

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Consolidated Matters of:

PARENTS ON BEHALF OF STUDENT,

v.

FOLSOM CORDOVA UNIFIED SCHOOL
DISTRICT,

OAH CASE NO. 2013040098

FOLSOM CORDOVA UNIFIED SCHOOL
DISTRICT,

OAH CASE NO. 2013090197

v.

PARENTS ON BEHALF OF STUDENT.

DECISION

On April 3, 2013, Student, through her Parents, filed a due process hearing request (complaint) with the Office of Administrative Hearings, State of California (OAH), naming the Folsom Cordova Unified School District (District). On September 6, 2013, District filed a complaint naming Student. On September 20, 2013, OAH granted Student's motion to amend her complaint as of that day, and consolidated the matters on the timeline of Student's amended complaint. The matter was continued on November 4, 2013.

Administrative Law Judge Charles Marson heard these matters in Rancho Cordova, California, on December 16-20, 2013, and January 7-8, 2014. Student's Parents represented Student. Student did not attend.

Anne M. Sherlock, Attorney at Law, represented District. Hunt Lin, District's secondary program coordinator, attended the hearing.

On the last day of hearing, the parties were granted a continuance to file written closing arguments by the close of business on January 29, 2014. Upon timely receipt of the written closing arguments, the record was closed and the matter was submitted.

ISSUES

Student's Issues (Case No. 2013040098):¹

A. Did District procedurally fail to provide Student a free appropriate public education (FAPE) during the 2010-2011, 2011-2012, 2012-2013, and 2013-2014 school years (unless otherwise noted) by:

1. Predetermining that Student was not eligible for, and should be exited from, special education (2010-2011 and 2013-2014 school years only);
2. Predetermining Student's individualized education programs (IEP's);
3. Denying Parents meaningful participation in the IEP process;
4. Failing adequately to report assessment results (2010-2011 school year only);
5. Failing to provide adequate progress reports (2011-2012 and 2012-2013 school years);
6. Failing to give Parents prior written notice of its proposed actions in the 2010-2011 and 2013-2014 school years to exit Student from special education?
7. Failing to timely convene an annual IEP team meeting (except in the 2013-2014 school year);
8. Failing to develop a new appropriate IEP for Student (2011-2012 and 2012-2013 school years); and
9. Failing to conduct a resolution session (2012-2013 school year only)?

B. Did District substantively fail to provide Student a FAPE during the 2010-2011, 2011-2012, 2012-2013, and 2013-2014 school years (unless otherwise noted) by failing to:

1. Offer a new IEP with proper eligibility classification, appropriate and measurable goals, services, accommodations, and modifications;
2. Offer adequate speech-language services;

¹ Parents' issues as set forth in the Order Following Prehearing Conference have been reorganized and reworded for clarity and to reflect the evidence introduced at hearing and the arguments made and abandoned in Parents' closing brief. (See *J.W. v. Fresno Unified School Dist.* (9th Cir. 2010) 626 F.3d 431, 442-443.)

3. Offer an appropriate reading program;
 4. Offer a resource specialist program;
 5. Implement her outstanding IEP's; and
 6. Failing, in the 2013-2014 school year, to place Student in the least restrictive environment (LRE) in her language arts class?
- C. Is the two-year statute of limitations inapplicable because District knowingly deceived Parents regarding Student's progress?

District's Issue (Case No. 2013090197):

Is Student eligible for special education and related services?

SUMMARY OF DECISION

Parents contend that District committed numerous procedural violations in attempting to exit Student from special education in 2011 and 2013; that she was eligible for special education throughout those years due to a speech-language impairment; and that she is still eligible in that category, and in the categories of specific learning disorder and other health impaired as well. Parents contend that the IEP's offered by District failed to meet Student's unique needs in the areas of speech-language, reading, and resource support. They contend further that Student's grades overstate her academic performance, which is far less satisfactory than District claims. Finally, they contend that Student's current placement in a special education language arts class is not in the LRE .

District contends that Student's speech-language therapy has been so successful that she is no longer eligible for special education in the speech-language impairment category, and has never been eligible in the categories of specific learning disorder or other health impaired. It argues that Student, who has average cognitive capacity, has continually received average or better grades, and that those grades accurately reflect her performance in school. District contends that it did not deny Parents meaningful participation in the IEP process and committed no consequential procedural error in offering Student's IEP's, and that each of those IEP's was appropriate and provided, or would have provided, Student a FAPE. It argues that Student's placement in a restrictive language arts class is justified by a mediation agreement with Parents. District seeks an order that Student is no longer eligible for special education.

This Decision holds that Student is not placed in the LRE in her language arts class, but otherwise resolves the issues in favor of the District. It holds that the actions taken by District in attempting to exit Student from special education and in offering or providing her several IEP's was procedurally correct, or if incorrect did not affect Student's education or Parents' participatory rights. It holds that the two IEP offers proposing to exit Student from

special education were reasonably and correctly made, and that the IEP's in which District did offer Student special education offered her a FAPE. Finally, it holds that Student is no longer eligible for special education.

FACTUAL FINDINGS

Background and Jurisdiction

1. Student is an 11-year-old girl who resides with Parents within the geographical boundaries of District. At all relevant times Student has been receiving special education and related services in the category of speech-language impairment.

2. Student was assessed for speech-language impairment in 2004, at age two, and found to have significant expressive language difficulties. She was first made eligible for special education in 2005, when she was assessed again on her entry into preschool. She has received speech-language support since then. On March 10, 2010, the parties agreed to an IEP that placed Student in general education for her third grade year with 42 sessions a year of small group speech-language support. At an IEP team meeting on May 13, 2011, District proposed to exit Student from special education, claiming she was no longer eligible for it in any category, but Parents did not agree and the March 2010 IEP remained in effect. The parties were unsuccessful in agreeing on another IEP until July 23, 2012, when Parents agreed to an IEP proposed on April 27, 2012.

3. After Student filed her complaint in April 2013, District held another IEP team meeting on August 23, 2013, at which it again proposed that Student be exited from special education, and again the parties could not agree. Student now attends Folsom Middle School and is in the sixth grade. Her April 2012 IEP has remained in effect during the pendency of these consolidated cases.

Procedural Compliance During Third Grade (School Year 2010-2011)

4. On March 18, 2011, District convened Student's annual IEP team meeting. The parties discussed the next triennial review, due in January 2012, and agreed to advance it in time so Student would be assessed sooner and the assessments would be reviewed at a triennial IEP team meeting in April 2011 (later postponed to May 13, 2011). Parents agreed, and signed an assessment plan allowing psychoeducational, speech-language, and academic assessments, which were conducted that March, April, and May 2011.

THE MAY 13, 2011 TRIENNIAL IEP TEAM MEETING

5. At the triennial IEP team meeting on May 13, 2011, District's assessors presented their assessment results and recommended that Student be exited from special education because she was no longer eligible in any disability category. District members of the team agreed, but Parents did not. They now allege numerous violations of the

Individuals with Disabilities Education Act (IDEA) arising out of that meeting and its related psychoeducational assessment.

PREDETERMINATION

Initial Notice of Meeting

6. Student argues that District's recommendation at the May 13, 2011 triennial IEP team meeting was predetermined for two principal reasons. First, Student claims the original notice of the meeting described the meeting's purpose as exiting Student from special education. As the March 18, 2011 meeting was adjourning, Deena Masera-Lynch, Student's speech-language therapist, handed Parents a notice of the upcoming meeting with a check in the box showing that the purpose of the meeting was to "[t]erminate special education program."² When Parents objected, Ms. Masera-Lynch explained that the check mark was a mistake, apologized, and promptly gave them a new notice stating that the purpose of the meeting was to consider eligibility. Ms. Masera credibly testified that the original notice was only a mistake, and at the time she did not know that Student would be exited. However, at the triennial meeting, District did attempt to exit Student, so Student characterizes the initial notice as evidence of a predetermined District plan.

7. The evidence supported Ms. Masera-Lynch's testimony. At the time she gave Parents the initial notice, testing for an academic assessment had been completed but no report had been written, and District's assessors had not begun their triennial speech-language and psychoeducational assessments. District members of the May 13, 2011 IEP team meeting based their recommendation to exit Student largely on the results of those three assessments, which all concluded that Student was no longer eligible for special education. Thus, although some District staff may have suspected earlier that Student was no longer eligible, the assessment results reaching that conclusion did not yet exist when Ms. Masera-Lynch gave Parents the mistaken notice. There was no other evidence that District made a decision to exit Student before the May 13, 2011 meeting.

8. The three triennial assessments were presented by their authors at the May 13, 2011 IEP team meeting. There was no evidence that they were circulated before the meeting, except to Parents, or discussed by District team members among themselves. Even if they had been, District members of the IEP team were entitled to prepare for the meeting.

² Ms. Masera-Lynch has a bachelor's degree in speech-language pathology from California State University at Chico and a speech-language pathologist teaching credential. She is a member of the Sacramento and California Speech-Hearing Associations. She worked as a speech-language pathologist for District for 38 years, serving students from preschool to high school, and has conducted at least 1500 speech-language assessments. For several years she also taught a special day class in summers and a night program for adults. She retired in June 2011 and now volunteers in schools teaching communications skills.

In the absence of other evidence, the timing of the conduct and distribution of the three assessments refutes Parents' suggestion that the initial IEP team meeting notice revealed a predetermined result.

Nondisclosure of Dr. Singer's Assessment Protocols

9. Parents' second reason for contending that the May 13, 2011 outcome was predetermined is based on District's nondisclosure of the test protocols that Dr. Arthur Singer assembled for his May 2011 psychoeducational assessment.³ Dr. Singer wrote a report on the results of his assessment that he gave to Parents before the May 13, 2011 IEP team meeting and to the other team members at or shortly before the meeting. Dr. Singer's report was based in part on responses to rating scales (questionnaires) relating to attention problems that he distributed as part of a Conners – Third Edition (Conners-3) assessment, and on computer-generated worksheets analyzing the responses. These data and worksheets are known as "protocols." Dr. Singer did not distribute the protocols with his assessment report, and Parents did not learn of them until they made a request to District in April 2013 for all of Student's records under the provisions of the Education Code requiring production of educational records.

10. Parents argue that District's "withholding" of the protocols was deliberate and constituted misrepresentation of assessment results that, if revealed, may have demonstrated Student's eligibility for special education in several categories. The critical document Parents claim District withheld is the Conners-3 rating scale completed by Bob Winford, Student's third grade teacher.⁴ They characterize it as "an in depth analysis of Student having highly elevated areas in attention/ADHD [Attention Deficit Hyperactivity Disorder], learning problems and social skills deficits that District represented to parents were just a 'mild' concern or 'some weaknesses.'" Parents describe it as "critical assessment information . . . (that Student had ADHD-I)." The evidence did not support these characterizations.

³ Dr. Singer received a bachelor's degree in psychology from California State University at Northridge, a master's in counseling psychology from the University of California at Los Angeles, and a doctorate in educational psychology and counseling from the University of San Francisco. He is both a California-certified educational psychologist and a credentialed school psychologist, as well as a marriage and family therapist. From 1980 to 2013 he worked for District as a school psychologist. He has been a consultant for the Kaplan Foundation, Sacramento County, the Yuba County schools, the Melvin-Smith Learning Center, and Educational Research Consultants. He is a member of the California Association of School Psychologists and Children with Attention Deficit Disorders (C.H.A.D.D.), and has given numerous presentations to professional groups, including several about attention deficits in children. He retired from District in 2013 and is now a psychologist in private practice.

⁴ Mr. Winford's education and experience are not in the record, as he recently died.

11. The Conners-3 rating scale for teachers sets forth 115 statements about a student's recent behavior, such as she "gets overly excited" or "has a short attention span." A teacher is asked to respond to each statement by marking "not at all/never," "just a little true/occasionally," "pretty much true/often," or "very much true/frequently." The teacher's responses are then combined into 8 categories (such as inattention and aggression) and compared to the responses expected for students of the test subject's age and gender. The grouped responses are then ranked as low, average, high average, elevated, or very elevated. An "elevated" score means, according to the test publisher, "more concerns than are typically reported" and indicates that "problems ... may exist." A "very elevated" score means "many more concerns than are typically reported." Mr. Winford's responses produced both some elevated and very elevated scores.

12. Dr. Singer explained persuasively at hearing that while the results of an assessment must be presented to parents and the rest of the IEP team in his report, the underlying protocols are not considered assessment results but are simply worksheets and raw data. They are professional work product provided for use by the clinician in interpreting his scores and are not traditionally given to parents because, among other reasons, they are potentially misleading to people not professionally trained. The publisher's instructions on the protocols confirm that they are "intended for use by qualified assessors only, and . . . not to be shown or presented to the respondent or any other unqualified individuals."

13. In his report, Dr. Singer accurately summarized the information in the protocols, and did not omit anything significant. His report states:

Both parents note an elevated level of inattention The Conners 3 ADHD score is elevated for both parent ratings, which is often indicative of a child diagnosed with attention deficit disorder [¶]Mr. Winford, [Student's] teacher, also observed inattentive behavior The inattention scale is considered very elevated, as is the learning problems scale. The Conners 3 ADHD score is also elevated.

Dr. Singer also attached to his report two pages of charts showing in graphic form the detailed scores for each rater, including those for Mr. Winford, and explaining the terms "elevated" and "very elevated." Parents do not identify anything in the protocols that is not accurately summarized in Dr. Singer's final report. At the May 2011 IEP meeting, Dr. Singer added that if Parents had further concerns about attention, they might seek an outside professional opinion from their physician.

14. Dr. Singer described Student's attention difficulties as mild. He testified credibly that he reached and announced this conclusion not to deceive anyone but because he did not rely on Mr. Winford's Conner-3 rating scale in isolation from other assessment results. Instead, as the test publisher required, he followed up on the concerns it raised, analyzed those concerns in light of all the other information available to him, and decided

that, overall, Student's attention difficulties were not sufficiently significant to require special education.

15. The evidence showed that Dr. Singer retained the protocols and did not send them to Parents with his assessment report because he was following standard practice and the publisher's instructions. He accurately summarized the data from the protocols in his report. District later produced these protocols when Student's records were requested under Evidence Code section 56504, as they contained data pertaining to Student. The evidence thus did not support Parents' claim that District concealed anything as part of a plan to achieve a particular result at the May 13, 2011 IEP team meeting.⁵ The evidence did not support Parents' contention that the result of the May 13, 2011 IEP team meeting was predetermined.

FAILURE TO PROVIDE PRIOR WRITTEN NOTICE OF INTENT TO EXIT STUDENT

16. Parents contend that District failed, before the May 13, 2011 triennial IEP team meeting, to provide them prior written notice of its intent to exit Student from special education. As shown above, however, there was no evidence that District arrived at that decision until the meeting itself. District therefore did not fail to provide prior written notice of its intentions, because it had not formed a proposal requiring prior written notice until the meeting itself.

MEANINGFUL PARTICIPATION IN THE IEP PROCESS

17. Parents contend that District's withholding of Dr. Singer's protocols meant that they were deceived about Student's needs and therefore deprived of their right to meaningful participation in the IEP process. This argument fails because, as shown above, there was nothing deceitful about Dr. Singer's retention of the protocols and he accurately summarized them in his report.

18. Parents participated fully in the May 13, 2011 triennial IEP team meeting. In the days and weeks leading up to the meeting, they communicated frequently with the assessors by email about the status of their assessments, and obtained those assessments before the May 13 meeting. Before the meeting they distributed to the team members a

⁵ Parents also cite a number of lesser events as proof of predetermination, including "presenting Parents with an assessment plan prepared by District for Parents to sign, at District's suggestion and direction, that evolved into an early full triennial evaluation," and the correction of a minor mathematical error by the resource teacher before she gave her academic assessment report to Parents. These events were routine and for the most part required by law, and do not indicate predetermination.

packet of information setting forth their views of Student's IEP needs. Attached to a full-page description of their concerns were three writing samples taken from Student's work during third grade, which Parents believed supported their views.

19. At the triennial meeting, Parents described their concerns again, referring to the documents they had distributed. The evidence established that Parents participated fully in the discussion, and the meeting notes confirmed their participation. Parents do not claim that there was any specific limit on their participation, and Mother admitted District team members answered their questions. Parents are educated, articulate advocates for their daughter, and are well informed about their rights and assertive of them; they would have asked for more time to present their views, or for another meeting, had they thought more time was required. Parents were afforded meaningful participation in the May 13, 2011 IEP team meeting.

EFFECT OF THE STATUTE OF LIMITATIONS

20. Parents contend that Dr. Singer's decision not to provide them his 2011 test protocols until April 2013 operated to extend the two-year statute of limitations beyond April 3, 2011 (two years before their filing of their request for due process) because District withheld documents it was required to produce at or before the May 13, 2011 triennial IEP team meeting. As shown above, however, the protocols were Dr. Singer's raw data and worksheets based on the publisher's instructions and were not a required part of the assessment report. The two-year statute of limitations therefore bars any claim based on events Parents knew about before April 3, 2011, including any claims based on the March 18, 2011 annual IEP team meeting and offer.

Substantive Compliance During the Third Grade

THE TRIENNIAL ASSESSMENTS OF SPRING 2011

21. The substantive correctness of District's decision in May 2011 that Student was no longer eligible for special education depends in large part on the triennial assessments it conducted.⁶

MS. MASERA-LYNCH'S MAY 2011 SPEECH-LANGUAGE ASSESSMENT

22. During April and May 2011, Ms. Masera-Lynch assessed Student's language skills using a wide variety of standardized instruments. On all of them Student obtained overall scores that were average or above, except for one language processing score, which was borderline because it was brought down by poor performance on one subtest. She found

⁶ As part of an interim agreement the parties executed at a mediation on May 9, 2013, Student waived her right to challenge the appropriateness of any of District's assessments in this matter in return for District's agreement to pay for additional independent assessments.

no difficulties in Student's auditory processing, except for one memory score which, she wrote, "may reflect weakness" in Student's attention.

23. Two of Ms. Masera-Lynch's measures had also been administered during Student's last triennial review in January 2009, and the comparison of those composite scores to the 2011 scores revealed that Student had made very substantial progress since 2009. Her core language had risen from the 12th to the 45th percentile; her receptive language from the 53rd to the 63rd percentile; her expressive language from the sixth to the 37th percentile; and her language structure from the 12th to the 42d percentile. Comparison of language development results from 2009 also showed a pattern of substantial growth.

24. In reaching her conclusions, Ms. Masera-Lynch also considered her own experience as Student's speech-language therapist since first grade. She noted that in preschool, Student's speech intelligibility had been poor due to articulation errors, deficits in phonological processing, and poor expressive language skills. But since then, she reported, Student "has made very good progress in her communications skills each year and currently displays communications skills which are within normal limits for her age and gender."⁷ From all the information she had, Ms. Masera-Lynch concluded that in May 2011, Student did not meet special education eligibility requirements for speech-language impairment, although she might benefit from continued practice outside of special education.

MS. CRONE'S APRIL-MAY 2011 ACADEMIC ASSESSMENT

25. When Student was in first grade, resource teacher Nina Crone assessed her academic skills and found them to be age-appropriate.⁸ In 2009 the parties had agreed that Student's academic performance was not an area of concern related to her disability. As part of Student's third grade 2011 triennial review, Ms. Crone administered to Student an academic assessment using the Wechsler Individual Achievement Test – Third Edition (Wechsler-3). On 14 subtests Student's scores were all average or above. Her six composite scores – for total reading, basic reading, reading comprehension and fluency, written expression, math, and math fluency – ranged from the 18th to the 75th percentile and were all in the average range. Ms. Crone concluded in her report and persuasively confirmed at hearing that, although Student was stronger in some areas than others, overall there was no

⁷ Student's substantial year-to-year progress since preschool was noted in her March 2010 IEP, agreed to by Parents. It reported that Student had made "good progress toward her goals" and that her test results "reflect growth in all areas."

⁸ Ms. Crone has a bachelor's degree from the University of Nebraska and about 60 hours left toward a master's degree. She has a clear K-12 California credential, a resource specialist certification, a cross-cultural language and academic development (CLAD) certificate, and a mild/moderate handicapped credential. She has taught for more than 40 years, mostly in public schools. For 25 years she taught in general education and the last 16 in special education, as a resource teacher for District, in which capacity she has taught more than 300 special education students, including Student.

reason to be concerned about her academic abilities, which remained age-appropriate. She also concluded that Student did not need resource support. Ms. Crone found no severe discrepancy between Student's tested cognition and academic achievement that would support eligibility in the category of specific learning disorder.

DR. SINGER'S MAY 2011 PSYCHOEDUCATIONAL ASSESSMENT

26. Dr. Singer, who had done a previous psychoeducational assessment of Student for her 2009 triennial review, again administered a full battery of tests to Student in May 2011. He concluded that Student did not display a specific learning disorder and that her attention difficulties, though noticeable, were mild.

ALLEGED DEFICIENCIES IN THE MAY 13, 2011 OFFER

27. Student contends the May 13, 2011 IEP offer, which proposed to exit her from special education and explore general education alternatives, denied her a FAPE not only because it denied her eligibility for special education, but also because it denied her a variety of needed goals and services. However, if District was correct that Student was not eligible for special education on May 13, 2011, she was not then entitled to an IEP at all.

28. The information before the IEP team on May 13, 2011, supported District's view that Student was not eligible for special education. As Ms. Masera-Lynch found, Student's speech-language skills had improved so much since her services began in kindergarten that she was no longer eligible in the category of speech-language impairment. The assessments by Ms. Crone and Dr. Singer ruled out eligibility in the specific learning disorder category because Student's test scores did not reveal the severe discrepancy between ability and achievement required for eligibility in that category. (See Legal Conclusion No. 56.) None of the assessments before the team suggested that Student had ADHD or that her attention deficits were more than mild. No professional testified that Student was still eligible for special education in May 2011.

29. Student contends she was denied a FAPE by District's May 13, 2011 IEP offer because she should have had an IEP that included additional speech goals, and goals in the areas of reading and writing. The written materials Parents submitted to the IEP team stated that Student had "difficulties" in these and other areas. But as Ms. Crone observed, everyone is better at some things than others; everyone has relative strengths and weaknesses. Parents' argument rests on the erroneous assumption that if a skill or subject has been identified as a relative weakness or an area of need, Student is thereby entitled to an IEP and one or more goals to address it. This overlooks the requirement that Student must first be eligible for special education and entitled to an IEP in order to receive special education to address her needs. It also overlooks the requirement that, in order to be eligible, Student must demonstrate that her needs cannot be adequately addressed in the general education environment. Neither at hearing nor in their closing brief did Parents attempt to establish that special education was required to address Student's relative weaknesses and needs as identified by teachers and assessors, and no professional testified that it was.

STUDENT'S SPEECH NEEDS IN MAY 2011

30. Student did not need a special education speech goal in May 2011, and no professional testified that she did. In her earlier years, Student's speech difficulties (which provided the basis for her eligibility) were in articulation, phonological processing, and expressive language, areas that had been addressed by her goals since kindergarten. But, as District speech-language pathologist Caren Maxwell observed, Student's speech difficulties were identified and addressed early, and therefore successfully.⁹ In 2009, Student's IEP reported that her articulation and verbal fluency had become age-appropriate. In her March 2010 IEP, Ms. Masera-Lynch reported that Student had made good progress on her goals and shown growth in all areas. Dr. Singer, who had assessed Student in 2009 as well as 2011, reported that by 2011, "[u]nlike the evaluation in 2009, no noticeable articulation errors were observed." There was no evidence that the late Mr. Winford, Student's third grade teacher, thought otherwise.

31. There was nothing before the May 13, 2011 IEP team -- aside from Parents' stated concerns -- that would have supported the conclusion that Student still needed special education, or a speech goal, for her speech difficulties. The IEP team proposed instead that Student be permitted to participate in a 20-hour general education intervention in the 2011-2012 school year that would focus on visualizing strategies for memory, comprehension, and expression. Parents do not argue that this program would have been inadequate.

STUDENT'S READING NEEDS IN MAY 2011

32. Student did not need a special education reading goal in May 2011, and no professional testified that she did. The 2009 IEP described Student's reading comprehension as "weak." But reading comprehension -- specifically the comprehension and analysis of grade level text -- was the target of Student's speech-language articulation goal in her March 2010 IEP, and the May 2011 IEP team learned that Student had met that goal. On the Wechsler achievement test Ms. Crone administered to Student in 2011, Student obtained average scores overall and on all five of its subtests for reading. Mr. Winford graded Student as approaching proficiency in reading in the first two trimesters of her third grade year, and proficient by the end of the year.¹⁰ He reported to the IEP team that Student's reading

⁹ Ms. Maxwell has a master's degree in speech-language pathology and a Clinical or Rehabilitation Services credential with special education class authorization. She has worked for District as a speech-language pathologist for 15 years, and provided direct speech-language therapy to Student in fourth and fifth grades.

¹⁰ This was District's grading system that year:

4 ADVANCED Exceeds Grade Level Standard	3 PROFICIENT At Grade Level Standard	2 APPROACHING Grade Level Standard	1 BELOW Grade Level Standard
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fluency had improved and that she had recently graduated from the Read Naturally program, a general education intervention available to all students who needed help in reading. In the absence of a reading goal, Student made substantial progress in reading in the following academic year.

STUDENT’S WRITING NEEDS IN MAY 2011

33. Student did not need a special education writing goal in May 2011, and no professional testified that she did. The IEP team had before it the 2009 IEP, which reported that Student’s written expression was “developing nicely, with occasional errors . . .” On Ms. Crone’s Wechsler testing in 2011, Student’s standard score in written expression was 112, well above the average of 100. Over the three trimesters of third grade, Mr. Winford gave Student grades of 3, 3, and 2, in writing.

34. Parents submitted to the May 13, 2011 IEP team three samples of Student’s handwriting, from October 2010 and January and May 2011, believing that her weakness in handwriting was self-evident. These samples were apparently selected to advocate that position; there was no evidence they were representative of Student’s writing throughout the year. No professional testified that those three writing samples were meaningful by themselves or showed a need for special education.

35. Parents also note that Student’s English Language Arts score on the spring 2011 STAR test was “basic.”¹¹ But as Dr. Singer explained, due to Student’s average cognitive capacity (see below), she could reasonably be expected to get “C” grades. A “basic” STAR score is consistent with that level of performance and does not indicate a need for special education.

STUDENT’S ATTENTION NEEDS IN MAY 2011

36. Student did not need a special education goal in May 2011 to address her inattention, and no professional testified she did. As set forth above, the Conners-3 rating scale Mr. Winford provided to Dr. Singer suggested a strong possibility of serious attention difficulties and warranted further inquiry. Parents’ ratings were similar, though less elevated, and also suggested further inquiry. But in conducting that further inquiry, Dr. Singer learned that, overall, Student’s attention difficulties were mild and did not affect her academic performance.

O Outstanding	G Good	S Satisfactory	N Needs Improvement

¹¹ STAR scores are Advanced, Proficient, Basic, Below Basic, and Far Below Basic.

37. Mr. Winford's grouped answers on the Conners-3 rating scale produced a rating of "not an area of concern" in the categories of hyperactivity/impulsivity, defiance/aggression, oppositional behavior, and conduct problems. They produced ratings of "many more concerns than average (very elevated score)" in the categories of inattention, learning problems/executive functioning, and peer relations. In answer to catch-all questions, Mr. Winford indicated that Student's problems "very often seriously affect her schoolwork or grades" but "never seriously affect her friendships and relationships." According to calculations on Dr. Singer's work sheets, Mr. Winford's ratings suggested that "an ADHD classification is strongly indicated (81% probability)." Mr. Winford had identified six out of the nine symptoms set forth in the diagnostic checklist for "ADHD-Inattentive" in the Diagnostic and Statistical Manual of Mental Disorders of the American Psychiatric Association – Fourth Edition (Text Revision)(DSM-IV-TR), which was then in use. That meant that the "symptom count" for diagnosing that disorder was, based on that rating scale alone, "probably met."

38. Dr. Singer testified convincingly that a single rating scale, containing subjective responses by a single respondent, is never considered to support any conclusion by itself. The publisher's explanations accompanying the working papers for the Conners-3 repeatedly confirm that statement. The publisher cautions that the teacher rating scales must not be used in isolation and "should not be ... used as the sole criterion for clinical diagnosis or intervention." Instead the publisher requires that "[a]ll the combined information is used to determine if [the student] needs help in a certain area and what kind of help is needed. . . ."

39. Because of the Conners-3 rating scales and concerns expressed by Parents, Dr. Singer focused with special interest on Student's reported attention difficulties. Dr. Singer selected what he regarded as the best available assessment measure specifically directed at attention: the Cognitive Assessment System (Cognitive test). That instrument measures cognitive processing, based on a neuropsychological model, in the four interrelated areas of Planning, Attention, Simultaneous, and Successive. Student's Cognitive test results contradicted the Conners-3 rating scales; overall, Dr. Singer reported, Student displayed "high average Full Scale ability on the CAS, with a cognitive strength in Planning and a relative weakness in Successive processing, although this score was still well within the average range."

40. Dr. Singer assessed Student's attention in other ways as well. He reexamined his 2009 results. He visited Mr. Winford's class, looking for signs of the inattention Mr. Winford reported, but did not observe them. He saw Student play with a button on her shirt, but she was otherwise attentive; she listened to the teacher during a discussion and wrote answers when directed to. He considered all the other measures he administered and his own interaction with Student in his testing, during which she was attentive throughout. Based on the totality of the information available to him, he reported to the 2011 triennial IEP team and credibly testified at hearing that while Student had some mild attention difficulties, they did not rise to the level of a disability qualifying her for special education and could successfully be addressed in the general education environment.

41. The May 13, 2011 IEP team had nothing before it that contradicted Dr. Singer's conclusions about Student's attention, except the statement by Parents that Student experienced difficulties in that area. The IEP team's conclusion that Student did not need a goal for attention was therefore objectively reasonable and correct based on the information it had.

STUDENT'S RESOURCE SUPPORT NEEDS IN MAY 2011

42. Student did not need special education resource support in May 2011. Based on her 2011 academic assessment, Ms. Crone, the resource teacher, told the IEP team that all of Student's skills were age-appropriate and Student did not require specialized academic instruction. There was no evidence to the contrary.

43. For the reasons above, Parents did not prove that, in May 2011, Student was eligible for special education and therefore entitled to an IEP or goals. Nor did they prove that Student required special education or goals for her relative weaknesses or needs. District members of the May 13, 2011 triennial IEP team were objectively reasonable and correct in deciding that Student was not eligible for special education and that her needs and relative weaknesses could be adequately addressed in the general education environment. Subsequent events confirmed that view.

Procedural Compliance in the Fourth Grade (School Year 2011-2012)

THE ASSESSMENTS OF SUMMER 2011

44. Parents did not agree to the exit IEP proposed at the May 2011 triennial IEP team meeting. Rather than seeking an order from OAH that Student was no longer eligible for special education, District, with Parents' agreement, commissioned two independent educational assessments in summer 2011 to see if further information would resolve the impasse between the parties.

DR. CHRISTO'S 2011 PSYCHOEDUCATIONAL ASSESSMENT

45. In July and August 2011, Student was given another psychoeducational assessment by Dr. Catherine Christo, who is both a credentialed school psychologist and a licensed educational psychologist.¹² In her August 2011 report, Dr. Christo thoroughly

¹² Dr. Christo has a master's degree in counseling from California State University at Hayward and a doctorate in education and psychological studies from the University of California at Davis. She recently retired from her position as a professor and program coordinator at California State University at Sacramento (CSUS), which she held since 1992. In that role she taught such classes as preventive academic intervention, cognitive assessment, and assessment of special needs. From 2006 to 2008 she was the University Assessment Coordinator for CSUS. She is a nationally certified school psychologist, a member of the International, National, and California Associations of School Psychologists,

reviewed all of Student's testing results back to age two and administered several standardized tests.

46. Dr. Christo's test results were consistent with those of Dr. Singer. On 13 different measures of attention and executive functioning on the Differential Ability Scales-I (Differential Ability test), Dr. Christo found Student at or above the expected level for her age. The Behavior Assessment for Children -2, like the Conners-3, consists of rating scales, and on that measure both Parents and Student provided ratings within the average range for attention problems. Student's attention was good throughout the testing. Dr. Christo concluded that Student performed within the average range in written expression; that "[c]ognitive testing did not reveal any areas of significant weakness"; that evidence for attentional problems was not present; and that Student "performed within expected levels across the areas assessed." Dr. Christo noted that Student might have some language difficulties, but wrote "if so those do not appear to be affecting her academic performance." Dr. Christo looked for but did not find a severe discrepancy between ability and achievement that would indicate Student had a specific learning disorder.

MS. JOHNSON'S 2011 SPEECH-LANGUAGE ASSESSMENT

47. District also retained speech-language pathologist Jane Johnson to conduct another speech-language assessment.¹³ Her assessment results sharply contradicted Ms. Masera-Lynch's conclusions in May. Ms. Johnson administered the Comprehensive Assessment of Spoken Language (Spoken Language test), the Listening Comprehension Test 2 (test), and the Goldman Fristoe Test of Articulation – 2 (Articulation test). Student scored at the seventh percentile or lower on most subtests of the Listening test and on one subtest of the Spoken Language test. Ms. Johnson did not expressly find any severe discrepancy that would indicate a specific learning disorder, or take a position on Student's eligibility for special education, but based on her assessment results she recommended various goals and individual speech therapy twice a week for 60 minutes each session.

and the author of numerous publications concerning school psychologists, assessments, and reading and dyslexia. She worked from 1985 to 1995 as a school psychologist for the Davis Joint Unified School District (USD) and maintains a private practice.

¹³ Ms. Johnson received a master's degree in speech pathology from CSUS 11 years ago and has been state-licensed as a speech-language pathologist since then. She has an American Speech-Language-Hearing Association (ASHA) certification, is the past president of the Sacramento Area Speech-Language-Hearing Association (SASHA), and is on the advisory boards of SASHA and CSUS. She has been in private practice for more than three years and has conducted more than 400 speech-language assessments in her career.

THE SEPTEMBER 23, 2011 IEP TEAM MEETING AND OFFER

PREDETERMINATION

48. Student's IEP team met on September 23, 2011, to determine her program for the 2011-2012 school year. Ms. Masera-Lynch had retired over the summer, and Ms. Maxwell took her place as Student's therapist and case manager. Parents argue that the result of this meeting was predetermined, but no evidence supports that claim. District did not adhere to its position in May that Student was ineligible for special education. Instead, the meeting resulted in an offer supported by Ms. Maxwell that would have retained Student in special education with eligibility in the category of speech-language impairment, and would have provided more speech-language services than she had previously been receiving. Ms. Maxwell established that although she had misgivings about Ms. Johnson's assessment, she was new to Student's IEP team and had conducted only a few therapy sessions with her by the time of the September meeting. She saw that Student had a history of services, and that Parents were adamant she needed services, so Ms. Maxwell suppressed her doubts and agreed to support a finding of eligibility based on Ms. Johnson's assessment, and to support, in substance, some of the goals Ms. Johnson had proposed.

49. Parents' primary reason for perceiving the meeting as predetermined is that District members of the IEP team did not agree with several things Parents and Ms. Johnson requested. Ms. Johnson had recommended two sessions of individual speech therapy a week of 60 minutes each. Student's general education teachers were concerned that this would take Student out of class for too much time, and Ms. Maxwell thought small group therapy would be better for Student. District offered 56 sessions a year of small group therapy (an increase from the previous 42 sessions) and three goals modeled somewhat on suggestions by Ms. Johnson. Parents did not agree to the offer, but it constituted a substantial change of position by District from the May 2011 meeting, and strongly indicates the result was not predetermined.

50. At some point during the September 2011 meeting, a form was distributed stating that Student did not meet the criteria for having a specific learning disorder. District members signed it but Parents did not. Parents remember that the form was circulated at the beginning of the meeting, suggesting the possibility of predetermination. District members testified that there was a discussion of specific learning disorder eligibility centering on the findings of Dr. Christo and Dr. Singer, both of whom found that Student had no specific learning disorder, and that the form was circulated after that discussion. Although the meeting notes are ambiguous, the order in which the notes are written supports the timing remembered by District witnesses. Parents did not prove by a preponderance of evidence that the form was distributed before the discussion of specific learning disorder eligibility.

MEANINGFUL PARTICIPATION

51. Parents participated fully in the September 23, 2011 IEP team meeting. Before the meeting they distributed a 26-page handout containing a list of their concerns,

several test scores from the state's annual STAR tests, and several samples of Student's handwriting and performance on quizzes and tests. Parents also distributed a 6-page list of proposed IEP provisions. At the meeting Parents argued for eligibility and several goals based on these materials. All District team members who attended the meeting and testified stated that Parents participated extensively in the meeting, and the meeting notes confirm that they expressed their concerns.

52. Mother testified she got "some" of her concerns out "when I could" but she mostly waited for others to present their assessments and views and was able to present her concerns "toward the end" of the meeting. Asked whether time ran out before she could express all her concerns, Mother responded: "No . . . a lot of time was spent on others' assessments . . ." According to Father, the meeting lasted about two to three hours. Parents did not ask for more time to present their views, and did not establish that their participation was restricted by District in any way. A few weeks later they were offered another IEP team meeting and declined.

53. Parents argue in connection with all the IEP team meetings discussed here that they were denied meaningful participation "by District's not incorporating all of Parents' concerns, or even including one proposal or suggestion made by Parents in any of Student's IEPs . . ." But District team members entered the September 23, 2011 meeting with the knowledge that District's last offer had been to exit Student from special education. The combined persuasion of Ms. Johnson and Parents led them to determine that Student should be found eligible for special education in the speech-language impairment category and to adopt goals modeled to some degree on Ms. Johnson's suggestions. In this instance Parents' advocacy was notably successful.

THE APRIL 27, 2012 IEP TEAM MEETING AND IEP

PREDETERMINATION

54. The IEP team met again on April 27, 2012, while Student was still in fourth grade. Parents contend generally that the outcome of this meeting was predetermined, but do not identify any particular reasons for that view. There was no evidence that the outcome of the meeting was predetermined.

MEANINGFUL PARTICIPATION

55. Parents participated fully in the April 27, 2012 IEP team meeting, and do not contend that their participation was restricted in any particular way. Before or at the meeting Parents distributed a 35-page packet of information containing their views and concerns, and various work samples and quizzes completed by Student, and at the meeting they discussed these concerns. The team discussed categories of eligibility. Student's goals were updated to reflect what District team members regarded as Student's present levels of performance. District offered to continue Student's eligibility in the category of speech-language impairment, and again offered 56 sessions a year of small group speech-language therapy.

Parents disagreed with this level of service. District did not restrict Parents' participation in any way.

FAILURE TO IMPLEMENT MARCH 2010 IEP GOAL

56. Parents told the April 12, 2012 IEP team that Student had three goals in her March 2010 IEP, not the two on which District had reported. They claimed there was an additional goal for "2.2.5 Restate facts and details in text to clarify and organize ideas." Ms. Maxwell investigated the claim and testified credibly at hearing that there were only two goals in the March 2010 IEP. Parents introduced the March 2010 IEP in evidence. It contains only two goals, and the phrase quoted above is from one of the two.

57. Parents at first declined to agree to the April 27, 2012 IEP offer, but on July 23, 2012, consented to it and returned it to District. That IEP went into effect for the academic year 2012-2013.

Substantive Compliance in the Fourth Grade

THE SEPTEMBER 2011 IEP OFFER

58. Parents did not agree to the September 23, 2011 IEP offer, and now argue that the speech services and the three proposed speech goals were inadequate, and that Student should also have had goals in the areas of reading comprehension, writing, vocabulary, and phonological awareness.

ADEQUACY OF OFFERED SPEECH SERVICES

59. In her 2011 speech-language assessment, and at the September 2011 IEP team meeting, Ms. Johnson recommended that Student receive two sessions of individual speech therapy a week for 60 minutes each. Parents argue Student was denied a FAPE because she was only offered 56 sessions a year, twice a week for 30 minutes each in a small group. At the meeting, the IEP team debated the merits of individual versus small group therapy. According to the meeting notes, Ms. Johnson conceded that a group setting could be good for Student, as she was comfortable with the peers in her group, and proposed that one session a week be held in a small group. But she also stated that an individual setting for the other weekly session "might be good" to reinforce her idea skills. Because Student's classroom teachers were concerned about Student's losing two hours a week of classroom instruction to pull-out speech services, District adhered to its proposal.

60. At hearing, neither Ms. Johnson nor Parents addressed the need for individual speech therapy twice a week for 60 minutes each. Parents produced no evidence to suggest that the individual therapy or the greater number of sessions of speech-language services proposed by Ms. Johnson was required to provide Student a FAPE. Speech-language pathologists Ms. Masera-Lynch and Ms. Maxwell credibly testified that small group therapy served Student better than individual therapy because in a small group she could learn from

the speech of others and have someone other than an adult with whom to communicate. There was no evidence to the contrary.

ADEQUACY OF THE THREE PROPOSED SPEECH GOALS

61. The first and second goals District offered in September 2011 were for pragmatics, and the third was for syntax. Parents point out that none of the three were written using the descriptive words suggested by Ms. Johnson in her 2011 recommendations. But neither Ms. Johnson nor any other witness addressed the differences in the wording of the goals at hearing. No professional testified that there were any flaws in the proposed September 2011 goals, and there was no evidence that they were flawed.

STUDENT'S READING NEEDS IN SEPTEMBER 2011

62. Student's reading needs were not significantly different than they had been four months earlier. In the absence of a separate reading goal, Student made great progress in reading in her fourth grade year. At the beginning of the year, she was reading at 58 words per minute with 70 percent comprehension. By March 2012 her reading rate had doubled; she was reading at 120 words per minute, still with 70 percent comprehension. Student had no need for a separate reading goal in September 2011 in order to make progress in reading. Student did not prove she needed a reading goal in September 2011.

STUDENT'S WRITING NEEDS IN SEPTEMBER 2011

63. Student's writing needs were not significantly different than they had been four months earlier. Ms. Johnson's 2011 speech-language assessment made no recommendation concerning writing. Parents argued to the September 23, 2011 IEP team, and at hearing, that Student had writing needs because she had scored relatively low on a single written conventions subtest of the English Language Arts portion of that spring's STAR tests. However, her overall score in that portion of the test was "basic." Dr. Singer, Ms. Masera-Lynch, and Ms. Maxwell testified persuasively that reliance on a single test score is not a valid way to determine ability, as many things can affect a single score on any given day: for example, a student may be fatigued, distracted by an upcoming trip or a recent personal interaction, uncomfortable with an unfamiliar examiner, or may just be having a bad day. Student's score on a single subtest of the STAR tests in spring 2011 was not by itself significant.

64. Parents distributed another packet of materials to the September 2011 IEP team containing samples of Student's writing. Again Parents appeared to have selected the samples that put their daughter's writing in a poor light. There was no evidence that these samples were representative of her writing, and no professional testified that they had any particular meaning. Student did not prove she needed a separate writing goal in September 2011.

STUDENT'S SOCIAL (PRAGMATICS) NEEDS IN SEPTEMBER 2011

65. On a pragmatic judgment subtest of the Spoken Language test administered by Ms. Johnson in 2011, Student scored in the 14th percentile. Based on that score alone, Ms. Johnson recommended a goal addressing Student's social skills. Ms. Johnson did not defend that suggestion at hearing except to say that the one subtest supported it, and no other professional testified that a social skills goal was needed.

66. The notion that Student had social difficulties that interfered with her education contradicted almost everything District knew about Student. The March 2010 IEP reported: "Student enjoys her friends. She takes on leadership role as a quiet, polite leader." The March 2011 IEP reported that Student's "social skills are good." Student's report to Dr. Singer of her own social skills was positive. Dr. Christo stated that, during testing, Student "appear[ed] to be socially adept." And later information confirmed in retrospect that Student had no social difficulties: In June 2013, Mother described Student to Dr. Lisa Sporri, an independent assessor (see below) as "happy, friendly, caring [and] social . . . gets along well with adults and children and has a group of friends at school." Mother also told Dr. Sporri that Student ran for student council positions every year and performed in school talent shows. The August 2013 IEP lists one of Student's strengths as being that she likes to spend time with family and friends, and later states that she "gets along well with her peers." Ample information supported the decision of the District members of the IEP team that Student did not need a social skills goal in September 2011, and Student did not prove that she did.

STUDENT'S VOCABULARY NEEDS IN SEPTEMBER 2011

67. Based only on Student's low score (in the sixth percentile) on the vocabulary subtest of the Listening Comprehension test, Ms. Johnson recommended a vocabulary goal for Student that would increase her vocabulary from 50 to 100 words. Nothing in Ms. Johnson's 2011 report supports her assumption that Student's vocabulary at the beginning of fourth grade consisted of only 50 words, and Ms. Johnson did not address at hearing how a student who had been doing grade level work in the second, third, and fourth grades could have a vocabulary of only 50 words.

68. Ms. Maxwell persuasively testified that the vocabulary goal proposed by Ms. Johnson was so low it was appropriate only for a kindergartner. Ms. Maxwell also established that the IEP team declined to write a vocabulary goal for Student because it had significant information that contradicted Ms. Johnson's low estimate of Student's vocabulary. Ms. Masera-Lynch, only months earlier, had found in her assessment that all of Student's language skills, including vocabulary, were in the average range. Dr. Christo had performed some subtests involving language and vocabulary that produced scores in the average range. Even Student's score on the antonym subtest of Ms. Johnson's Spoken Language test – which measures vocabulary – was well within the average range. Student did not prove she needed a vocabulary goal in September 2011.

STUDENT'S PHONOLOGICAL AWARENESS NEEDS IN SEPTEMBER 2011

69. Student's goals since kindergarten had addressed phonological processing, and Ms. Masera-Lynch established that by 2011 Student had met those goals and no longer needed them. When Dr. Singer tested Student's phonological awareness in May 2011 he found "mild concerns"; he stated that phonological awareness was one of the areas in which she was "a bit weak." Dr. Christo also described Student's phonological processing as a relative weakness. But neither assessor thought that special education was required to address that weakness. Ms. Johnson did not address phonological awareness in her 2011 speech-language assessment or make recommendations concerning it. Parents do not identify any evidence that could have persuaded the September 2011 IEP team that Student needed a goal for phonological awareness, and no professional testified that she did. Student did not prove that she needed a phonological awareness goal in September 2011.

RELIANCE ON MS. JOHNSON'S ASSESSMENT RESULTS IN GENERAL

70. After the September 2011 IEP team meeting, Ms. Maxwell remained skeptical of Ms. Johnson's 2011 assessment and asked Diane Youtsey, a District administrator, to request the underlying protocols from Ms. Johnson so Ms. Maxwell could see how the tests had been scored. Starting in fall 2011, Ms. Youtsey, other District staff, and District's attorney made several requests for those protocols. Ms. Johnson testified she sent the protocols to District "several times," which suggests she kept copies. Hunt Lin, District's secondary program coordinator, testified there was "no way" District could have failed to receive them several times if they had been sent several times.¹⁴ Finally, District's attorney subpoenaed the 2011 protocols for production at hearing, but Ms. Johnson was unable to produce them. The preponderance of evidence showed that Ms. Johnson never provided the protocols underlying her 2011 assessment to District. As a result, it is unknown whether that assessment was scored as erroneously as Ms. Johnson's 2013 speech-language assessment (see below); both showed a pattern of very low scores that contradicted several other assessments. Given the doubts raised as to its accuracy, and in the absence of the protocols,

¹⁴ Mr. Lin has a bachelor's in psychology from the University of California (UC) at Irvine, a master's in special education from UC Riverside, and a master's in administration from California State University at San Bernardino. He has mild/moderate and moderate/severe teaching credentials, an administrative credential, and a CLAD certificate. He belongs to the Association of California School Administrators, and has worked in special education administration for nine years. He began work for District in summer 2013 in his current position. Before that he worked for Mount DiabloUSD as a program specialist; Fremont USD as the assistant director of special education; the Ravenswood School District as a full inclusion coordinator; the Solano County Office of Education as a principal; and the Cucamonga School District as a teaching vice principal. He has 16 years of experience in special education.

the 2011 assessment cannot be given substantial weight here. At minimum, Parents did not prove by a preponderance of the evidence that Ms. Johnson's 2011 assessment results were valid and reliable.

THE APRIL 27, 2012 IEP

71. Since Parents did not agree with the September 23, 2011 IEP offer, Student continued the school year under the terms of her March 2010 IEP. On April 27, 2012, the IEP team met again and created an IEP that Parents eventually signed. That IEP updated Student's goals to better reflect her present levels of performance. Student's classroom teacher told the team that Student was meeting grade level standards, and asserted that some of the errors demonstrated by the packet of materials distributed by Parents were common to 4th graders.

72. Except for questioning the meaning of Student's grades (see below), Parents objected to the April 27, 2012 IEP for essentially the same reasons they objected to the September 23, 2011 IEP offer. Parents later agreed to the April 27, 2012 offer only to obtain updated goals for Student. Parents do not argue that there was any specific flaw in the April 27, 2012 IEP that has not already been addressed in connection with its predecessor.

73. According to her report card, Student continued to work above her expected capacity in the fourth grade. She finished the year with B's in reading, writing, and math, an A- in spelling and social studies, and a B+ in science.

PARENTS' CONTENTION THAT STUDENT'S GRADES ARE NOT REPRESENTATIVE

74. To support their claim that Student needs special education and related services and that her IEP's were inadequate, Parents contend that Student's academic grades exaggerate her academic performance in school. Her performance is, in Parents' view, far worse than her grades would suggest; according to Parents' closing brief, Student is "below grade level, or several years behind her peers in reading and writing, and other language skills." At the April 27, 2012 IEP team meeting, Parents argued that Student's actual academic performance showed she needed additional services. A dispute arose between Parents and District about the level of Student's academic performance that has pervaded their relationship and influenced every disagreement they have had since. Essentially, District staff believe that Student is of average cognitive capacity, does grade level work, and has been obtaining average (and frequently higher than average) grades throughout recent school years, thus demonstrating she does not need special education and related services. Parents believe that Student's cognitive capacity is well above average, and that her grades misrepresent her performance in school, which is substantially lower than her grades suggest, thus demonstrating a severe discrepancy between her ability and performance.

Student's Cognitive Capacity

75. In his 2009 assessment, Dr. Singer determined that Student's full scale intelligence quotient (IQ) on the Wechsler Intelligence Scale for Children, fourth edition (Wechsler Children's), was 99. In 2011, Dr. Christo determined that Student's General Conceptual Ability Score on the Differential Ability test was 98. In 2013, Dr. Sporri, who also administered the Wechsler Children's test, determined that Student's full scale IQ was 102 (see below). A score of 100 is average.

76. In 2011, Dr. Singer administered to Student the Cognitive test, which yielded a full scale score of 115. That is the cognitive measure Parents favor. Dr. Singer testified persuasively that the Cognitive test score is not a reliable measure of Student's cognitive ability because it was greatly affected by a single "outlier" score on a subtest for matching numbers. Student has frequently been observed to have strength in rapid processing, and on the day she took this test for Dr. Singer, she achieved a very high score on a subtest requiring the rapid matching of numbers. It significantly pulled up her full scale score. Dr. Singer therefore discounted the overall score on the Cognitive test in determining Student's cognitive ability. Dr. Singer established that the Wechsler Children's IQ score of 99 was a better measure of her cognitive ability because the scoring was more representative of Student's true abilities.

77. In addition, Dr. Singer established that the Cognitive test is not as broad or comprehensive a measure of intellectual ability as the Wechsler Children's or the Differential Ability tests. It is a narrower and more specific measure that Dr. Singer chose, in response to Parents' concerns, because it is focused on the test subject's attention. Dr. Singer noted that Student's scores on the 2009 Wechsler Children's, the Differential Ability test, and the Wechsler Children's test later administered by Dr. Sporri are in general agreement. Dr. Singer opined credibly that all those scores are much more accurate measures of Student's cognitive abilities than her score on the Cognitive test. Dr. Christo also persuasively testified that her Differential Ability test score was a much better indicator of Student's cognitive abilities than the Cognitive test. No professional testified in favor of using the Cognitive test as a measure of Student's cognitive ability, and there was no evidence that supported its use for that purpose.

Parents' Interpretation of Student's Grades

78. Parents distributed samples of Student's work to the IEP teams in April 2012 and September 2013, and introduced them at hearing, and argued that these samples demonstrate that Student's overall grades are not truly representative of her academic performance. Parents did not testify at hearing in defense of this interpretation of Student's grades, and no professional testified in support of it. Their interpretation is unpersuasive for at least two reasons.

79. Parents' selection of Student's work samples is highly selective and apparently designed to portray her academic performance in a negative light. For example, at the

September 2013 IEP team meeting Parents distributed printouts of Student's grades on dozens of tests and quizzes Student took in the fifth grade. A typical page lists 19 tests of Student's spelling, mostly with grades of A, and a few with grades of B and C. Parents circled two of the grades – an F and a D – and used them to argue that they represent the level of Student's spelling. That argument overlooks every other grade on the page.

80. In addition, several District witnesses testified credibly and without contradiction, that much more goes into a grade than the results of tests and quizzes. Students learn by different methods, not all of which are appropriately measured by tests and quizzes. Students are also graded in part upon homework completion, in-class participation, attendance, work habits and the like. In all those areas Student is almost an ideal student; she is polite and hardworking, and has acquired excellent study habits. She participates well in class, and is eager to learn. Her rate of homework completion is admirable, and she has only missed one day of school since the first grade. Student's grades appropriately reflect these other aspects of her educational performance. Student did not prove her grades exaggerate her academic performance.

Procedural Compliance in Fifth Grade (School Year 2012-2013)

TIMING OF ANNUAL MEETING

81. Student's annual IEP team meeting was due to be held on or before April 27, 2013. The parties worked diligently to agree on a date for the meeting, but District discovered there was no date before April 27 on which both the necessary District members and Parents could attend. (Parents work, and prefer Friday afternoons for IEP team meetings.) In an effort to hold a timely annual meeting, District scheduled an IEP team meeting for April 26, 2013, which it knew Parents could not attend. It assured Parents nothing substantive would happen at that meeting; its purpose was merely to have a timely meeting, and another meeting that Parents could attend would be scheduled shortly. Parents protested that District should not hold a meeting without them, so District cancelled the proposed April 26 meeting, and rescheduled it for a date in May.

RESOLUTION SESSION

82. Parents filed a request for a due process hearing on April 3, 2013, so District convened a resolution session on April 16, 2013. It was attended by District administrator Ms. Youtsey, who had authority to resolve the due process claim, and by Parents and a relative. Parents testified they were promised the entire IEP team would be there; Ms. Youtsey testified that she arranged only for Ms. Maxwell to attend by telephone. Ms. Maxwell was available by telephone, and was called at one point in the resolution session to discuss a new assessment by Ms. Johnson. The assessment was presented at the session by Parents. Then on May 8, 2013, the parties met at mediation and reached an interim agreement in which, among other things, they agreed to postpone Student's upcoming annual IEP team meeting from May to August 23, 2013, so the IEP team could consider the results of Ms. Johnson's new assessment and the results of two more independent assessments that

District agreed to fund over the summer. There was, therefore, no IEP team meeting held at the end of Student's fifth grade year.

FAILURE TO PROVIDE PROGRESS REPORTS

83. Each of Student's IEP's during the relevant time period required that District reported Student's progress to Parents every trimester. Parents contend that District failed to provide them adequate progress reports at the end of the 2011-2012 school year.

84. During the 2011-2012 school year, Ms. Maxwell reported to Parents on Student's progress on her speech-language goals on November 10, 2011; February 17, 2012; and on April 27, 2012, during the IEP team meeting. That year Ms. Maxwell had usually been delivering therapy sessions to Student twice a week, sometimes for longer than 30 minutes each. By April 27, 2012, Student had received the equivalent in time of all 42 of the speech-language sessions to which she was entitled that year under the March 2010 IEP, which was then still in effect. So there was nothing more, under the terms of the March 2010 IEP, for Ms. Maxwell to do or report on during the rest of that academic year.

85. At the April 27, 2012, IEP team meeting, District offered additional speech-language services but Parents did not sign the proposed IEP until July 23, 2012. Between April 27, 2012, and the end of the academic year, no IEP obligated Ms. Maxwell to deliver speech services and therefore to report on progress made during them. However, by informal agreement between Ms. Maxwell and Parents, Ms. Maxwell did resume speech services for the rest of the academic year. It does not appear that Ms. Maxwell ever reported on the progress made during those sessions, but no outstanding IEP obliged her to deliver those sessions or report on them.

Substantive Compliance in Fifth Grade

86. Student claims that District's April 27, 2012 IEP, which was operative for her fifth grade school year, continued to deny her a substantive FAPE regarding her eligibility classification, goals, services, accommodations, and modifications, and failed to address her needs for appropriate speech-language services, a reading program, and resource specialist support. In addition, she claims District failed to implement her outstanding IEP. Student produced no evidence at hearing that she needed better accommodations or more modifications than the IEP gave her. Otherwise, all these claims are the same as those made concerning the April 27, 2012 IEP, and are unpersuasive for the same reasons as set forth above. Parents did not present any new or different evidence concerning the 2012-2013 school year.

THE ASSESSMENTS OF SPRING AND SUMMER 2013

MS. JOHNSON'S 2013 SPEECH-LANGUAGE ASSESSMENT

87. In March 2013, Parents privately obtained another speech-language assessment from Ms. Johnson. Once again, Ms. Johnson's testing produced scores significantly lower than any speech-language assessment of Student other than her own in 2011. Ms. Johnson administered the Comprehensive Test of Phonological Processing, the Language Fundamentals test, two subtests from the Woodcock Achievement test, and the Differential Screening Test for Processing. On the Language Fundamentals test, Student scored average or higher on some subtests, but she was in the ninth percentile on the Understanding Spoken Paragraphs subtest, the fifth percentile on the Recalling Sentences subtest, and the "0.1st" percentile on the Formulated Sentences subtest. The subtests produced a Core Language Score in the eighth percentile, an Expressive Language Index in the second percentile, and a Language Memory Index in the first percentile. On the Passage Comprehension and Oral Comprehension subtests of the Woodcock Achievement test, she received grade equivalents of 2.9 and 2.6 respectively, though she was in the fifth grade.

88. Student's scores on Ms. Johnson's 2013 Language Fundamentals test, if accurate, would help establish the existence of two scores at or below the seventh percentile, on two or more standardized tests, in one or more of the areas of morphology, syntax, semantics, or pragmatics. That in turn would help show eligibility for special education in the speech-language impairment category. (See Legal Conclusion No. 49.) Ms. Johnson did not explicitly state that Student was eligible for special education, but she again recommended two sessions a week of individual speech therapy for 60 minutes each, and a variety of goals.

MS. DEGELLEKE'S 2013 SPEECH-LANGUAGE ASSESSMENT

89. In late May 2013, pursuant to the mediation agreement, private speech-language pathologist Jane deGelleke assessed Student.¹⁵ She administered the Oral and

¹⁵ Ms. deGelleke has bachelor's and master's degrees in speech-language pathology from the University of the Pacific (UOP) in Stockton. She has been a state-licensed speech-language pathologist since 1979 and is a member of ASHA and the California Speech-Language-Hearing Association CSHA. She received a certificate of clinical competence from ASHA in 1979 and has a Clinical or Rehabilitation Services credential with special education class authorization. She was for several years a supervisor in the speech pathology department of the Sutter Hearing and Speech Center in Sacramento and has been a clinical supervisor at UOP. Ms. deGelleke has been an autism consultant to five different school districts, including Folsom Cordova. She has owned and operated American River Speech since 1993, where she provides speech-language services to students age three to 22, and also provides early intervention services for the Alta California Regional Center. She has 30 years' experience as a speech-language pathologist and has conducted more than 1500 assessments. She is the recipient of numerous professional awards.

Written Language Scales, the Expressive test, the Receptive One-Word Picture Vocabulary Test, and the Test of Problem-Solving-3-Elementary. Ms. deGelleke's results were generally consistent with the results previously obtained by Ms. Masera-Lynch in 2011, and sharply contradicted those obtained by Ms. Johnson in 2011 and 2013. Ms. deGelleke found that Student's receptive and expressive language skills were in the average range. Her expressive and receptive vocabulary were also in the average range. Student demonstrated some relative weakness in critical thinking and problem solving skills, but her test scores did not meet the requirements for eligibility in the speech-language impairment category.

DR. SPORRI'S 2013 PSYCHOEDUCATIONAL ASSESSMENT

90. In June 2013, also pursuant to the mediation agreement, Dr. Sporri, a private pediatric neuropsychologist, conducted another psychoeducational assessment of Student.¹⁶ Over a period of six hours, Dr. Sporri administered a wide variety of standardized measurements. Dr. Sporri noted in her report that test fatigue and variability in attention level may have affected Student's performance. Dr. Sporri determined that Student's full scale IQ, as determined by the Wechsler Children's test, is 102. She found that Student demonstrated average perceptual reasoning and verbal comprehension skills, and intact skills across many cognitive domains. Her weakest performance was in written expression, which was in the low average range.

91. Dr. Sporri also found that Student's academic performance was commensurate with her cognitive ability. On the Wechsler, a widely used test of achievement, Student performed in the average range in reading comprehension, word reading, pseudoword decoding, math problem solving, numerical operations, and spelling. In essay composition she was in the average range in word count but the low average range in theme development and text organization.

92. Dr. Sporri found that Student had a significant deficit in the area of attention, especially on longer tasks. Referring to the DSM-IV-TR, Dr. Sporri diagnosed Student as having "Attention-Deficit/Hyperactivity Disorder, Predominantly Inattentive Type." However, she determined that "[Student's] difficulties with sustained attention are not significantly interfering with current academic achievement at this time . . .," and did not suggest that she was eligible for special education. Instead, Dr. Sporri opined that Student would be eligible for a "504 plan" and would benefit from certain accommodations.¹⁷

¹⁶ Dr. Sporri did not testify, and her credentials were not introduced in evidence.

¹⁷ A "504 plan" is an educational program created pursuant to Section 504 of the Rehabilitation Act of 1973. (29 U.S.C. § 794; see 34 C.F.R. § 104.1 et seq. (2000).) Generally, that Act requires a district to provide program modifications and accommodations to children who have physical or mental impairments that substantially limit a major life activity such as learning.

Dr. Sporri also made several suggestions for assistance to Student that did not involve special education.

Procedural Compliance in Sixth Grade (School Year 2013-2014)

THE IEP TEAM MEETING OF AUGUST 23, 2013 AND OFFER

93. At the end of the August 23, 2013 IEP team meeting, District again proposed an IEP that would exit Student from special education. The meeting was chaired by Hunt Lin, District's new secondary education coordinator. It was attended by Parents, and by Student's English teacher Pamela Ludlow; Student's science teacher Jonathan Robinette; school psychologist Richard Pinnell; District speech-language pathologist Jen Rodrick; Ms. deGelleke; and program specialist Beth Marjerison.

PREDETERMINATION

94. Because Mr. Lin was new to his job, he discussed Student's case before the meeting with some District staff to get a sense of her, but otherwise there was no evidence that District team members met or discussed the IEP meeting or its possible result before the meeting occurred. The three new 2013 assessments that were the principal focus of the meeting (by Ms. Johnson, Ms. deGelleke, and Dr. Sporri) were passed out at the meeting, not before it (except to Parents), which makes predetermination less likely. At the meeting District also distributed a document written by Ms. Maxwell criticizing Ms. Johnson's scoring of her new assessment, but Ms. Maxwell had only written it the night before the meeting.

95. Parents contend predetermination was shown because District controlled the choice of attendees at the meeting with the intention to control the outcome. As a result, Parents state that Ms. Johnson was not present to defend her assessment, and a District speech-language pathologist presented it instead. Student's sixth grade teachers, who were just beginning to know her, were present but her fifth grade teacher, who knew her better, was not. Dr. Sporri was not present, and a District school psychologist presented her report. Several teacher reports were described, but not by the teachers who wrote them. Caren Maxwell, Student's speech-language pathologist and case manager, wrote a report discrediting Ms. Johnson's 2013 speech-language assessment but was not there to present it, so another speech-language pathologist read it.

96. The evidence did not show that the District's decisions about attendees were made with a view toward any particular result. Mr. Lin made several efforts to obtain Dr. Sporri's attendance but could not. Ms. Maxwell had been struggling with a medically challenging pregnancy since the spring and was unable to attend for that reason.¹⁸ Having two of Student's current teachers at the meeting satisfied the legal requirements. Relations

¹⁸ It was not until December 2013 that it became clear Ms. Maxwell would be able to testify at hearing, which she did by telephone.

between District and Ms. Johnson were strained (see below), and District deliberately did not invite her. But this was Parents' 15th IEP team meeting, and they were well aware that they also had the right to invite participants to an IEP team meeting. They had most recently been advised of that right in the notice of the August 23, 2013 meeting. They could have invited Ms. Johnson, Student's fifth grade teacher, and anyone else they chose, but did not. There was no evidence that the absence of Ms. Johnson, Dr. Sporri, or the fifth grade teacher had any effect on Parents' participatory rights or Student's education. Ms. Johnson later conceded that she had made most of the errors in her report identified by Ms. Maxwell; she was forced to rewrite her report and rescore the results, after which the results did not indicate speech-language impairment eligibility (see below).

MEANINGFUL PARTICIPATION

97. At or shortly before the August 23, 2013 IEP team meeting, Parents distributed to the participants a 46-page packet of their concerns and Student's work samples, tests, and quizzes, and another 35-page packet of IEP proposals and suggested curriculum.

98. Parents recorded the two-hour meeting and introduced in evidence a verbatim transcript they made from their recording. The transcript occasionally shows unintelligible remarks or simultaneous talking, but District does not otherwise challenge its accuracy and it is the best evidence of what occurred at the meeting.

99. At the beginning of the meeting, Mr. Lin requested that it be considered a triennial as well as annual meeting, but Parents objected and Mr. Lin abandoned the idea. All of the 2013 assessments were discussed. Ms. deGelleke and Ms. Rodrick explained the flaws in Ms. Johnson's 2013 assessment. The parties aired their different views of Student's grades and progress, discussed eligibility in the categories of speech-language impairment and specific learning disorder, and discussed the implications of Dr. Sporri's diagnosis of ADHD. The parties disagreed on all these matters, and after two hours the meeting ended.

100. Parents now claim that they were given "little or no time" to present their own concerns because District filled the time with descriptions of assessments and teacher reports. Mother testified she was repeatedly interrupted and not given an uninterrupted block of time to address the group. Parents' transcript, however, shows that Mother spoke without restraint in the meeting. She was the most frequent speaker and spoke more than any other participant. She expressed dozens of concerns and made several references to the materials Parents distributed at or before the meeting. Father spoke frequently as well. The transcript shows that District did not restrict Parents' participation other than by setting the meeting for two hours. At the end of the meeting Parents had to leave to pick up their children, but did not express any desire to meet again or communicate further with the other team members. Parents were aware of their right to make such requests.

101. Parents did not prove that the result of the August 23, 2013 IEP team meeting was predetermined or that they were denied meaningful participation in it. On the contrary,

the evidence showed that the parties fully aired their differences but were unable to resolve them.

FAILURE TO PROVIDE PRIOR WRITTEN NOTICE OF INTENT TO EXIT STUDENT

102. Parents contend that District failed, before the August 23, 2013 IEP team meeting, to provide them prior written notice of its proposal to exit Student from special education. As shown above, however, there was no evidence that District arrived at that proposal until the meeting itself. District therefore did not fail to provide prior written notice of its proposal, because its proposal was not yet formed.

FAILURE TO PROVIDE PROGRESS REPORTS FROM THE PREVIOUS YEAR

103. During the 2012-2013 school year, Ms. Maxwell reported to Parents on Student's progress on her goals on November 2, 2012 and March 22, 2013. Due to her medical difficulties she did not report on the last trimester of the academic year until at, or shortly before, the IEP team meeting on August 23, 2013. District was thus late, by a period of eight to 10 weeks during summer break, in the delivery of that trimester's report.

104. There was no evidence that District's failure to produce a progress report for the last weeks of the 2011-2012 school year, or the tardiness of the August 2013 report, had any effect on Student's education or Parents' participatory rights. A progress report for the last few weeks of the 2011-2012 school year would have told Parents what they already knew: that Student had met and exceeded the speech goals from her March 2010 IEP. Parents were in frequent contact with Ms. Maxwell by email throughout her work with Student, and could have asked her informally about Student's progress. (In April 2011 they had asked for and received an out-of-cycle progress report from Ms. Masera-Lynch.) Parents do not identify anything in the tardy progress report of August 2013 that they did not know already, or anything they would have said or done differently, had they received the report earlier. And since they did not trust or agree with Ms. Maxwell's estimate of Student's progress anyway, it is not clear how the earlier receipt of more information they disputed would have had any effect.

Substantive Compliance in Sixth Grade

105. Student's sixth grade teacher for science and study hall is Jonathan Robinette.¹⁹ Mr. Robinette testified persuasively that Student is now receiving an A- in

¹⁹ Mr. Robinette has a bachelor's degree in communications from the University of Colorado, and a master's degree in education from the National Institute. He has multiple subject, foundational level science, and physical education teaching credentials. He began teaching for District in August 2013. Before that he taught science in elementary and middle

science and is “fantastic” in study hall. Pamela Ludlow teaches Student academic subjects in a small group resource class, and established that Student is now receiving an A- in that class as well.²⁰

106. The parties’ substantive disagreement about the August 23, 2013 IEP offer involves Student’s eligibility for special education, which is addressed below.

FAILURE TO PLACE STUDENT IN THE LREFOR LANGUAGE ARTS IN SIXTH GRADE

107. One of the provisions of the interim agreement signed by the parties at mediation on May 9, 2013, was that “Student will be enrolled in English 10 at the Middle School for the 2013-2014 school year, first semester.” At the time, as the parties understood, English 10 was a special education resource class with a mix of special and general education students, team-taught by a general education teacher and a special education teacher.

108. The name, composition, and staffing of English 10 changed at the beginning of Student’s sixth grade year. Student is now enrolled in English 60, which is the sixth grade version of English 10. Ms. Ludlow, who now teaches the class alone, established that due to the high number of special education students needing resource English at the beginning of the year, English 60 is now limited to special education students and no longer contains Student’s typically developing peers.

109. Ms. Ludlow testified persuasively at hearing that Student does not need to be in a special education resource class for English. English 60 is too easy for her, partly because less work is assigned than in general education, and she finishes before the other students. Ms. Ludlow opined that Student would do well in a general education English class. No District witness disagreed with her, and Mr. Lin stated that Student remains in English 60 because of the mediation agreement.

schools in Phoenix, Arizona, and worked for Pearson Higher Education, a textbook and curriculum publisher. Altogether he has 10 years of teaching experience.

²⁰ Ms. Ludlow has a master’s degree in career counseling and higher education. She has mild/moderate and moderate/severe special education credentials, and single and multiple subject general education credentials. She has certificates as a resource specialist and from CLAD. She has worked for District for three years, primarily in special education English classes. Before that she taught in a high school for the Roseville Joint Union High School District. She has taught for 20 years, with approximately 10 of them in special education.

110. The evidence showed that Student could be satisfactorily educated in a sixth grade general education English class, but as long as she remains in English 60 she does not get the benefits in that class of mixing with typical peers or being instructed in part by a general education teacher.

Student's Eligibility for Special Education at Present

SPEECH-LANGUAGE DISORDER

111. A student is eligible for special education if she has difficulty understanding or using spoken language, under specified criteria, and that difficulty both adversely affects her educational performance and cannot be corrected without special education. Eligibility is determined in part by a complex mathematical formula that is satisfied by two scores below the 7th percentile on two or more standardized tests in one or more of the areas of morphology, syntax, semantics, or pragmatics. (See Legal Conclusion No. 49.)

112. All the professional information before District in September 2013 and presented at hearing, except for Ms. Johnson's assessments, indicated that Student is no longer eligible for special education due to a speech-language impairment. In her speech-language assessment in 2011, Ms. Masera-Lynch looked for, but could not find, any scores below the seventh percentile on standardized tests that would support Student's eligibility in that category. Ms. Masera-Lynch testified persuasively at hearing that, based on her years of experience in assessing and providing speech-language therapy to Student, she no longer needs special education to address her speech-language needs. Dr. Singer testified credibly at hearing that, based on his 2009 and 2011 assessments, Student was no longer eligible for special education due to a speech-language impairment. He was persuasive that Student's cognitive capacity is average, but her grades range from average to well above average, so her performance in school shows that she does not suffer educationally from a speech-language impairment. Student's grades and teacher reports all support that conclusion.

113. In summer 2011, as part of her psychoeducational assessment, Dr. Christo administered some tests of Student's speech because of the conflict between the testing by District and the testing by Ms. Johnson. Dr. Christo testified at hearing that Student scored above average in working memory and ability to recall a passage read to her, and displayed appropriate verbal skills on the Differential Ability test. Dr. Christo observed no difficulties in Student's understanding of spoken language. Dr. Christo's results were similar to District's assessments, but unlike those of Ms. Johnson.

114. In 2013, Ms. deGelleke concluded in her speech-language assessment that Student was average by most measures, had some weaknesses that did not require special education to address, and was not eligible in the speech-language impairment category. The only professional whose assessments or testimony supported Student's eligibility in that category was Ms. Johnson.

THE UNRELIABILITY OF MS. JOHNSON'S 2013 SPEECH-LANGUAGE ASSESSMENT

115. Never having received Ms. Johnson's protocols from her 2011 assessment, Ms. Maxwell promptly requested Ms. Johnson's 2013 protocols when she learned of Ms. Johnson's 2013 speech-language assessment. Ms. Johnson provided those 2013 protocols to District. For medical reasons Ms. Maxwell did not analyze them until shortly before the August 23, 2013 IEP team meeting, but when she did, she found several serious errors in Ms. Johnson's scoring of her 2013 assessment measures that resulted in an unduly negative portrayal of Student's speech needs.

116. Ms. Maxwell, Ms. Masera-Lynch, Ms. deGelleke, and Jennifer Rodrick, the District speech-language pathologist who now serves Student in Ms. Maxwell's absence, generally agreed on the nature of Ms. Johnson's scoring errors and described them credibly in their testimony.²¹ The first error concerns questions that precede an "entry point." Several subtests of the Language Fundamentals test involve a series of questions of increasing difficulty. A test subject does not necessarily start with the first question; instead there is an entry point in the questions that varies with age. (For example, a test subject between nine and 12 years of age might start at question 24.) The assumption is that the test subject would easily answer the earlier, less difficult questions before the entry point, but in scoring the subtest, the publisher requires that the subject must be given credit for correct answers to the earlier questions that were passed by.

117. On three subtests of the Language Fundamentals test in 2013, Ms. Johnson incorrectly failed to give Student credit for the earlier, easier questions she passed by on her way to her entry points. On the subtest for Formulating Sentences, for example, Student's entry point was the eighth question, but Ms. Johnson failed to give her credit for the first seven answers. That yielded a score in the "0.1" percentile. Ms. Maxwell rescored this subtest with the assistance of Laura O'Neill, a District speech-language pathologist with 30 years of experience, and discovered Student's score, correctly calculated, would have been in

²¹ Ms. Rodrick has a master's degree in communicative disorders from the UOP. She used to hold a single subject teaching credential but now holds a Clinical or Rehabilitative Services credential. She is licensed by the State as a speech-language pathologist and has a certificate of clinical competence from ASHA. In the past, she worked in her licensed capacity in elementary and middle schools in San Francisco, Marin County and Stockton, for the El Dorado County Office of Education, and for nine years at Valley Oak Academy, a school for emotionally disturbed students. She worked for two years for District but left in 2002 to form Foothill Speech-Language with a partner. That certified non-public agency serves toddlers for the Alta California Regional Center, business and education charter school students, and public school students. She has a contract to provide speech-language services at Folsom Middle School.

the fifth percentile. On the subtest for Concepts and Following Directions, Student's entry point was the 24th question but Ms. Johnson did not give her credit for correct answers to the first 23. That error produced a score in the fifth percentile, which when corrected was in the 64th percentile. On the subtest for Recalling Sentences, Student's entry point was the sixth question, but Ms. Johnson did not give her credit for correctly answering the first five. That error yielded a percentile score of five; when corrected the percentile was nine.

118. Ms. Johnson's scoring errors on the three subtests incorrectly reduced Student's composite scores on the Language Fundamentals test, which are calculated using the subtest scores. Student's core language index with the incorrect scores was in the eighth percentile; when corrected it was in the 27th percentile. Student's expressive language index with the incorrect scores was in the second percentile; when corrected it was in the 19th percentile. Student's language memory index with the incorrect scores was in the first percentile; when corrected it was in the 30th percentile.

119. Ms. Johnson's scoring errors, if undiscovered, would have supported a finding of eligibility in the category of speech-language impairment, since the incorrect scores on the Language Fundamentals test produced two composite scores (expressive language index and language memory index) below the seventh percentile, and thus within the formula for calculating the existence of a qualifying speech-language impairment. The corrected scores yielded only one subtest score below the seventh percentile (Formulating Sentences) and no composite score below that level, and therefore do not support eligibility.

120. At some time after the August 23, 2013 IEP team meeting, Ms. Johnson acknowledged scoring errors and produced a corrected report. At hearing she admitted most of the errors. She volunteered, however, that she still believed Student was eligible for special education in the speech-language impairment category due to the presence of two scores below the seventh percentile in her corrected report. Challenged to identify those two scores, she could identify only the single subtest score (Formulating Sentences) described above. At that point Ms. Johnson further undermined her credibility by stating that the other qualifying score came from the two subtests of the Woodcock Achievement test that she administered. Those had yielded grade equivalent scores of 2.9 (Passage Comprehension) and 2.6 (Oral Comprehension). She claimed these grade equivalent scores were the same as scores below the seventh percentile. Asked to convert the grade equivalent scores into percentile scores, she was unable to do so, and could only say that she "could get" the equivalent scores by checking the publisher's materials. She did not supply those equivalent scores at hearing. But Dr. Christo, who testified after Ms. Johnson, did obtain those equivalent scores, and they were above the seventh percentile. In addition, Dr. Singer and Ms. deGelleke credibly testified that grade equivalent scores, for a variety of technical reasons, are potentially misleading and should not be used to determine eligibility or make program decisions.

121. The second major error Ms. Johnson made in scoring her 2013 assessment was in grading Student too low on the Formulating Sentences subtest, which tests for proper grammar and requires scores of 0, 1, or 2 for each sentence written by the test subject. For

example, one question asks for a response to “running”; Student wrote “The kids are running to the other person.” As Ms. Maxwell established, that sentence is grammatically correct, but Ms. Johnson gave Student a score of 1 rather than 2. Ms. Maxwell identified several other examples of this low scoring in Ms. Johnson’s grading of the Formulating Sentences subtest and the Recalling Sentences subtest as well. To check her rescoring, Ms. Maxwell consulted two other speech-language pathologists and an English teacher. All of them agreed that several of Ms. Johnson’s scores on the Formulating Sentences subtest were too low because Student was grammatically correct in several answers but received only partial credit.

122. The scoring errors in Ms. Johnson’s 2013 speech-language assessment render it unreliable, and it is not given any significant weight here. They also cast substantial doubt on the accuracy of Ms. Johnson’s 2011 assessment, which may have involved the same sorts of errors.

SPECIFIC LEARNING DISORDER

123. Eligibility for special education in the category of specific learning disorder requires the existence of a severe discrepancy between intellectual ability and achievement in specified academic areas. The existence of the required severe discrepancy must be determined by a complicated mathematical formula. (See Legal Conclusion No. 56.)

124. District and independent assessors, in considering whether Student is eligible for special education because of a specific learning disorder, have looked for the required severe discrepancy between Student’s cognitive ability and academic achievement four times and not found it. Dr. Singer found both in 2009 and 2011 that a severe discrepancy in Student’s standardized test scores did not exist. Dr. Christo concurred with that conclusion in 2011, and Dr. Sporri concurred with it in 2013. Parents offer no reason why those assessments should be disregarded. There is no assessment information in the record that suggests the existence of the required severe discrepancy. The evidence did not show that Student is eligible for special education in the category of specific learning disorder.

OTHER HEALTH IMPAIRED (ADHD)

125. As set forth above, Dr. Singer tested Student’s attention extensively in 2011 and found that her attention difficulties were mild and did not require special education to address. Dr. Christo came to the same general conclusion. Student’s performance in school (especially her increasingly good grades) confirms that conclusion.

126. In 2013, Dr. Sporri, a qualified pediatric neuropsychologist, diagnosed Student as having ADHD, Inattentive Type. Dr. Singer and Ms. Maxwell disagreed with this diagnosis at hearing, pointing out that Dr. Sporri omitted mention of several symptoms required for the diagnosis by the DSM-IV-TR. However, Dr. Sporri did not think that Student’s ADHD required special education, and there was no evidence that Student’s ADHD, if it exists, cannot be adequately addressed in the general education environment.

LEGAL CONCLUSIONS

*Introduction – Legal Framework under the IDEA*²²

1. This due process hearing was held under the IDEA, its regulations, and California statutes and regulations intended to implement it. (20 U.S.C. §§ 1400 et. seq.; 34 C.F.R. §§ 300.1 (2006) et seq.;²³ Ed. Code, §§ 56000 et seq.; and Cal. Code. Regs., tit. 5, §§ 3000 et seq.)

2. The main purposes of the IDEA are: 1) to ensure that all children with disabilities have available to them a FAPE that emphasizes special education and related services designed to meet their unique needs and to prepare them for employment and independent living, and 2) to ensure that the rights of children with disabilities and their parents are protected. (20 U.S.C. § 1400(d)(1)(A), (B); Ed. Code, § 56000, subd. (a).)

3. A FAPE means special education and related services that are available to an eligible child at no charge to the parent or guardian, meet state educational standards, and conform to the child’s IEP. (20 U.S.C. § 1401(9); 34 C.F.R. § 300.17; Cal. Code Regs., tit. 5, § 3001, subd. (p).) “Special education” is instruction specially designed to meet the unique needs of a child with a disability. (20 U.S.C. § 1401(29); 34 C.F.R. § 300.39(a)(1); Ed. Code, § 56031, subd. (a).) “Related services” are transportation and other developmental, corrective, and supportive services as may be required to assist the child in benefiting from special education. (20 U.S.C. § 1401(26)(A); 34 C.F.R. § 300.34(a); Ed. Code, § 56363, subd. (a).)

Burden of Proof

4. Because Student filed a request for due process hearing on her issues, she had the burden of proving the essential elements of her claim as to those issues. Because District filed a request for due process on its issue, it had the burden of proving the essential elements of its claim as to that issue. (*Schaffer v. Weast* (2005) 546 U.S. 49, 62 [163 L.Ed.2d 387].)

The Relevance of After-Acquired Evidence

5. The Ninth Circuit has held that a district’s decisions in writing an IEP cannot be judged exclusively in hindsight, since an IEP is a snapshot, not a retrospective. (*Adams v. State of Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149.) “In striving for appropriateness, an IEP must take into account what was, and was not, objectively reasonable when the snapshot was taken, that is, at the time the IEP was drafted.” (*Id.* at p. 1149, quoting *Fuhrmann v.*

²² Unless otherwise indicated, the legal citations in this Introduction are incorporated by reference into the analysis of each issue decided below.

²³ All references to the Code of Federal Regulations are to the 2006 version unless otherwise stated.

East Hanover Bd. of Educ., (3d Cir. 1993) 993 F.2d 1031, 1041 [internal citations omitted].) However, after-acquired evidence may shed light on the objective reasonableness of a school district's actions at the time the school district rendered its decision. (*E.M. v. Pajaro Valley Unified School Dist.* (9th Cir. 2011) 652 F.3d 999, 1004 [citing *Adams, supra*, 195 F.3d at 1149].)

Procedural Violations and Prejudice

6. In *Board of Educ. v. Rowley* (1982) 458 U.S. 176, 205-206 [73 L.Ed.2d 690], the Supreme Court recognized the importance of adherence to the procedural requirements of the IDEA. However, a procedural error does not automatically require a finding that a FAPE was denied. A procedural violation results in a denial of a FAPE only if the violation: (1) impeded the child's right to a FAPE; (2) significantly impeded the parent's opportunity to participate in the decision-making process; or (3) caused a deprivation of educational benefits. (20 U.S.C. § 1415(f)(3)(E)(ii); see Ed. Code, § 56505, subd. (f)(2); *W.G. v. Board of Trustees of Target Range School Dist. No. 23* (9th Cir. 1992) 960 F.2d 1479, 1484.)

7. In *R.B. v. Napa Valley Unified School Dist.* (9th Cir. 2007) 496 F.3d 932, the Ninth Circuit Court of Appeals held that a procedural violation did not result in a denial of FAPE because the pupil was no longer eligible for special education. "A child ineligible for IDEA opportunities in the first instance cannot lose those opportunities merely because a procedural violation takes place. . . . In other words, a procedural violation cannot qualify an otherwise ineligible student for IDEA relief." (*Id.* at p. 942 [citations omitted].)

Issue A.1: Did District fail to provide Student a FAPE during the school years 2010-2011 and 2013-2014 by predetermining that Student was not eligible for, and should be exited from, special education?

8. A District may not predetermine its IEP offer. Predetermination occurs when an educational agency has decided on its offer to the IEP team meeting, including when it presents one placement option at the meeting and is unwilling to consider other alternatives. (*Deal v. Hamilton County Bd. of Educ.* (6th Cir. 2004) 392 F.3d 840, 858.) A district may not arrive at an IEP team meeting with a "take it or leave it" offer. (*JG v. Douglas County School Dist.* (9th Cir. 2008) 552 F.3d 786, 801, fn. 10.)

9. Student did not prove that District predetermined its decisions to propose that Student be exited from special education at or after the May 2011 or August 2013 IEP team meetings. Ms. Masera-Lynch's initial notice that the purpose of the May 13, 2011 triennial IEP team meeting was to exit Student was merely a mistake and not part of a plan. None of the three triennial assessments on which District's 2011 decision was based had been completed, and two of them had not even begun. District members of the IEP team were informed of those assessment results at the meeting, not before it, and there was no evidence that they made any decisions concerning Student's IEP before the meeting. Dr. Singer's action in not disclosing his protocols to Parents with his report was routine and not part of a predetermined plan.

10. In 2013, Mr. Lin asked some IEP team members about Student because he was new to his role and did not know her, but there was no evidence that those team members decided upon any particular placement or result. The assessments conducted in 2010 and 2013 were not distributed to the participants (except for Parents) before the meeting. Ms. Maxwell did not write her criticism of Ms. Johnson's 2013 speech-language assessment until the night before, and it was distributed at the meeting, not before it. There was no evidence that District members of the IEP teams arrived at any particular conclusions before they analyzed and discussed the 2013 assessments. Parents did not prove that District predetermined its decisions at the May 2011 or August 2013 IEP team meetings.

Issue A.2: Did District fail to provide Student a FAPE during the school years 2010-2011, 2011-2012, 2012-2013, and 2013-2014 by predetermining her IEP's?

11. Student did not prove that District predetermined any of Student's IEP's. As set forth above, District did not predetermine the exit IEP's offered on May 13, 2011 and August 23, 2013. The decision of District members of the September 23, 2011 IEP team was not reached until the meeting, was favorable to Parents, and constituted a substantial change in District's position. There was also no evidence of any predetermination before the April 27, 2012 IEP team meeting.

Issue A.3: Did District fail to provide Student a FAPE during the 2010-2011, 2011-2012, 2012-2013, and 2013-2014 school years by denying Parents meaningful participation in the IEP process?

12. "[T]he informed involvement of parents" is central to the IEP process. (*Winkelman v. Parma City School Dist.* (2007) 550 U.S. 516, 524 [167 L.Ed.2d 904]. Protection of parental participation is "[a]mong the most important procedural safeguards" in the Act. (*Amanda J. v. Clark County School Dist.* (9th Cir. 2001) 267 F.3d 877, 882.)

13. Federal and State law therefore require that parents of a child with a disability must be afforded an opportunity to participate in meetings with respect to the identification, assessment, educational placement, and provision of a FAPE to their child. (20 U.S.C. § 1414(d)(1)(B)(i); Ed. Code, §§ 56304, 56342.5.) A district must ensure that the parent of a student who is eligible for special education and related services is a member of any group that makes decisions on the educational placement of the student. (Ed. Code, § 56342.5.)

14. Parents have meaningfully participated in the development of an IEP when they are informed of their child's problems, attends the IEP team meeting, expresses their disagreement with the IEP team's conclusions, and requests revisions in the IEP. (*N.L. v. Knox County Schools* (6th Cir. 2003) 315 F.3d 688, 693.) A parent who has an opportunity to discuss a proposed IEP, and whose concerns are considered by the IEP team, has participated in the IEP development process in a meaningful way. (*Fuhrmann v. East Hanover Bd. of Educ.*, *supra*, 993 F.2d at p. 1036.)

15. Student did not prove that Parents were denied meaningful participation in the IEP process. Before each of the IEP meetings at issue, Parents distributed written information setting forth their concerns and supporting evidence. Before the meetings of September 22, 2011, April 27, 2012, and September 23, 2013, Parents also distributed detailed IEP proposals. They had ample time to discuss those concerns and proposals at the meetings, and did so. The meetings were lengthy, with substantial consideration by District team members of Parents' concerns. The fact that the parties disagreed does not indicate that Parents did not meaningfully participate in the process.

Issue A.4: Did District fail to provide Student a FAPE during school year 2010-2011 by failing adequately to report assessment results?

16. State law requires that, after an assessment has been completed, parents must be given "the assessment report and the documentation of determination of eligibility . . ." (Ed. Code, § 56329, subd. (a)(3).) Federal law imposes the same requirement. (34 C.F.R. § 300.306(a)(2).) The Education Code identifies eight categories of information that must be in the assessment report, but none of them includes the work papers or protocols underlying the assessment. (See Ed. Code, § 56327.)

17. Test protocols must be furnished to parents when requested under Education Code section 56504. (*Newport-Mesa Unified School Dist. v. California Dept. of Educ.* (C.D.Cal. 2005) 371 F.Supp.2d 1170, 1173, 1179.)

18. Student did not prove that District failed adequately to report Dr. Singer's assessment results in May 2011. His test protocols, including Mr. Winford's Conners-3 rating scale, were not assessment results; they were work sheets and instructions not intended for distribution to lay persons. District was not required to provide the protocols, including Mr. Winford's rating scale, to Parents until April 2013, when Parents requested and received them pursuant to section 56504 of the Education Code.

Issue A.5: Did District fail to provide Student a FAPE during the 2010-2011, 2011-2012, 2012-2013, and 2013-2014 school years by failing to provide adequate progress reports?

19. An IEP must state when periodic reports on the progress the child is making toward meeting his annual goals (such as through the use of quarterly or other periodic reports, concurrent with the issuance of report cards) will be provided. (20 U.S.C. § 1414(d)(1)(A)(III); 34 C.F.R. § 300.320(a)(3)(ii); Ed. Code, § 56345, subd. (a)(3).)

20. Student did not prove that District failed to provide adequate progress reports for the school years 2010-2011, 2011-2012, or 2013-2014. By March 2012, Ms. Maxwell had completed the equivalent of the 42 sessions of speech-language therapy to which Student was entitled under the March 2010 IEP. That IEP was in effect until July 23, 2012, when Parents agreed to the IEP offer of April 27, 2012. No IEP in effect during the interim period between the offer and the acceptance required the speech-language therapy Ms. Maxwell

provided Student in April and May 2012, and there was therefore no report she was required to provide Parents.

21. Student did prove that the District committed a technical violation of the IDEA because Ms. Maxwell did not report to Parents on Student's progress during the last trimester of the 2012-2013 school year until August 23, 2013, which was eight to 10 weeks later than the April 27, 2012 IEP required. But there was no evidence her tardiness affected Student's education or Parents' participatory rights in any way. There were no surprises in the report, which Parents likely could have obtained earlier had they asked for it and in any case did not accept as accurate. There was no evidence Parents would have said or done anything differently if they had received the report earlier.

Issue A.6: Did District deny Student a FAPE in the school years 2010-2011 and 2013-2014 by failing to give Parents prior written notice of its proposed actions to exit Student from special education?

22. The IDEA requires an educational agency provide "prior written notice" whenever the agency proposes or refuses to initiate or change "the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education." (20 U.S.C. § 1415(b)(3); see also 34 C.F.R. § 300.503(a); Ed. Code, § 56500.4, subd. (a).) The notice must contain: (1) a description of the action proposed or refused by the agency, (2) an explanation for the action, and (3) a description of the assessment procedure or report which is the basis of the action. (34 C.F.R. § 300.503(a); Ed. Code, § 56500.4, subd. (b).) An IEP document can serve as prior written notice as long as the IEP contains the required content of a prior written notice. (Assistance to States for the Education of Children With Disabilities and Preschool Grants for Children With Disabilities, 71 Fed.Reg. 46540, 46691 (Aug. 14, 2006)(Comments to 2006 Regulations).)

23. The procedures relating to prior written notice "are designed to ensure that the parents of a child with a disability are both notified of decisions affecting their child and given an opportunity to object to these decisions." (*C.H. v. Cape Henlopin School Dist.* (3d Cir. 2010) 606 F.3d 59, 70.) When a violation of such procedures does not actually impair parental knowledge of or participation in educational decisions, the violation is not a substantive harm under the IDEA. (*Ibid.*)

24. Student did not prove that District failed to give Parents adequate prior written notice of its proposed decisions on May 13, 2011, and August 23, 2013, to exit Student from special education. Those proposed decisions were not made until the meetings themselves, so no notice of them could have been given before the meetings. The exit IEP's proposed after the two meetings adequately served as prior written notice because they contained, in substance, the information that would have been contained in a prior written notice. Parents had adequate notice of the decisions at the meetings, and adequate opportunities to object to the decisions, which they did. Any failure of District to give notice of the proposed actions earlier had no impact on Parents' knowledge or participation in educational decisions.

Issue A.7: Did District fail to provide Student a FAPE during 2011-2012 and 2012-2013 school years by failing to timely convene an annual IEP team meeting?

Issue A.8: Did District fail to provide Student a FAPE during the 2011-2012 and 2012-2013 school years by failing to develop a new appropriate IEP for Student?

25. An IEP team must “review[] the child’s IEP periodically, but not less frequently than annually,” to determine whether his goals are met and to make appropriate revisions to his IEP. (20 U.S.C. §1414(d)(4)(A); 34 C.F.R. § 300.324(b)(1)(i); Ed. Code, § 56380, subd. (a)(1).) There is no requirement that an annual meeting must occur at any particular time of the year. (See, e.g., Notice of Interpretation, Appendix A to 34 C.F.R. Part 300, Answer to Question 20, 64 Fed.Reg. 12476 (1999 Regulations).) Nor is there a requirement that a district must hold an “annual meeting” as such.

26. Parents argue that each time District proposed an IEP that would exit Student from special education and they did not agree to it, District was required to revise its IEP offer again in order to provide Student with a FAPE. Their argument is based on *Anchorage School Dist. v. M.P.* (9th Cir. 2012) 689 F.3d 1047, in which the court held that the school district committed a procedural violation of its duty to revise a student’s IEP annually when it suspended IEP activity until litigation was completed. The court held that District’s duty to revise the student’s IEP was not suspended by the stay put rule because updating the student’s present levels of performance and goals would not have constituted a change of placement unless his educational setting was also changed. (*Id.* at pp. 1056-1057.) *Anchorage* does not apply here because this case does not involve the stay put rule. Here District did not suspend IEP efforts; it completed revisions to its IEP offers but Parents did not accept them. There was no evidence District suspended or declined to participate in the IEP process at any time for any reason. Nothing in *Anchorage* or any other decision requires a district to make a series of IEP offers until parents find one acceptable.

27. Student did not prove that District failed to have required annual IEP team meetings or to develop new IEPs. The parties met on May 13 and September 23, 2011, and April 27, 2012, to determine whether Student’s goals were met and to make appropriate revisions to her IEP. Although more than a year passed between the April 27, 2012 meeting and the meeting scheduled for May 2013, the District correctly chose to have a tardy meeting with parents rather than a timely meeting without them. (*Doug C. v. Hawaii Dept. of Educ.* (9th Cir. 2013) 720 F.3d 1038, 1045-1046.)

28. The parties did not meet again in spring 2013 because they were then in litigation and, in an interim agreement dated May 9, 2013, agreed to postpone the annual meeting to August 23, 2013 so that they could consider Ms. Johnson’s 2013 speech-language assessment and the assessments by Ms. deGelleke and Dr. Sporri that they agreed to have conducted in summer 2013. By agreeing to postpone the annual meeting to August, Parents waived any right they might have had to have the meeting conducted earlier. The annual meeting was held on August 23, 2013, only eight school days into school year 2013-2014,

and the absence of a meeting earlier in August had no apparent effect on Student's education or Parents' participatory rights.

29. Having proposed at the August 23, 2013 IEP meeting an IEP that would have exited Student from special education, District discharged its duty to review and revise Student's IEP and was not required to revise it again in the school year 2013-2014.

Issue A.9: Did District deny Student a FAPE by failing in school year 2012-2013 to conduct a resolution session?

30. When a parent files a request for due process hearing, a district must convene a resolution session within 15 days of receipt of the request to attempt to resolve the dispute. (Ed. Code, § 56501.5, subd. (a)(1); see also 20 U.S.C. § 1415(f)(1)(B); 34 C.F.R. § 300.510(a)(1).) The meeting must be attended by a representative of District who has decision-making authority for the district, and by "the relevant member or members of the individualized education program team who have specific knowledge of the facts identified in the due process hearing request." (Ed. Code, § 56501.5, subds. (a), (a)(2).) The parties select the attendees. (*Id.*, subd. (a).) The resolution session need not be held if the parties agree to use the mediation process provided by law. (*Id.*, subd. (b).) If District fails to conduct the resolution session, the parent may seek the intervention of a hearing officer to begin the due process hearing timeline, which otherwise does not begin until 30 days after District's receipt of the due process request. (*Id.*, subds. (d), (e)(2).)

31. Student did not prove that District failed to conduct a resolution session in April 2013. Ms. Youtsey conducted the resolution session meeting and had authority to resolve the due process complaint. Parents were present. Ms. Maxwell was available by telephone during the meeting and actually participated when Ms. Youtsey consulted her about Ms. Johnson's new assessment. Ms. Maxwell's telephonic presence therefore in substance satisfied the requirement that the resolution session be attended by a "member or members" of the IEP team with knowledge of the matter. (See Ed. Code, § 56501.5, subd. (a).) Since the parties agreed to mediation, District did not even need to hold a resolution session.

32. Parents concede in their closing brief that District's failure to hold a proper resolution session is not a denial of FAPE. The remedy for such a failure lies in a parent's right to obtain acceleration of the time schedule for the due process hearing, which Parents here did not seek. Therefore, there was no violation on this ground.

Issue C: Is the 2-year statute of limitations inapplicable because District knowingly deceived Parents regarding Student's progress?

33. The statute of limitations for special education due process claims in California requires that the party initiating a request for due process hearing must file it within two years from the date the party knew or had reason to know of the facts underlying the basis for the request. (Ed. Code, § 56505, subd. (1); see also 20 U.S.C. § 1415(f)(3)(C).)

This rule does not apply if the parent was prevented from requesting a due process hearing: 1) because of specific misrepresentations by the local education agency that it had solved the problem forming the basis for the request, or 2) because the local education agency withheld information from the parent that was required by law to be provided. (Ed. Code, § 56505, subd. (1)(1),(2); 20 U.S.C. § 1415(f)(3)(D).)

34. Student did not prove that District deceived Parents regarding her progress, or that District withheld information from Parents that it was required to provide. Dr. Singer's report was not deceptive because he accurately summarized the information in the protocols. District was not required to provide the protocols to Parents until Parents requested them in April 2013 under section 56504 of the Education Code.

Substantive Provision of a FAPE

Issues B.1, 2, 3, and 4: Did District substantively fail to provide Student a FAPE during school years 2010-2011, 2011-2012, 2012-2013, and 2013-2014 by failing to develop a new IEP with proper eligibility classification, appropriate and measurable goals, services, accommodations, and modifications, including adequate speech-language services, an appropriate reading program, and a resource specialist program?

35. In their dealings with District, Parents have long relied on the overall Cognitive test score of 115 produced by Dr. Singer's 2011 assessment, both as an accurate general measure of Student's cognitive ability and as the proper mathematical starting point for calculating whether Student displays a severe discrepancy between cognition and achievement for the purpose of determining eligibility in the category of specific learning disorder. At hearing, however, no witness defended the use of the single Cognitive test score for that purpose. Parents did not mention the propriety of its use in their testimony. Dr. Singer and Dr. Christo persuasively testified that Student's scores on the Differential Ability and Wechsler tests are better measures of her cognitive capacity than her 2011 score on Dr. Singer's Cognitive test measure. The preponderance of the evidence therefore showed that Student's cognitive ability is average, and that her school performance and special education eligibility must be evaluated accordingly.

36. Student did not prove that her grades failed to accurately represent her academic performance. Examination of the materials Parents distributed to the IEP team and presented at hearing shows that the work samples they identify do not accurately represent Student's performance on quizzes and tests or on other aspects of educational performance reflected in grades. In addition, Parents' reliance on occasional bad grades is unpersuasive because, as found above, any student for a variety of reasons can do poorly on a particular day. That kind of variation in a student's grades is not indicative of a disability or a need for special education services. Parents did not testify at hearing in defense of their interpretation of Student's grades, and no professional testified in support of that interpretation.

37. Student did not prove that District denied her a substantive FAPE during school year 2010-2011. District was objectively reasonable and correct in determining, at its

May 13, 2011 triennial IEP team meeting that Student was not eligible for special education or entitled to an IEP. She no longer needed speech-language therapy; she was not eligible in that or any other category; her needs in the areas of reading, writing, and attention could all be adequately addressed in the general education environment; and she did not need resource support.

38. Student did not prove that District denied her a substantive FAPE during the school year 2011-2012. District decided she was eligible for special education because of a speech-language impairment and provided goals and services for her speech-language needs that were reasonably calculated to allow her to obtain meaningful benefit from her education. Student did not need goals in the areas of reading, writing, social skills, vocabulary, or phonological awareness; all those needs could be adequately addressed in the general education environment. The same findings apply to the IEP of April 27, 2012, in which Student's goals were updated to reflect her present levels of performance.

39. Student did not prove that District denied her a substantive FAPE during the school year 2012-2013. Under the April 27, 2012 IEP, Student was able to access the curriculum and make substantial educational progress. Student did not demonstrate a need for additional goals and services beyond those provided in the April 27, 2012 IEP.

40. Student did not prove that District denied her a substantive FAPE during school year 2013-2014. District was objectively reasonable and correct in determining at its August 23, 2013 annual IEP team meeting that Student was not eligible for special education or entitled to an IEP. Student was unable to prove that her needs could not be adequately addressed in the general education environment.

Issue B.5: Did District fail to provide Student a FAPE during the 2010-2011, 2011-2012, 2012-2013, and 2013-2014 school years by failing to implement her outstanding IEP's?

41. To provide a FAPE, a district must deliver special education and related services "in conformity with" a Student's IEP. (20 U.S.C. § 1401(9).) In *Van Duyn v. Baker School Dist. 5J* (9th Cir. 2007) 481 F.3d 770, the Ninth Circuit held that failure to deliver related services promised in an IEP is a denial of FAPE if the failure is "material"; meaning that "the services a school provides to a disabled child fall significantly short of the services required by the child's IEP." (*Id.* at p. 780.)

42. Student did not prove that District failed to implement any of her IEP's. The only portion of an IEP that Parents argue was not implemented is the third goal that was allegedly in the March 10, 2010 IEP. Parents did not produce a third separate goal at hearing, and did not prove that such a goal had been included in Student's March 2010 IEP. Therefore, there was no third goal to implement.

Issue B.6: Did District fail in the 2013-2014 school year to place Student in the LRE in her language arts class?

43. A school district must provide special education in the LRE. A special education student must be educated with nondisabled peers "to the maximum extent appropriate," and may be removed from the general education environment only when the nature or severity of the student's disabilities is such that education in general classes with the use of supplementary aids and services "cannot be achieved satisfactorily." (20 U.S.C. § 1412(a)(5)(A); 34 C.F.R. § 300.114(a)(2)(ii).)

44. The District argues that it was not required to place Student in the LRE in sixth grade language arts because it was complying with the provision in the May 9, 2013 mediation agreement requiring it to place Student in English 10. However, a District cannot contract away its duty to provide special education in the LRE. If parents agreed to an IEP placing a student in an overly restrictive placement, a district would still be liable for violating the LRE rule; it could not claim as a defense that parents had agreed to the violation. The District does not furnish any authority for allowing it to avoid its LRE obligation by entering into a mediation agreement.

45. Student proved that her sixth grade placement in English 60 was not in the LRE. The District could not suspend its LRE obligations by entering into a mediation agreement. In addition, for LRE purposes English 10 – on which the parties had agreed – was not the same class as English 60. In English 10 Student would have mixed with some typically developing peers and received instruction from a general education teacher. English 60 contains no typically developing peers and is solely a special education class.

46. It also appears that District violated the stay put rule in retaining Student in English 60 in the sixth grade. Parents and a district may modify a stay put placement by agreement (20 U.S.C. § 1415(j)), but the district must comply with the agreement. Here, English 60 is not the class for which the parties contracted in the mediation agreement. In addition, the mediation agreement placed Student in English 10 only for the first semester of her sixth grade year. Folsom Middle School uses trimesters, not semesters, but more than half an academic year has passed, so the mediation agreement may no longer require her placement in English 10 or its equivalent.

Eligibility for Special Education and Related Services

47. An Administrative Law Judge has the authority to determine whether a student is eligible for special education and related services under the IDEA. (*Hacienda La Puente Unified School Dist. v. Honig* (9th Cir. 1992) 976 F.2d 487, 492-493.) If a district has failed to identify a student as eligible for special education, and therefore failed to develop an appropriate IEP for the student, District has denied the student a FAPE. (*Dept. of Educ. v. Cari Rae S.* (D. Hawaii 2001) 158 F.Supp.2d 1190, 1196.)

48. Not every student who is impaired by a disability is eligible for special education. Some disabled students can be adequately educated in a regular education classroom. Federal law requires special education for a "child with a disability," who is defined in part as a child with an impairment "who, by reason thereof, needs special education and related services." (20 U.S.C. § 1401(a)(3)(A)(ii); 34 C.F.R. § 300.8(a)(i).) State law requires special education for "individuals with exceptional needs," who are defined in part as individuals whose "impairment ... requires instruction, services, or both, which cannot be provided with modification of the regular school program." (Ed. Code, § 56026, subd. (b).) Special education is defined as "specially designed instruction ... to meet the unique needs of individuals with exceptional needs, whose educational needs cannot be met with modification of the regular instruction program . . ." (Ed. Code, § 56031.) Accordingly, "[a] pupil shall be referred for special educational instruction and services only after the resources of the regular education program have been considered and, where appropriate, utilized." (Ed. Code, § 56303.) In deciding whether a student needs special education, courts apply the *Rowley* standard and consider whether the pupil can receive some educational benefit from the general education classroom. (*Hood v. Encinitas Union School Dist.* (9th Cir. 2007) 486 F.3d 1099, 1106-1107 [decided under former Ed. Code, § 56337].)

SPEECH-LANGUAGE IMPAIRMENT

49. A student is eligible for special education and related services if she demonstrates difficulty understanding or using spoken language under specified criteria and to such an extent that it adversely affects her educational performance and cannot be corrected without special education. (Ed. Code, § 56333.) The criteria are:

- (a) Articulation disorders, such that the pupil's production of speech significantly interferes with communication and attracts adverse attention.
- (b) Abnormal voice, characterized by persistent, defective voice quality, pitch, or loudness. An appropriate medical examination shall be conducted, where appropriate.
- (c) Fluency difficulties which result in an abnormal flow of verbal expression to such a degree that these difficulties adversely affect communication between the pupil and listener.
- (d) Inappropriate or inadequate acquisition, comprehension, or expression of spoken language such that the pupil's language performance level is found to be significantly below the language performance level of his or her peers.
- (e) Hearing loss which results in a language or speech disorder and significantly affects educational performance.

(*Ibid.*) Determination of the existence of a language disorder under subdivision (d) of the statute is governed by regulation:

(4) Language Disorder. The pupil has an expressive or receptive language disorder when he or she meets one of the following criteria:

- (A) The pupil scores at least 1.5 standard deviations below the mean, or below the 7th percentile, for his or her chronological age or developmental level on two or more standardized tests in one or more of the following areas of language development: morphology, syntax, semantics, or pragmatics. When standardized tests are considered to be invalid for the specific pupil, the expected language performance level shall be determined by alternative means as specified on the assessment plan, or
- (B) The pupil scores at least 1.5 standard deviations below the mean or the score is below the 7th percentile for his or her chronological age or developmental level on one or more standardized tests in one of the areas listed in subsection (A) and displays inappropriate or inadequate usage of expressive or receptive language as measured by a representative spontaneous or elicited language sample of a minimum of fifty utterances. The language sample must be recorded or transcribed and analyzed, and the results included in the assessment report. If the pupil is unable to produce this sample, the language, speech, and hearing specialist shall document why a fifty utterance sample was not obtainable and the contexts in which attempts were made to elicit the sample. When standardized tests are considered to be invalid for the specific pupil, the expected language performance level shall be determined by alternative means as specified in the assessment plan.

(Cal.Code Regs., tit. 5, § 3030, subd. (c).)

50. Student is not eligible in the speech-language impairment category because her therapy has been so successful that, by the time of the May 2011 IEP team meeting, she no longer needed special education to address her speech-language needs. Credible testimony by Ms. Masera-Lynch and Ms. Maxwell, the speech-language pathologists who worked with Student, and assessments by Ms. Masera-Lynch and Ms. deGelleke show that she no longer meets the technical requirements of the eligibility category.

51. District's offer in September 2011 to reinstate Student's eligibility under this category was based on a questionable independent assessment by Ms. Johnson. District proved that Ms. Johnson's 2013 assessment was not reliable because it contained serious errors in scoring. When corrected, that assessment, like all the other speech-language assessments in the record, does not support speech-language impairment eligibility. District

also proved that Ms. Johnson’s 2013 assessment errors retrospectively cast doubt on the accuracy of her 2011 assessment, especially since she was unable or unwilling to produce the protocols for the 2011 assessment so that her scoring could be verified.

52. At hearing, Parents did not challenge the testimony of the speech-language pathologists who testified that Ms. Johnson scored her 2013 assessment incorrectly, and there was no evidence to contradict their explanations of those errors. Ms. Johnson admitted at least two of them. In their closing brief, Parents do not defend Ms. Johnson’s 2013 assessment; they argue only that it discloses that Student has “deficits” in speech, which does not qualify her in the category of speech-language impairment. Parents do not identify any low scores on any standard assessments that would qualify Student for special education in the category of speech-language impairment.

53. Aside from Ms. Johnson’s assessments, no professional assessment of Student in the record, recent or older, shows the low scores on standardized tests that would support eligibility in the category of speech-language impairment. Ms. Masera-Lynch, Ms. Maxwell, Ms. deGelleke and Ms. Rodrick testified persuasively that Student’s scores on standardized tests do not qualify her under the formula required for speech-language impairment eligibility. There was no reliable evidence that Student scored at or below the seventh percentile on at least two standardized assessment tests. In addition, there is no reliable evidence that Student demonstrates serious difficulties in understanding or using spoken language. Dr. Singer, Ms. Masera-Lynch, Ms. deGelleke, Ms. Rodrick, and Mr. Lin testified credibly that any speech-language delays Student still has can be adequately addressed in the general education environment, and there was no evidence to the contrary. District therefore proved by a preponderance of evidence that Student is not eligible for special education in the category of speech-language impairment.

SPECIFIC LEARNING DISABILITY

54. A student is eligible for special education and related services if, among other things, she has a specific learning disorder as defined by statute and regulation. A specific learning disorder is a disorder in one or more of the basic psychological processes involved in understanding or in using language, spoken or written, which may manifest itself in the imperfect ability to listen, think, speak, read, write, spell, or perform mathematical calculations. The term includes conditions such as perceptual disabilities, brain injury, minimal brain dysfunction, dyslexia, and developmental aphasia. (20 U.S.C. §1401(30); Ed. Code, § 56337, subd. (a).)

55. By regulation a student has a specific learning disorder as defined above when she has, among other things, “a severe discrepancy between intellectual ability and achievement in one or more of the academic areas specified in Section 56337(a) of the Education Code.” (Cal.Code Regs., tit. 5, § 3030, subd. (j).) In determining the existence of a specific learning disorder:

- (1) Basic psychological processes include attention, visual processing, auditory processing, sensory-motor skills, cognitive abilities including association, conceptualization, and expression;
- (2) Intellectual ability includes both acquired learning and learning potential and shall be determined by a systematic assessment of intellectual functioning;
- (3) The level of achievement includes the pupil's level of competence in materials and subject matter explicitly taught in school and shall be measured by standardized achievement tests;
- (4) The decision as to whether or not a severe discrepancy exists shall be made by the IEP team, including assessment personnel in accordance with Education Code Section 56341(d), which takes into account all relevant material that is available on the pupil; and. . . .
- (5) The discrepancy shall not be primarily the result of limited school experience or poor school attendance.

(Cal. Code Regs., tit. 5, § 3030, subd. (j).) Thus the law avoids total reliance on a single mathematical calculation to determine a severe discrepancy by requiring corroboration of that calculation by other assessment data, which may include other tests, scales, instruments, observations, and work samples, as appropriate. (*Hood, supra*, 486 F.3d at pp. 1105-1106.)

56. In determining the existence of a severe discrepancy, “[n]o single score or product of scores, test or procedure shall be used as the sole criterion for the decisions of the individualized education program team as to the pupil's eligibility for special education.” (Cal. Code Regs., tit. 5, § 3030, subd. (j)(4).) Instead, the IEP team shall use the following procedures:

- (A) When standardized tests are considered to be valid for a specific pupil, a severe discrepancy is demonstrated by: first, converting into common standard scores, using a mean of 100 and standard deviation of 15, the achievement test score and the ability test score to be compared; second, computing the difference between these common standard scores; and third, comparing this computed difference to the standard criterion which is the product of 1.5 multiplied by the standard deviation of the distribution of computed differences of pupils taking these achievement and ability tests. A computed difference which equals or exceeds this standard criterion, adjusted by one standard error of measurement, the adjustment not to exceed 4 common standard score points, indicates a severe discrepancy when such discrepancy is corroborated by other assessment data which may include other tests, scales, instruments, observations and work samples, as appropriate.

- (B) When standardized tests are considered to be invalid for a specific pupil, the discrepancy shall be measured by alternative means as specified on the assessment plan.
- (C) If the standardized tests do not reveal a severe discrepancy as defined in subparagraphs (a) or (b) above, the IEP team may find that a severe discrepancy does exist, provided that the team documents in a written report that the severe discrepancy between ability and achievement exists as a result of a disorder in one or more of the basic psychological processes. The report shall include a statement of the area, the degree, and the basis and method used in determining the discrepancy. The report shall contain information considered by the team which shall include, but not be limited to: (1) data obtained from standardized assessment instruments; (2) information provided by the parent; (3) information provided by the pupil's present teacher; (4) evidence of the pupil's performance in the regular and/or special education classroom obtained from observations, work samples, and group test scores; (5) consideration of the pupil's age, particularly for young children; and (6) any additional relevant information.

(Cal. Code Regs., tit. 5, § 3030, subd. (j)(4)(A)-(C).)²⁴

57. A student claiming specific learning disorder eligibility must demonstrate that their impaired ability to listen, think, speak, read, write, spell, or do mathematical calculations is caused by their disorder rather than by some other factor. (Ed. Code, § 56337, subd. (a); Cal. Code Regs., tit. 5, § 3030, subd. (j).)

58. Student did not sustain her burden to establish that she was ever eligible for special education in the specific learning disorder category. Two credible District assessments by Dr. Singer and credible independent assessments by Dr. Christo and Dr. Sporri have demonstrated she does not have the severe discrepancy required as a condition of eligibility. District also proved that any processing deficits Student may have may adequately be addressed in general education.

59. In their closing brief, Parents state only that Student is “possibly” eligible in the specific learning disorder category “[b]ased on all the documentary evidence shown at hearing including, but not limited to assessment information, and other data, including Student’s work product and performance . . .” They do not attempt to identify any severe

²⁴ In determining eligibility in the category of specific learning disorder, a school district may choose between using the severe discrepancy method and the use of response to intervention, which involves a student’s response to scientific, research-based intervention during the assessment process. (See Ed. Code, § 56337, subs. (b), (c).) District has chosen to use the severe discrepancy method.

discrepancy between Student's tested cognition and her academic achievement. As shown above, Parents' selection of Student's work product does not demonstrate that her grades are inaccurate. Student's grades reveal not only that she is performing in school at or above her cognitive capacity; they also show a pattern of steady improvement through the years. She is now doing better in sixth grade, with A- grades, than she has ever done before.

60. For the reasons above, from the May 2011 IEP team meeting to the present, Student has not displayed on standardized tests the severe discrepancy between cognitive ability and performance required for eligibility in the specific learning disorder category. District therefore proved by a preponderance of evidence that Student is not eligible for special education in the category of specific learning disorder.

OTHER HEALTH IMPAIRMENT AND ADHD

61. A student may be eligible for special education in the category of other health impaired if she "has limited strength, vitality or alertness, due to chronic or acute health problems" (Cal. Code Regs., tit. 5, § 3030, subd. (f).) The regulation lists a number of examples of such health problems, such as a heart condition, cancer, or leukemia.

62. A student having a suspected or diagnosed ADHD may be eligible for special education in the category of other health impaired. (Ed. Code, §56339, subd. (a); see also Ed. Code, § 56337, subd. (a)[eligibility in specific learning disorder category due to ADHD].) But in order to be eligible, the student must show that her educational performance is adversely affected by the disorder, and must demonstrate a need for special education and related services by meeting the eligibility criteria for other health impaired set forth in the preceding paragraph. (Ed. Code, §56339, subd. (a).) If a student with ADHD cannot make that showing, her instructional program must be provided in the regular education program. (Ed. Code, §56339, subd. (b).)

63. District proved that Student does not have limited vitality, strength or alertness due to any chronic or acute health problem, including ADHD. Dr. Sporri was the only professional to conclude that Student has ADHD. There was no other evidence that Student has ADHD. Dr. Singer and Dr. Christo disagreed with Dr. Sporri's diagnosis, but it is not necessary to resolve that dispute here. Dr. Sporri stated that Student's attention needs could be adequately addressed with a 504 plan, which means by necessary implication that they do not require special education. As Dr. Christo established, Student's successful educational performance strongly suggests that her education is not adversely affected by attention deficits or any other disorder. In their closing brief, Parents do not expressly claim that special education is required to address Student's ADHD or attention deficits, and there was no evidence that would support such a claim.

64. For the reasons above, District proved that Student's attention deficits, including any ADHD, do not adversely affect her educational performance and can be adequately addressed without special education. District therefore proved by a

preponderance of evidence that Student is not eligible for special education in the category of other health impaired.

District's Issue: Is Student eligible for special education and related services?

65. Student did not sustain her burden to establish that she remained eligible for special education after the May 2011 or August 2013 IEP team meetings. For the reasons above, District proved by a preponderance of the evidence that Student is not eligible for special education and related services at the present time in the categories of speech-language impairment, specific learning disorder, other health impaired, or any other category of eligibility.

Remedial Authority

66. School districts may be ordered to provide compensatory education or additional services to a student who has been denied a FAPE. (*Parents of Student W. v. Puyallup School Dist.* (9th Cir. 1994) 31 F.3d 1489, 1496 (*Puyallup*).) The authority to order such relief extends to hearing officers. (*Forest Grove School Dist. v. T.A.* (2009) 557 U.S. ___ [129 S.Ct. 2484, 2494, fn. 11].) Compensatory education is an equitable remedy that depends upon a fact-specific and individualized assessment of a student's current needs. (*Puyallup, supra*, 31 F.3d at p. 1496; *Reid v. District of Columbia* (D.C.Cir. 2005) 401 F.3d 516, 524 (*Reid*).) No award of compensatory education is appropriate for the LRE violation in this matter because Student cannot be retroactively mixed with her typically developing peers. However, she can and will be promptly placed in a general education language arts class so that she can interact with typically developing peers in the future.

ORDER

1. The District shall transfer Student from English 60 to an appropriate general education English class as soon as practicable.
2. All other requests by Student for relief are denied.
3. Student is not at present eligible for special education and related services.

PREVAILING PARTY

Pursuant to California Education Code section 56507, subdivision (d), the hearing Decision must indicate the extent to which each party has prevailed on each issue heard and decided. Here, District prevailed on all issues except Issue B.6, on which Student prevailed.

RIGHT TO APPEAL THIS DECISION

The parties to this case have the right to appeal this Decision to a state or federal court of competent jurisdiction. If an appeal is made, it must be made within 90 days of receipt of this Decision. (Ed. Code, § 56505, subd. (k).)

Dated: February 24, 2014

/s/
CHARLES MARSON
Administrative Law Judge
Office of Administrative Hearings