the February 24, 2021 IEP, the recommendations she made were necessary for Student to achieve educational benefit, or that without them Student's right to a FAPE was impeded.

In fact, many of the issues upon which Dr. Ballinger's recommendations were based were already being addressed through the supports contained in Student's IEPs, or were techniques already being implemented in the classroom. Dr. Ballinger did not demonstrate she had ever read Student's IEPs or been made aware of the contents of Student's IEPs. She had no familiarity with what was provided at school because she never observed Student at school or spoke to her teachers before she prepared her report. This greatly undermined the weight given her opinions.

Because of the numerous issues affecting Dr. Ballinger's credibility and given Student's grade-to-grade progress at school, Student failed to prove that Dr. Ballinger's opinions were reliable, much less establish by a preponderance of the evidence, that at the time of the February 24, 2021 IEP, Student required vision therapy.

Saddleback Valley did not deny Student a FAPE by failing to offer appropriate levels of vision therapy in the February 24, 2021 IEP.

ISSUE 2Avii: DID SADDLEBACK VALLEY DENY STUDENT A FAPE IN THE FEBRUARY 24, 2021 IEP BY FAILING TO OFFER APPROPRIATE LEVELS OF SOCIAL SKILLS TRAINING?

Student contended at hearing she was given no group or social skills training in the February 24, 2021 IEP, and Parents ended up obtaining their own private social skills training for Student. In her closing argument, Student argues Saddleback Valley provided no social skills training despite Student's diagnosis of autism, speech and language disorder, and clear difficulties in social integration and pragmatics.

Saddleback Valley contended at hearing there was no substantive evidence Student needed social skills training she was not otherwise getting in the educational

environment. Saddleback Valley argued Student was functioning appropriately in the educational environment based on the testimony of all her teachers, the grades she achieved, and the other evidence. In its closing argument, Saddleback Valley argues the 2022 private functional behavior report obtained by Parents does not support Student's position on Issue 2Avii because the report

- failed to contain sufficient quantified data, details about the specific individual interviews and observations conducted,
- was filled with highly qualifying language and uncertainties, and
- failed to factor in Student's demonstrated academic progress.

Saddleback Valley argues the report failed to properly address variables, specifically whether Student was engaged in preferred or non-preferred tasks when she was not participating. Saddleback Valley also attacks the reliability of the report because it was based on the wrong legal standard, and because it proposed goals without baselines, and Dr. Hernandez was unable to basic questions about the goals. Saddleback Valley contends Dr. Murillo's 2023 academic/cognitive assessment report did not undermine the appropriateness of Student's program. It asserts Dr. Murillo made no recommendations directly in the area of social skills, she never interviewed any school personnel or reviewed Student's 2020 multidisciplinary assessment, and the March 2023 assessment report was never reviewed by an IEP team.

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STUDENT DID NOT PROVE INADEQUATE SOCIAL SKILLS TRAINING WAS OFFERED AT THE FEBRUARY 24, 2021 IEP

Student's closing argument points to no specific evidence to support her claim that social skills training should have been offered at the February 24, 2021 IEP, other than to refer to her disability and the fact Parents obtained private social skills training.

As an initial matter, Student is incorrect that her social skills deficits were not addressed in Student's February 24, 2021 IEP. As discussed in Issue 2Ai, Student was offered a pragmatics goal, Goal No. 6, as part of her February 24, 2021 IEP, which specifically focused on peer interaction, for which the speech language pathologist was responsible for implementing. Goal No. 6 addressed many of the very things Student worked on in her private social skills group. The February 24, 2021 IEP offered group speech and language services to work on that goal, along with specialized academic instruction in a small group setting.

Student failed to prove what was offered in Student's February 24, 2021 IEP was insufficient to meet Student's needs in the area of socialization at that time. None of the witnesses Student called to testify about Student's behavior established what Saddleback Valley offered in the February 24, 2021 IEP to address social skills deficits was inadequate to provide Student a FAPE.

By the time of the February 24, 2021 IEP, Student had met some of her annual goals, including her pragmatics goal. The IEP stated that Student was more accurate when she was displaying whole body listening, including turning toward a speaker, making eye contact, and demonstrating a calm body. She was also demonstrating

the ability to hold conversations with peers and adults on the playground and in the classroom. Student still had trouble maintaining conversations on non-preferred topics with proper body positioning and Goal No. 6 addressed that deficit.

Sawyer, Student's first grade teacher during distance learning in the 2020-2021 school year, could not recall Student ever having any difficulty with being on camera, and Student participated in all instruction. On Fridays, Sawyer observed students participate in recess time during distance learning, where the students in her class logged onto Zoom and interacted with each other, like on a "playground," while Sawyer muted her mic and turned off her camera and observed them.

Besides meeting all grade standards except one during the second trimester where she nearly met the standard, and one where Student exceeded the standard during the third trimester, Sawyer reported for both the second and third trimesters Student demonstrated appropriate behavior in establishing and maintaining positive relationships and in understanding, managing emotions, and persevering in solving problems. This evidence corroborated Saddleback Valley's position that Student did not require social skills training to access her education and make progress at the time of the February 24, 2021 IEP.

None of Student's experts were persuasive in establishing that Student should have been offered social skills training in the February 24, 2021 IEP.

MEGAN BUDD-REYES'S TESTIMONY

Although Student began receiving private social skills training in October 2022, this evidence, together with all the other evidence, was insufficient to prove Student's claim. Specifically, Children's Learning Connection, provided social skills training to Student one

day a week beginning in October 2022. During the clinic-based social skills training, Student engaged with peers at her level, including playing games, having a snack, and engaging in reciprocal conversations with eye contact and body orientation toward peers. Prior to October 2022, Children's Learning Connection had been providing behavior services in Student's home three days a week, which decreased to two days in the home when social skills training began. After November 2022, Student did not consistently receive these private behavior services three days a week.

Megan Budd-Reyes was a board-certified behavior analyst who worked for Children's Learning Connection. Since June 2022, Budd-Reyes supervised the therapist providing the private home-based behavior services to Student. When Student was regularly receiving behavior services, Budd-Reyes observed Student twice a month at home. Although Student had what Budd-Reyes described as a "minor meltdown" in January 2023, she otherwise described Student's behaviors as "mild," including getting frustrated when working on adult directed tasks such as writing or when presented with difficult demands.

Budd-Reyes observed Student once at school in February 2023 during a hailstorm which excited the entire class, and she had some communications with Saddleback Valley board-certified behavior analyst Gayou, between September 2022 and February 23, 2023. Budd-Reyes opined Student's area of deficit was observational learning, which required prompting for Student to attend to what the leader was saying. Budd-Reyes testified socialization was a main concern for Student. She testified Student had issues with eye contact, and body orientation toward the speaker, stimming behaviors like jumping and flapping her hands, and difficulties with recalling events and peers' names, although her reciprocal conversation skills had improved.

Nothing Budd-Reyes testified to established that Saddleback Valley failed to provide sufficient social skills services to Student at the time of the February 24, 2021 IEP. Significantly, Budd-Reyes offered no opinions as to the adequacy of the February 24, 2021 IEP regarding social skills training and the evidence did not establish she was familiar with Student's program at school during the 2020-2021 school year. In fact, she did not offer opinions about Student's needs for social skills training prior to June 2022. All of Budd-Reyes' opinions relate to the period after June 2022, more than a year after the February 24, 2021 IEP was developed and she only observed Student once in school in February 2023. In any event, the fact that Parents obtained inconsistent amounts of private social skills training for Student beginning in October 2022 of the 2022-2023 school year, did not prove Saddleback Valley was required to offer it at the time of the February 24, 2021 IEP during the 2020-2021 school year.

DR. MURILLO'S OPINIONS

Clinical psychologist Dr. Murillo did not offer any specific opinions about social skills training, and she never assessed Student in this area. In particular, the focus of her assessment was Student's academic achievement and cognitive functioning as of March 2023. Moreover, she never interviewed school personnel and her review of Student's educational file was incomplete. In particular, she never reviewed Saddleback Valley's 2020 multidisciplinary evaluation or Student's February 24, 2021 IEP. Any opinions she offered on Student's behaviors were unpersuasive for many of the same reasons discussed in Issues 2Aiii and 2Aiv.

DRS. HERNANDEZ'S AND HUGHES'S OPINIONS

Significantly, neither Drs. Hernandez and Hughes specifically or persuasively opined that Student's February 24, 2021 IEP failed to offer appropriate levels of social

skills training. Moreover, their report was not provided to Saddleback Valley until the fall of 2022, more than a year after the February 24, 2021 IEP was proposed. The opinions of Drs. Hernandez and Hughes were otherwise unpersuasive on this claim for the same reasons set forth above in Issue 2Aiii.

Among other things, in their report they claimed Student's social skills had declined over the years, relying on nonspecific observations during which Student was alone during social time, engaged in nonfunctional solitary activities, and was not engaged in age-appropriate conversations or any extended social interactions. They also claimed that the gap in social skills between Student and her peers was exemplified by more recent topographies such as aggression, inappropriate touching of others, calling out and refusal.

However, as discussed in Issue 2Aiii, the report failed to sufficiently describe or give pertinent details regarding the current observations, interviews or other sources providing the basis for these statements. In fact, the very example of alleged "aggression" Dr. Hernandez gave to the IEP team on September 12, 2022, the report itself states was not aggressive. In addition, Drs. Hernandez and Hughes did not administer any specific or standardized tests or instruments to evaluate Student's social skills or these so-called "additional topographies."

For these reasons, and that Dr. Hernandez was not a credible witness and the 2022 private behavior assessment was unreliable as discussed in Issue 2Aiii, Drs. Hernandez's and Hughes's conclusion that Student interactions showed a declining social competency, was unpersuasive.

Saddleback Valley did not deny Student a FAPE by failing to offer appropriate levels of social skills training in the February 24, 2021 IEP.

ISSUE 2Aviii: DID SADDLEBACK VALLEY DENY STUDENT A FAPE IN THE FEBRUARY 24, 2021 IEP BY FAILING TO OFFER APPROPRIATE LEVELS OF ASSISTIVE TECHNOLOGY SUPPORT AND TRAINING?

Student contended hearing that assistive technology was not discussed at the February 24, 2021, but Saddleback Valley checked the box on the IEP indicating Student did not require assistive technology devices and/or services, which was improper. Student's counsel admitted no one testified Student needed assistive technology, but claimed the opposite was also true. In her written closing argument, Student argues Saddleback Valley failed to offer assistive technology services as part of Student's February 24, 2021 IEP.

Saddleback Valley contended at hearing that Student had documented appropriate and responsible technology use and did not need assistive technology support or training at the time of the February 24, 2021 IEP. Saddleback Valley argued Student presented no evidence she needed assistive technology to progress in the general education environment, which was admitted by her counsel, so it is immaterial Saddleback Valley checked a box that she did not require it.

In its closing brief, Saddleback Valley contends Student failed to prove she needed assistive technology beyond that which was available in the classroom at the time of the February 24, 2021 IEP. It asserts Student's teacher's grade reports and testimony established without contradiction Student was using available technology and was not in need of any further assistive technology to receive a FAPE at the time of the February 24, 2021 IEP.

Student's November 2019 report card reflected that she met all grade level standards that were graded except two standards she nearly met and one standard in phonological awareness she did not meet. It also documented Student had responsible appropriate technology use. By the time of the February 24, 2021 IEP, Student had met half of her eight goals.

Student does not point to any contemporaneous evidence establishing that at the time the February 24, 2021 IEP was developed, Student required assistive technology beyond that which was already available to all students in the classroom to access the curriculum. Student argued at hearing and Mother testified assistive technology was not discussed at the February 24, 2021 IEP team meeting.

The February 24, 2021 IEP did not offer specific assistive technology support and training. As Student's counsel acknowledged at hearing, no witness testified Student needed assistive technology support and training at the time of the February 24, 2021 IEP. Student otherwise failed to prove she required assistive technology support and training to access the curriculum at the time of the February 2021 IEP beyond what was already provided in the classroom to all students.

Again, the fact that Saddleback Valley checked the box Student did not require assistive technology devices and services, did not prove Saddleback Valley failed to offer appropriate levels of assistive technology support and training at the time of the February 2021 IEP.

Other evidence corroborated that Student did not require assistive technology support and training to receive a FAPE in the February 24, 2021 IEP. At the time of the February 24, 2021 IEP team meeting, Student had been in both hybrid learning and distance learning, using a computer to access her education. First grade teacher Sawyer

testified Student participated in all synchronous and asynchronous learning and she could not recall any difficulties with Student engaging. Student's second grade general education teacher Stowers testified that all students in her classroom had an electronic tablet and used it for assignments in English language arts and math, to practice writing, spelling, and quizzes. Stowers recalled Student used her tablet correctly without issue, and there was no need for any additional assistive technology in her classroom. Student's third grade teacher also testified that electronic tablets were used in the classroom so students could formulate sentences at their desks. Even in Student's kindergarten class students used electronic tablets in the classroom. Student failed to prove that appropriate assistive technology was not available to Student to use during the relevant period or that Student required assistive technology services for a FAPE.

As discussed at Issue 2Aiii, Student's 2020-2021, 2021-2022, and 2022-2023 school year report cards documented was Student meeting or nearly meeting grade level standards. There was no evidence Student was not able to use her classroom tablet appropriately and that she needed additional assistive technology supports. Student's report cards from 2019 through March 2022 reported appropriate and responsible technology use. For the second and third trimesters of second grade during the 2021-2022 school year, appropriate responsible technology use was an area of strength for Student. In fact, Student's private functional behavior assessors reported during a school observation in February or March 2022, that when Student returned to class during a computer activity in progress, she went to her computer, accessed the assignment, and began working on it without needing support.

Student's closing argument regarding Issue 2Aviii fails to specify what assistive technology support or training Saddleback Valley failed to offer at the February 24, 2021 IEP. Even assuming Student is referring to the slant board and speech to text program

mentioned in Student's closing brief regarding Issue 1A, Student failed to meet her burden of proof. None of the witnesses specifically or persuasively testified Student required either a slant board or a speech to text program at the time of the February 24, 2021 IEP, and the evidence did not otherwise establish this.

Neither of Student's experts, Dr. Ballinger or Dr. Murillo, recommended a speech-to-text program. Student's evidence did not establish, or adequately explain why speech-to-text software was educationally necessary. Closing argument is not evidence. The passing recommendation to dictation as an alternative to Student writing made in Drs. Hernandez's and Hughes's 2022 private functional behavior assessment report was not convincing given the credibility issues with their report and their testimony discussed in Issue 2Aiii. The same is true of their fall 2022 suggestion that "typing" or using "word tiles," be considered to support Student with writing. Moreover, Drs. Hernandez and Hughes did not make their recommendation for an alternative to handwriting until fall 2022, well after the February 24, 2021 IEP was developed.

Dr. Ballinger did not make her recommendation for a slant board until fall 2022, which Saddleback Valley promptly provided Student, and Dr. Ballinger was unaware of what supports already existed or were needed in the classroom because she never observed Student at school or interviewed any of Student's teachers. In addition, her opinions were not persuasive for some of the same reasons discussed in Issue 2Avi. Moreover, Drs. Lingua and Gore never recommended assistive technology support or training at school. Student failed to prove her vision issues required assistive technology support and training for a FAPE at the time of the February 24, 2021 IEP.

Similarly, Dr. Murillo did not make her recommendations for typing until March 15, 2023, and her opinions were otherwise unpersuasive for some of the same

reasons discussed in Issue 2Aiv. Although Dr. Murillo noted that Student's hand appeared to become fatigued after writing sentences, it was unclear how Dr. Murillo made this determination. Only after comparing unspecified undated samples of Student's working samples from second grade, third grade and at the time of testing in March 2023, and seeing no change in the size or legibility of Student's writing over that period, Dr. Murillo recommended that other forms of communication such as typing be evaluated to reduce frustration and get Student caught up with the writing quality of her peers.

However, omitted from Dr. Murillo's report and testimony is any opinion that Saddleback Valley should have offered Student assistive technology support and training at the time of the February 24, 2021 IEP. The evidence was unconvincing that Student's alleged frustration with writing had to do with the physicality of writing. Rather, Student's issues with writing had more to do with composition, including generating her own ideas, applying learned vocabulary, and recalling previously learned words or concepts. Dr. Murillo's report and her testimony failed to establish that Student's handwriting caused her frustration, for example, not being able to fit her words in the space provided. Nor does Student point to any persuasive evidence establishing this was an issue warranting assistive technology support in February 2021.

For these reasons, Student did not meet her burden of proving that in February 2021 she needed assistive technology support or training beyond the skills taught in the classroom and the computer technology available in the classroom.

Saddleback Valley did not deny Student a FAPE by failing to offer appropriate levels of assistive technology support and training in the February 24, 2021 IEP.

ISSUE 2Bi: DID SADDLEBACK VALLEY DENY STUDENT A FAPE IN THE JANUARY 2022 IEP BY FAILING TO DEVELOP VALID OR ACCURATE PRESENT LEVELS OF PERFORMANCE?

Student contended at hearing that her position was identical to her position in Issue 2Ai, and there was no additional testing that would have improved the status of the present levels of performance. Student asserted

- there was not much difference between the two IEPs,
- that “not much stock” could be placed in the report cards, and
- she was relying on Dr. Murillo’s testimony about Student academic progress.

In her closing brief, Student makes a nonsensical argument which appears unrelated to her challenges to the January 2022 IEP. Student argues the present levels remained inaccurate given the input provided in the “CFBA.”

Saddleback Valley contended at hearing that Student never sought to have the January 18, 2022 IEP admitted into evidence and Student’s counsel asked no questions about it to establish its contents. Saddleback Valley asserted this resulted in a complete failure to prove what was in the January 18, 2022 IEP necessary to adjudicate Issues 2Bi through 2Bviii. In its written closing brief, Saddleback Valley argues Student had multiple opportunities to request that the January 18, 2022 IEP be admitted into

evidence. It contends there is no January 18, 2022 IEP which Student can challenge, and that the appropriateness of the January 18, 2022 is entirely dependent upon the terms of the offer of FAPE embodied in that IEP, and without it, the trier of fact is without any basis to make factual determinations and legal conclusions as to its appropriateness. As such, Saddleback Valley argues it is not necessary for it to address Student's Issues 2Bi through 2Bviii.

"Burden of proof" means the obligation of a party to establish by evidence a requisite degree of belief concerning a fact in the mind of the trier of fact or the court. The burden of proof may require a party to raise a reasonable doubt concerning the existence or nonexistence of a fact or that he established the existence or nonexistence of a fact by a preponderance of the evidence, by clear and convincing proof, or by proof beyond a reasonable doubt. Except as otherwise provided by law, the burden of proof requires proof by a preponderance of the evidence. (Evid. Code, § 115.)

Authentication of a writing means:

- a) the introduction of evidence sufficient to sustain a finding that it is the writing that the proponent of the evidence claims it is, or
 - b) the establishment of such facts by any other means provided by law.
- (Evid. Code, § 1400.)

Authentication of a writing is required before it may be received in evidence. (Evid. Code, § 1401, subd. (a).) Authentication of a writing is required before secondary evidence of its content may be received in evidence. (Evid. Code, § 1401, subd. (b).)

Student never authenticated Student's January 18, 2022 IEP, or sought to admit that IEP into evidence. Student did not specifically question witnesses about the January 18, 2022 IEP, and the record did not otherwise fully establish

- what was stated in Student's January 18, 2022 IEP, or
- what was discussed at the January 18, 2022 IEP team meeting regarding Student's present levels of performance, or
- whether they were incorporated into the baselines of the IEP's annual goals.

Student's conclusory argument that there was not much difference between the February 2021 and January 2022 IEPs completely disregards her burden of proof and authentication requirements. The occasional reference in the record through testimony or documentary evidence to the January 18, 2022 IEP or some portions of it was inadequate to fully establish its contents, particularly the present levels of performance developed by Saddleback Valley. As such, there is no basis to make findings as to appropriateness of the January 18, 2022 IEP presents levels of performance. Student failed to meet her burden of proof in establishing Saddleback Valley denied Student a FAPE by failing to develop valid or accurate present levels of performance.

Saddleback Valley did not deny Student a FAPE by failing to develop valid or accurate present levels of performance in the January 18, 2022 IEP.

ISSUE 2Bii: DID SADDLEBACK VALLEY DENY STUDENT A FAPE IN THE JANUARY 2022 IEP BY FAILING TO OFFER APPROPRIATE LEVELS OF INDIVIDUAL AND SMALL GROUP SPEECH LANGUAGE THERAPY?

On the last day of hearing, Student withdrew Issue 2Bii. Accordingly, Issue 2Bii is dismissed. The dismissal of Issue 2Bii is with prejudice. There was no agreement between the parties to dismissal of Issue 2Bii without prejudice, and the ALJ finds no good cause for dismissal without prejudice.

ISSUE 2Biii: DID SADDLEBACK VALLEY DENY STUDENT A FAPE IN THE JANUARY 2022 IEP BY FAILING TO OFFER APPROPRIATE LEVELS OF APPLIED BEHAVIOR ANALYSIS THERAPY WITHIN THE EDUCATIONAL ENVIRONMENT?

Student contended at hearing that the February 24, 2021 and January 18, 2022 IEPs were virtually the same and everything flowed from Saddleback Valley's failure to reassess Student for the January 18, 2022 IEP team's annual review of Student's educational program. Student argued she had a roster of neurological processing difficulties and started to regress, therefore the January 18, 2022 IEP should have offered applied behavior analysis therapy. In her written closing, Student argues Saddleback Valley did not offer any applied behavior analysis services in the January 18, 2022 IEP, and it was inappropriate for "all the same reasons discussed throughout" given Student's needs described by the 2022 private functional behavior report prepared by Drs. Hernandez and Hughes.

At hearing, Saddleback Valley contended that for the same reasons Student failed to prove a FAPE required an offer of applied behavior analysis therapy in the February 24, 2021 IEP, Student did not prove a FAPE required an offer of applied behavior analysis therapy in the January 18, 2022 IEP. It asserted that if Student sought to prove that any portion of the offer in the January 18, 2022 IEP was inappropriate, she should have proffered, but did not, the document for admission into evidence. It also argued consideration of Dr. Murillo's March 15, 2023 report, prepared over two years after the February 2021 IEP and more than one year after the January 2022 IEP, violated the snapshot rule. In its written closing, Saddleback Valley also contends there is no January 2022 IEP in evidence which Student can challenge, so it was not necessary for it to address Student's Issue 2Biii, because without the January 18, 2022 IEP in evidence, Student cannot meet her burden of proof.

As earlier discussed, Student never sought to admit Student's January 18, 2022 IEP into evidence, and the record did not otherwise fully establish what was stated in Student's January 18, 2022 IEP or what was discussed at the January 2022 IEP team meeting regarding Student's offer of special education and related services. That said, Saddleback Valley moved into evidence the September 12, 2022 IEP amendment which appears to include certain pages of the January 2022 IEP, specifically the service pages. Those pages, together with the occasional reference in the record through testimony or documentary evidence to the January 18, 2022 IEP or its contents was inadequate to fully establish the contents of the January 18, 2022 IEP.

In particular, as discussed in Issue 2Bi above, missing from the record was sufficient reliable evidence establishing Student's present levels of performance developed at the January 18, 2022 IEP team meeting. Also absent from the record were all of the annual goals offered in the January 18, 2022 IEP, along with any other

portions of the IEP necessary to determine the appropriateness of the services offered, including the notes of the discussion among the IEP team members regarding the development of the present levels of performance, annual goals and services.

It is impossible to determine the appropriateness of Student's January 18, 2022 IEP services without sufficient reliable proof of Student's present levels of performance and her annual goals, and any discussion at the IEP team meeting regarding their development. It is the present levels of performance that guide development of the goals, and the goals that guide the determination of the type and amount of related services that should be offered, including the frequency, intensity and duration of those services.

Also, offers of special education and related services can sometimes be supplemented or clarified in the notes or other places in the IEP. In short, without the entire IEP or other evidence establishing its complete contents, there is an incomplete picture of both Student at the time of the January 18, 2022 IEP and Saddleback Valley's offer of FAPE. On this ground alone, Student failed to prove Saddleback Valley denied her a FAPE by failing to offer an adequate amount of applied behavior analysis therapy in the January 2022 IEP.

Based only on the related services pages of the January 18, 2022 IEP incorporated into the September 12, 2022 IEP amendment admitted into evidence, the January 2022 IEP appears to offer Student the same amount of specialized academic instruction, speech and language services and physical therapy as the February 24, 2021 IEP. In addition to consultation between the speech language pathologist and teaching staff, it appears to offer consultation between the physical therapist and the IEP team to discuss strategies when needed for Student to safely access her school environment, as well as

consultation between the adapted physical education teacher and the general physical education teacher. Behavior services were not offered on the January 18, 2022 IEP services pages attached to the September 12, 2022 IEP admitted into evidence.

Student did not prove Saddleback Valley was required to offer applied behavior analysis therapy for many of the same reasons discussed in Issue 2Aiii regarding the February 24, 2021 IEP. In addition, Student failed to prove Student's present levels of performance at the time of the January 18, 2022 IEP, or that the goals offered in the January 18, 2022 IEP required the support of applied behavior analysis therapy.

Significantly, there was no clear or reliable evidence establishing what goals were offered to address Student's behavior. The 2022 private functional behavior assessment references that Student had "many IEP goals addressing behavior and social skills needs," and appears to copy one speech goal into the report, but this was insufficient to prove what goals were actually offered in the January 2022 IEP. There was no clear or reliable evidence at hearing establishing what goals were offered in the January 18, 2022 IEP.

Moreover, none of the witnesses who testified established Student should have been offered applied behavior analysis therapy at the time of the January 18, 2022 IEP. Private behavior supervisor Budd-Reyes, who did not start working with Student until June 2022, offered no opinion on this specific issue. Dr. Murillo conducted an academic and cognitive functioning assessment, but specifically testified her focus was Student's March 2023 functioning. Drs. Hernandez's and Hughes's report and their opinions were not reliable as discussed above. The evidence was insufficient to meet Student's burden of proof on Issue 2Biii.

Saddleback Valley did not deny Student a FAPE by failing to offer appropriate levels of applied behavior analysis therapy within the educational environment in the January 18, 2022 IEP.

ISSUE 2BIV: DID SADDLEBACK VALLEY DENY STUDENT A FAPE IN THE JANUARY 2022 IEP BY FAILING TO OFFER APPROPRIATE LEVELS OF OCCUPATIONAL THERAPY TO ADDRESS FINE MOTOR AND SENSORY INTEGRATION DEFICITS?

Student contended at hearing her position regarding Issue 2Biv was identical to her position in Issue 2Aiv, except it was for a different period, and that the February 24, 2021 IEP and the January 18, 2022 IEPs were virtually the same. In her written closing, Student argues Saddleback Valley has not provided Student with any occupational therapy services to address her fine motor or sensory issues, despite the fact they have been mentioned in several documents and by several clinicians.

Saddleback Valley contends its arguments regarding the February 24, 2021 IEP in Issue 2Aiv apply equally to Issue 2Biv regarding the January 18, 2022 IEP. Saddleback Valley argues there is no January 18, 2022 IEP in evidence which Student can challenge, so it was not necessary for it to address Student's Issue 2Biv.

Student's failure to either seek admission of the January 18, 2022 IEP into evidence or otherwise prove its contents, prevented Student from meeting her burden of proof on Issue 2Biv for the same reasons set forth in Issue 2Biii. On this ground alone, Student failed to prove Saddleback Valley denied her a FAPE by failing to offer an adequate amount of occupational therapy to address fine motor and sensory integration deficits in the January 2022 IEP.

Occupational therapy services were not offered on the January 18, 2022 services pages attached to the September 12, 2022 IEP admitted into evidence. Student did not prove Saddleback Valley was required to offer occupational therapy services in the January 2022 IEP for many of the same reasons Student did not prove it was required to offer these services in the February 24, 2021 IEP, discussed in Issue 2Aiv.

In addition, Student failed to prove Student's present levels of performance at the time of January 18, 2022 IEP required occupational therapy services. Notably, Student failed to establish what present levels of performance were considered by the January 18, 2022 IEP team, or what goals were offered in the January 2022 IEP. Moreover, because Student did not prove goals were adopted to address Student's fine motor and sensory processing deficits, Student did not prove occupational therapy services were required to enable Student to make progress on fine motor and sensory goals.

Furthermore, none of the witnesses testified Student should have been offered occupational therapy services at the time of the January 18, 2022 IEP. Student did not establish Student's functioning with respect to writing or "sensory integration" at the time of the January 18, 2022 IEP required occupational therapy services. Dr. Murillo's recommendation for occupational therapy services in March 2023 was based on an assessment over a year after the January 18, 2022 IEP was developed.

Although Drs. Hughes and Hernandez noted some issues with Student's writing when they performed their assessment, they did not recommend occupational therapy services and their opinions were not reliable as discussed above. In any event, the evidence presented was insufficient for Student to meet her burden of proof on Issue 2Biv.

Saddleback Valley did not deny Student a FAPE by failing to offer appropriate levels of occupational therapy to address fine motor and sensory integration deficits in the January 18, 2022 IEP.

ISSUE 2BV: DID SADDLEBACK VALLEY DENY STUDENT A FAPE IN THE JANUARY 2022 IEP BY FAILING TO OFFER APPROPRIATE LEVELS OF AUDITORY PROCESSING THERAPY?

Student contended at hearing that her position on Issue 2Bv was identical to her position in Issue 2Av, except it was for a different period, and that the February 24, 2021 IEP and the January 18, 2022 IEP were virtually the same. In her written closing, Student argues Saddleback Valley has continued to refuse to address Student's auditory processing deficits despite Dr. Abramson's findings and recommendations.

Saddleback Valley contended at hearing its arguments regarding the February 24, 2021 IEP in Issue 2Av, applied to the January 2022 IEP. In its closing brief, Saddleback Valley contends there is no January 2022 IEP in evidence which Student can challenge, so it was not necessary for it to address Student's Issues 2Bv.

Student's failure to either seek admission of the January 18, 2022 IEP into evidence or otherwise prove its contents, prevented Student from meeting her burden of proof on Issue 2Bv for the same reasons set forth in Issue 2Biii. On this ground alone, Student failed to prove Saddleback Valley denied her a FAPE by failing to offer an adequate amount of auditory processing therapy in the January 2022 IEP.

The services pages of the January 18, 2022 IEP included in the September 12, 2022 IEP admitted into evidence, did not offer auditory processing therapy. However, Student did not prove Saddleback Valley was required to offer auditory processing

therapy in the January 18, 2022 IEP for many of the same reasons Student did not prove Saddleback Valley was required to offer these services in the February 24, 2021 IEP, as discussed in Issue 2Av.

In addition, Student failed to prove that Student's present levels of performance at the time of January 18, 2022 IEP required auditory processing therapy, or that the January 18, 2022 IEP included goals addressing Student's auditory processing that required the support of auditory processing therapy. Notably, none of the witnesses testified Student should have been offered auditory processing therapy at the time of the January 18, 2022 IEP. Although Dr. Abramson reviewed the January 18, 2022 IEP, she offered no specific credible opinion establishing auditory processing therapy should have been offered at that time. The evidence was insufficient to meet Student's burden of proof on Issue 2Bv.

Saddleback Valley did not deny Student a FAPE by failing to offer appropriate levels of auditory processing therapy in the January 18, 2022 IEP.

ISSUE 2Bvi: DID SADDLEBACK VALLEY DENY STUDENT A FAPE IN THE JANUARY 2022 IEP BY FAILING TO OFFER APPROPRIATE LEVELS OF VISION THERAPY?

Student contended at hearing that her position on Issue 2Bvi was identical to her position in Issue 2Avi, except it was for a different period, and that the February 24, 2021 IEP and the January 18, 2022 IEP were virtually the same. In her written closing, Student argues Saddleback Valley has continued to refuse to address Student's vision needs, except for the slant board.

Saddleback Valley contended at hearing its arguments regarding the February 24, 2021 IEP in Issue 2Avi, applied to the January 18, 2022 IEP. In its closing brief, Saddleback Valley contends there is no January 18, 2022 IEP in evidence which Student can challenge, so it was not necessary for it to address Student's Issue 2Bvi.

Student's failure to either seek admission of the January 18, 2022 IEP into evidence or otherwise prove its contents, prevented Student from meeting her burden of proof on Issue 2Bvi for the same reasons set forth in Issue 2Biii. On this ground alone, Student failed to prove Saddleback Valley denied her a FAPE by failing to offer an adequate amount of vision therapy in the January 2022 IEP.

The service pages of the January 18, 2022 IEP included in the September 12, 2022 IEP amendment admitted into evidence, did not offer vision therapy. However, Student did not prove Saddleback Valley was required to offer vision therapy in the January 18, 2022 IEP for the same reasons Student did not prove Saddleback Valley was required to offer these services in the February 24, 2021 IEP, as discussed in Issue 2Avi.

In addition, Student failed to prove Student's present levels of performance at the time of January 18, 2022 IEP required vision therapy. Student did not establish goals addressing Student's vision were adopted and required the support of vision therapy. None of the witnesses or other evidence established Student should have been offered vision therapy services at the time of the January 18, 2022 IEP. Dr. Ballinger offered no specific credible opinion about whether vision therapy should have been offered at that time. The evidence was insufficient to meet Student's burden of proof on Issue 2Bvi.

Saddleback Valley did not deny Student a FAPE by failing to offer appropriate levels of vision therapy in the January 18, 2022 IEP.

ISSUE 2Bvii: DID SADDLEBACK VALLEY DENY STUDENT A FAPE IN THE JANUARY 2022 IEP BY FAILING TO OFFER APPROPRIATE LEVELS OF SOCIAL SKILLS TRAINING?

Student contended at hearing that her position was identical to her position in Issue 2Avii, except it was for a different period, and that the February 24, 2021 IEP and the January 18, 2022 IEP were virtually the same. In her written closing, Student argues Saddleback Valley has failed to provide social skills services by a behaviorist or autism specialist and Parent testified the services it provided were not group services.

Saddleback Valley contended at hearing its arguments regarding the February 24, 2021 IEP in Issue 2Avii, applied to the January 18, 2022 IEP. Saddleback Valley contends there is no January 18, 2022 IEP in evidence which Student can challenge, so it was not necessary for it to address Student's Issue 2Bvii.

Student's failure to either seek admission of the January 18, 2022 IEP into evidence or otherwise prove its contents, prevented Student from meeting her burden of proof on Issue 2Bvii for the same reasons set forth in Issue 2Biii. On this ground alone, Student failed to prove Saddleback Valley denied her a FAPE by failing to offer an adequate amount of social skills training in the January 2022 IEP.

The services pages from January 18, 2022 IEP included in the September 12, 2022 IEP admitted into evidence did not offer designated social skills training. Student did not prove Saddleback Valley was required to offer social skills training in the January 18, 2022 IEP as a separate service. Student did not prove Saddleback Valley was required to offer these services for many of the same reasons discussed in Issues 2Aiii, 2Avii and 2Biii. In addition, Student failed to prove Student's present levels of performance at the

time of the January 18, 2022 IEP, or that the goals offered in the January 18, 2022 IEP required the support of designated social skills training. As discussed above, there was no clear or reliable evidence establishing the goals offered in the January 2022 IEP. Moreover, none of the witnesses established Student should have been offered social skills training at the time of the January 18, 2022 IEP.

Private behavior supervisor Budd-Reyes, who did not start working with Student until June 2022, offered no opinion on this specific issue. Dr. Murillo did not offer specific credible opinions about social skills training. Drs. Hernandez's and Hughes's report and opinions were not reliable. The evidence was insufficient to meet Student's burden of proof on Issue 2Bvii.

Student's arguments based on Saddleback Valley's alleged failure to provide social skills services by a behaviorist or autism specialist, or properly implement Student's services, are irrelevant. Neither of these issues were within the scope of the issues for hearing as set forth in the March 24, 2023 Order Following Prehearing Conference for Hearing by Videoconference, to which Student filed no objections. Nor were they litigated. Thus, these issues are not addressed in this Decision.

Saddleback Valley did not deny Student a FAPE by failing to offer appropriate levels of social skills training in the January 18, 2022 IEP.

ISSUE 2Bviii: DID SADDLEBACK VALLEY DENY STUDENT A FAPE IN THE JANUARY 2022 IEP BY FAILING TO OFFER APPROPRIATE LEVELS OF ASSISTIVE TECHNOLOGY SUPPORT AND TRAINING?

Student contended at hearing that her position was identical to her position in Issue 2Aviii, except it was for a different period, and that the February 24, 2021 IEP and

the January 18, 2022 IEP were virtually the same. In her written closing, Student argues Saddleback Valley has failed to provide Student with assistive technology equipment support services with exception of a slant board, despite prechecking the “no need” box on Student’s IEPs.

Saddleback Valley contended its arguments regarding the February 24, 2021 IEP in Issue 2Aviii, applied to the January 18, 2022 IEP. Saddleback Valley contends there was no January 18, 2022 IEP in evidence that Student can challenge, so it was not necessary for it to address Student’s Issue 2Bviii.

Student’s failure to either seek admission of the January 18, 2022 IEP into evidence or otherwise prove its contents, prevented Student from meeting her burden of proof on Issue 2Bviii for the same reasons set forth in Issue 2Biii. On this ground alone, Student failed to prove Saddleback Valley denied her a FAPE by failing to offer an adequate amount of assistive technology support and training in the January 2022 IEP.

There was no clear evidence that Saddleback Valley checked any box on the January 18, 2022 IEP regarding assistive technology. Moreover, Student did not prove Saddleback Valley was required to offer assistive technology in the January 18, 2022 IEP for many of the same reasons Student did not prove Saddleback Valley was required to offer these services in the February 24, 2021 IEP, as discussed in Issue 2Aviii. In addition, Student failed to prove Student’s present levels of performance or her goals at the time of January 18, 2022 IEP required assistive technology support and training for a FAPE.

There was no sufficient credible evidence that goals were offered to address Student’s use of assistive technology, or that Student required assistive technology support and training which was not offered in the January 18, 2022 IEP. Moreover,

none of the witnesses or other evidence established Student should have been offered assistive technology support and training at the time of the January 18, 2022 IEP. The evidence was insufficient to meet Student's burden of proof on Issue 2Bviii.

Saddleback Valley did not deny Student a FAPE by failing to offer appropriate levels of assistive technology support and training in the January 18, 2022 IEP.

ISSUE 2C: DID SADDLEBACK VALLEY DENY STUDENT A FAPE IN THE SEPTEMBER 12, 2022 IEP BY FAILING TO OFFER APPROPRIATE LEVELS OF APPLIED BEHAVIOR ANALYSIS THERAPY WITHIN THE EDUCATIONAL ENVIRONMENT?

Student contended at hearing that her 2022 private behavior assessment was presented to the IEP team at the September 12, 2022 IEP team meeting, but Saddleback Valley refused to amend Student's IEP. Student argued the district members of the IEP team were less than receptive to the information, and the IEP behavior services were still in deficit. In her closing brief, Student argues that other than adding behaviorist consultation by the September 12, 2022 IEP amendment, Saddleback Valley refused to offer any direct applied behavior analysis services despite her private assessors' recommendations.

Saddleback Valley contended at the hearing that Student's assertions were false. It argues it listened to the presentation and added behavior specialist consultation at the September 12, 2022 IEP team meeting. In its closing brief, Saddleback Valley contends that at the September 12, 2022 IEP team meeting, it considered the private behavior assessment report, Student's teacher discussed typical peer behavior in the classroom,

and it offered behavior consultation for collaboration between Saddleback Valley's board -certified behavior analyst and school staff. Saddleback Valley contends Parents demanded that Saddleback Valley hire an outside agency to train staff for 40 to 50 hours, but it declined to do so, and neither Drs. Hughes or Hernandez testified this private training protocol was appropriate, thus it was not corroborated or supported by any evidence.

THE SEPTEMBER 12, 2022 IEP TEAM MEETING

An IEP team amendment meeting was held on September 12, 2022 for purposes of discussing the private functional behavior assessment conducted by Drs. Hernandez and Hughes. Those in attendance included Parents, Dr. Hernandez, Student's attorney, Saddleback Valley's attorney, along with other members of the IEP team, including Student's general education and special education teachers and behavior specialist Gayou.

Dr. Hernandez reviewed her report and recommendations. She gave an example of Student's aggression as reaching out to grab the microphone when she was not selected to participate in an activity, but admitted Student did not physically take the microphone from the peer. She shared that wearing a hoodie made it easier for Student to disengage from peers and would impact her on a later date. Dr. Hernandez also asserted that data demonstrated "prompt dependence is inadvertently increasing prompt dependence." She discussed prompting, inconsistent time for writing assignments, and work completion. Dr. Hernandez shared Student did better in a small group with a predictable environment

and preferred tasks, and stated Student should not be compared to typical children. Dr. Hernandez acknowledged Saddleback Valley staff had taken good data in the past, but at this point the focus should be on how the interventions were implemented and that quarterly reports should be sent to Parents.

Student's teachers shared their views regarding prompting, typical peer behavior for task initiation and off task behavior, and the existing classroom reinforcement system. Student's special education teacher attempted to clarify the time frame used for prompting and explained that 30 percent of the class was typically slow to start. General education teacher Carter shared that 33 percent of her students displayed off task behaviors at a given time and shared what the reinforcement system looked like in the classroom. Saddleback Valley agreed to add behavior consultation for a minimum of one hour a month, to which Parents stated they agreed.

During the September 12, 2022 IEP team meeting Saddleback Valley's attorney stated that many other students exhibit the same behavior as Student and further data should be taken. During the meeting, he twice proposed Student's three-year review be advanced so Saddleback Valley could assess Student, to which Student's attorney objected. Student's attorney requested that an outside agency be hired to train school district staff, and Parents did not agree with Saddleback Valley data.

Saddleback Valley amended Student's January 18, 2022 IEP to add one hour per month of behavior consultation between Saddleback Valley's behavior specialist and school staff. On October 3, 2022 Saddleback Valley sent a letter responding to Student's counsel September 15, 2022 letter requesting outside consultation hours

using a mutually agreeable board certified behavior analyst. It declined the request for the outside consultant but agreed to send data collection documents to Parents on a weekly basis.

SADDLEBACK VALLEY WAS NOT REQUIRED TO OFFER APPLIED BEHAVIOR ANALYSIS THERAPY TO STUDENT IN THE SEPTEMBER 12, 2022 IEP

Saddleback Valley was not required immediately adopt the recommendations in the 2022 private functional behavior assessment report or the requests made at the September 12, 2022 IEP team meeting. Saddleback Valley was entitled to conduct its own assessment and Student could not force it to rely solely on the private functional behavior assessment or the new request for outside consultation hours. (See e.g., *Patricia P. v. Board of Education of Oak Park* (7th Cir. 2000) 203 F.3d 462, 468 (*Patricia B.*); see also, *Andress v. Cleveland Independent School Dist.* (5th Cir. 1995) 64 F.3d 176, 178 (*Andress*)[A parent who desires for her child to receive special education must allow the school district to reevaluate the child using its own personnel; there is no exception to this rule.].) Besides proposing that Student be assessed at the September 12, 2022 IEP team meeting, Saddleback Valley also sent an assessment plan the day after this meeting, and again on November 4, 2022, as discussed in more detail in Issue 1A.

However, Parents refused to consent to any assessment of Student until March 8, 2023.

Student did not prove Saddleback Valley was required to offer applied behavior analysis therapy for some of the same reasons explained in Issues 2Aiii and 2Biii. Among other things, on its face, the 2022 private functional behavior assessment lacked important supporting detail and was otherwise flawed, as discussed in Issue 2Aiii.

Furthermore, the members of the IEP team were appropriately skeptical of Dr. Hernandez's failure to consider or appreciate typical peer behavior, which Dr. Hernandez essentially claimed was not relevant. In fact, Dr. Hernandez's statement at the IEP team meeting directly conflicted with her testimony and that of Dr. Hughes's, where they unpersuasively claimed to have considered peer behavior despite the absence of data in their report. The importance of factoring in and comparing peer behavior was not only made clear by Dr. Hughes's testimony but was corroborated by the testimony of Saddleback Valley behavior specialist Branham who discussed comparisons to peers as part of Saddleback Valley's 2020 functional behavior assessment.

Moreover, the report characterized Student's behavior as aggressive, but gave no persuasive examples of this alleged behavior. The only example Dr. Hernandez gave to the IEP team on September 12, 2022 was the one time incident in which Student attempted to grab a microphone. Dr. Hernandez not only admitted to the team that Student never took the microphone from the peer, her report stated this "did not appear aggressive."

At the time of the September 12, 2022 IEP, board certified behavior analyst Gayou had observed Student in the classroom during the school year, reviewed the data taken by Student's teacher, and had consulted with Student's home behavior program supervisor Budd-Reyes. She did not observe any behaviors by Student she considered maladaptive. At hearing, Gayou testified the offer of consultation was made to help support the school team and Student, and she believed it was the appropriate addition to the IEP at the time it was made.

Although some parts of Gayou's testimony were confusing and evasive which negatively impacted her credibility, based on the totality of evidence Student nonetheless did not otherwise prove Saddleback Valley was required to offer Student "applied behavior analysis therapy" at the time of the September 12, 2022 IEP.

Finally, Student failed to establish that the outside consultation services she requested was "applied behavior analysis therapy," and even it could be considered as such, the evidence was otherwise insufficient to prove it was required to provide Student a FAPE. Saddleback Valley had qualified staff that could provide behavior training.

Saddleback Valley did not deny Student a FAPE by failing to offer appropriate levels of applied behavior analysis therapy within the educational environment in the September 12, 2022 IEP.

ISSUE 2D: DID SADDLEBACK VALLEY DENY STUDENT A FAPE IN THE OCTOBER 14, 2022 IEP BY FAILING TO OFFER APPROPRIATE LEVELS OF VISION THERAPY?

Student contended at hearing that Saddleback Valley refused to initiate the recommendations made by optometrist Dr. Ballenger at the October 14, 2022 IEP team meeting. Student argues she put her requests in writing as requested by Saddleback Valley, but they were denied except for a slant board. Student also reargued the vision assessment claim, accused Saddleback Valley of being "tone deaf," and asserted Saddleback Valley should have conducted a vision assessment

from the outset. In her closing brief, Student asserts Saddleback Valley refused to offer any vision support services despite the recommendations by Dr. Ballinger, unless and until it was allowed to assess Student.

Saddleback Valley contended at hearing that neither Dr. Lingua or Dr. Gore recommended vision therapy, and they were not called as witnesses at hearing. Saddleback Valley asserted that Parents were presented with an assessment plan on September 13, 2022 which explicitly called for a vision assessment, but Parents refused to consent to Saddleback Valley assessing Student's vision for six months despite multiple requests.

In its closing brief, Saddleback Valley argues it considered Dr. Ballinger's report at the October 14, 2022 meeting. It argues that Dr. Ballinger never concluded Student was IDEA eligible as visually impaired, nor did her report address Student's academic progress or refer to any educational assessments or other records in her report. Nonetheless, it asserts, she recommended vision therapy that presumably she would provide, without ever speaking to anyone at school about Student's in-school vision functioning or Student's ophthalmologist, and she relied on a test last normed 30 years ago.

Saddleback Valley argues Dr. Ballinger admitted at hearing all the "concerns" listed in her report came only from Student's family, and Dr. Ballinger failed to demonstrate she was qualified to make some of the recommendations she made, which were in areas outside of her specialty. Saddleback Valley also asserts Student's ophthalmologists never recommended vision therapy, Student did not call her ophthalmologist as a witness, and Parents refused to sign the assessment plan sent to them in fall 2022.

THE OCTOBER 14, 2022 IEP TEAM MEETING

An IEP team amendment meeting was held on October 14, 2022 for purposes of discussing the vision assessment conducted by Dr. Ballinger. Parents, Dr. Ballenger, Student's attorney, and Saddleback Valley's attorney, attended the meeting along with other members of the IEP team, including Catherine Mears, Saddleback Valley's teacher for the visually impaired.

Dr. Ballenger reviewed her report. She explained that a slant board could make Student's life easier, minimizing glare, and that vision therapy could help with primary gaze and down space. Dr. Ballinger asked questions about Student's school functioning, demonstrating she was not familiar with it. She stated Student needed a central auditory processing assessment and a one-to-one aide to guide her learning, and the speed with which the teacher was talking was challenging for Student to keep up. Student's attorney agreed to send a written request related to the vision therapy.

Saddleback Valley considered Dr. Ballinger's report at the October 14, 2022 IEP team meeting. Saddleback Valley IEP team members stated they would like the school district's optometrist to review the report and do an educational evaluation. Saddleback Valley noted Dr. Ballinger's report did not mention any of Student's IEPs and additional information would be needed to determine if there was any educational basis for vision services. Vision specialist Mears, who had recently conducted an informal observation of Student at school, stated Saddleback Valley could implement the slant board without an assessment, but she wanted to conduct an assessment to determine Student's needs in an educational setting as opposed to the medical assessment Dr. Ballinger conducted.

As discussed above, Parent claimed not to recall receiving the September 13, 2022 assessment plan.

Saddleback Valley amended Student's January 18, 2022 IEP to add a slant board to the list of Student's accommodations. In an October 21, 2022 letter, Student's counsel demanded Saddleback Valley offer 48 in-office vision therapy sessions and seven progress evaluations, and in a November 4, 2022 letter to Student's attorney, Saddleback Valley declined the request for vision therapy, but stated it was willing to further consider the request after it had an opportunity to conduct a vision assessment.

STUDENT FAILED TO PROVE SADDLEBACK VALLEY WAS REQUIRED TO OFFER VISION THERAPY IN THE OCTOBER 14, 2022 IEP

Saddleback Valley was not legally required to offer vision therapy to Student in the October 14, 2022 IEP. Since September 12, 2022, Saddleback Valley had been trying to assess Student's vision, and Parents did not consent to an assessment of Student's vision until March 8, 2023. Saddleback Valley was not required immediately adopt Dr. Ballinger's recommendations given the issues with the report and it wanted to conduct its own assessment. Indeed, the law is clear that if Parents wanted Saddleback Valley to provide vision therapy, they were required to allow Saddleback Valley to assess Student's need for vision therapy and could not force it to rely solely on Dr. Ballinger's one-sided evaluation. (See e.g., *Patricia P.*, *supra*, 203 F.3d at p. 468; see also, *Andress*, *supra*, 64 F.3d at p. 178.)

On its face, Dr. Ballinger's evaluation was based on incomplete information. As Saddleback Valley members discussed during the October 14, 2022 IEP team meeting and as discussed above in this Decision, Dr. Ballinger did not conduct an educationally based evaluation. Among other things, she failed to properly inform herself about Student's functioning at school before making recommendations about what Student required to function appropriately at school. She never reviewed Student's school records, Student's IEPs, or interviewed any school staff as part of her assessment. Dr. Ballinger's opinions were not otherwise persuasive for the reasons discussed earlier in this Decision.

Despite Dr. Ballinger's unsuccessful attempts to claim otherwise, there was no actual recommendation for vision therapy made by Student's ophthalmologists, and Student did not otherwise present any other persuasive evidence establishing that Student required educationally based vision therapy at the time of the October 14, 2022 IEP.

Saddleback Valley did not deny Student a FAPE by failing to offer appropriate levels of vision therapy in the October 14, 2022 IEP.

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:

Saddleback Valley did not deny Student a FAPE by failing to appropriately assess Student in all known/suspected areas of need, specifically, by failing to conduct an assistive technology assessment between December 14, 2020, and December 14, 2022.

Saddleback Valley prevailed on Issue 1A.

ISSUE 1B:

Saddleback Valley did not deny Student a FAPE, by failing to appropriately assess Student in all known/suspected areas of need, specifically, by failing to conduct a vision assessment between December 14, 2020, and October 2022.

Saddleback Valley prevailed on Issue 1B.

ISSUE 1C:

Saddleback Valley did not deny Student a FAPE by failing to appropriately assess Student in all known/suspected areas of need, specifically, by failing to assess in the area sensory integration/hyperactivity between December 14, 2020, and December 14, 2022.

Saddleback Valley prevailed on Issue 1C.

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ISSUE 1D:

Saddleback Valley did not deny Student a FAPE by failing to appropriately assess Student in all known/suspected areas of need, specifically, by failing to conduct a functional behavior analysis assessment between December 14, 2020, and December 14, 2022.

Saddleback Valley prevailed on Issue 1D.

ISSUE 1E:

Saddleback Valley did not deny Student a FAPE by failing to appropriately assess Student in all known/suspected areas of need, specifically, by failing to conduct a health assessment between December 14, 2020, and December 14, 2022, given Student's eye surgeries and health issues.

Saddleback Valley prevailed on Issue 1E.

ISSUE 1F:

Saddleback Valley did not deny Student a FAPE by failing to appropriately assess Student in all known/suspected areas of need, specifically, by failing to assess in the area of social emotional functioning between December 14, 2020, and December 14, 2022.

Saddleback Valley prevailed on Issue 1F.

ISSUE 2Ai:

Saddleback Valley did not deny Student a FAPE by failing to develop a comprehensive IEP to address Student's needs, specifically, in the February 24, 2021 IEP, by failing to develop valid or accurate present levels of performance.

Saddleback Valley prevailed on Issue 2Ai.

ISSUE 2Aii:

Saddleback Valley did not deny Student a FAPE by failing to develop a comprehensive IEP to address Student's needs, specifically, in the February 24, 2021 IEP, by failing to offer appropriate levels of individual and small group speech language therapy.

Saddleback Valley prevailed on Issue 2Aii.

ISSUE 2Aiii:

Saddleback Valley did not deny Student a FAPE by failing to develop a comprehensive IEP to address Student's needs, specifically, in the February 24, 2021 IEP, by failing to offer appropriate levels of applied behavior analysis therapy within the educational environment.

Saddleback Valley prevailed on Issue 2Aiii.

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ISSUE 2Aiv:

Saddleback Valley did not deny Student a FAPE by failing to develop a comprehensive IEP to address Student's needs, specifically, in the February 24, 2021 IEP, by failing to offer appropriate levels of occupational therapy to address fine motor and sensory integration deficits.

Saddleback Valley prevailed on Issue 2Aiv.

ISSUE 2Av:

Saddleback Valley did not deny Student a FAPE by failing to develop a comprehensive IEP to address Student's needs, specifically, in the February 24, 2021 IEP, by failing to offer appropriate levels of auditory processing therapy.

Saddleback Valley prevailed on Issue 2Av.

ISSUE 2Avi:

Saddleback Valley did not deny Student a FAPE by failing to develop a comprehensive IEP to address Student's needs, specifically, in the February 24, 2021 IEP, by failing to offer appropriate levels of vision therapy.

Saddleback Valley prevailed on Issue 2Avi.

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ISSUE 2Avii:

Saddleback Valley did not deny Student a FAPE by failing to develop a comprehensive IEP to address Student's needs, specifically, in the February 24, 2021 IEP, by failing to offer appropriate levels of social skills training.

Saddleback Valley prevailed on Issue 2Avii.

ISSUE 2Aviii:

Saddleback Valley did not deny Student a FAPE by failing to develop a comprehensive IEP to address Student's needs, specifically, in the February 24, 2021 IEP, by failing to offer appropriate levels of assistive technology support and training.

Saddleback Valley prevailed on Issue 2Aviii.

ISSUE 2Bi:

Saddleback Valley did not deny Student a FAPE by failing to develop a comprehensive IEP to address Student's needs, specifically, in the January 18, 2022 IEP by failing to develop valid or accurate present levels of performance.

Saddleback Valley prevailed on Issue 2Bi.

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ISSUE 2Bii:

Saddleback Valley did not deny Student a FAPE by failing to develop a comprehensive IEP to address Student's needs, specifically, in the January 18, 2022 IEP by failing to offer appropriate levels of individual and small group speech language therapy.

Saddleback Valley prevailed on Issue 2Bii.

ISSUE 2Biii:

Saddleback Valley did not deny Student a FAPE by failing to develop a comprehensive IEP to address Student's needs, specifically, in the January 18, 2022 IEP by failing to offer appropriate levels of applied behavior analysis therapy within the educational environment.

Saddleback Valley prevailed on Issue 2Biii.

ISSUE 2Biv:

Saddleback Valley did not deny Student a FAPE by failing to develop a comprehensive IEP to address Student's needs, specifically, in the January 18, 2022 IEP by failing to offer appropriate levels of occupational therapy to address fine motor and sensory integration deficits.

Saddleback Valley prevailed on Issue 2Biv.

ISSUE 2Bv:

Saddleback Valley did not deny Student a FAPE by failing to develop a comprehensive IEP to address Student's needs, specifically, in the January 18, 2022 IEP by failing to offer appropriate levels of auditory processing therapy.

Saddleback Valley prevailed on Issue 2Bv.

ISSUE 2Bvi:

Saddleback Valley did not deny Student a FAPE by failing to develop a comprehensive IEP to address Student's needs, specifically, in the January 18, 2022 IEP by failing to offer appropriate levels of vision therapy.

Saddleback Valley prevailed on Issue 2Bvi.

ISSUE 2Bvii:

Saddleback Valley did not deny Student a FAPE by failing to develop a comprehensive IEP to address Student's needs, specifically, in the January 18, 2022 IEP by failing to offer appropriate levels of social skills training.

Saddleback Valley prevailed on Issue 2Bvii.

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ISSUE 2Bviii:

Saddleback Valley did not deny Student a FAPE by failing to develop a comprehensive IEP to address Student's needs, specifically, in the January 18, 2022 IEP by failing to offer appropriate levels of assistive technology support and training.

Saddleback Valley prevailed on Issue 2Bviii.

ISSUE 2c:

Saddleback Valley did not deny Student a FAPE by failing to develop a comprehensive IEP to address Student's needs, specifically, in the September 12, 2022 IEP, by failing to offer appropriate levels of applied behavior analysis therapy within the educational environment.

Saddleback Valley prevailed on Issue 2C.

ISSUE 2d:

Saddleback Valley did not deny Student a FAPE by failing to develop a comprehensive IEP to address Student's needs, specifically, in the October 14, 2022 IEP, by failing to offer appropriate levels of vision therapy.

Saddleback Valley prevailed on Issue 2D.

ORDER

1. Student's Issue 2Aii is dismissed with prejudice.
2. Student's Issue 2Bii is dismissed with prejudice.
3. All relief sought by Student is 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.

Laurie Gorsline

Administrative Law Judge

Office of Administrative Hearings