

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
SPECIAL EDUCATION DIVISION
STATE OF CALIFORNIA

In the Matter of:

STUDENT,

Petitioner,

v.

LOS ANGELES UNIFIED SCHOOL
DISTRICT,

Respondent.

OAH CASE NO. N2005070427

**NOTICE: This decision
has been UPHELD by
the United States
District Court. Click
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DECISION

Administrative Law Judge (ALJ) Glynda B. Gomez, Office of Administrative Hearings, Special Education Division (OAH), heard the above-captioned matter in Los Angeles, California on March 5-9, 12-13, 15, and 20- 23, 2007. At the request of the parties, the record remained open until April 9, 2007, to allow submission of written closing briefs. Both parties filed timely closing briefs. Student's closing brief is identified for the record as exhibit PP. District's closing argument is identified as exhibit 11. The record was closed and the matter submitted for Decision on April 9, 2007. Pursuant to stipulation of the parties, the Decision in this matter was due on April 25, 2007.

Tania Whiteleather, Attorney at Law, represented Petitioner Student (Student). Student's father was present on March 12, 2007. Student's mother was present on March 12, 2007, and March 13, 2007. Kim Merrill, law clerk for Ms. Whiteleather was present on March March 13, 2007, and March 23, 2007. Rodney Ford, advocate for Student was present for portions of the hearing on March 5-9, 12, 14, 15, 20, 21 and 22, 2007.

Respondent Los Angeles Unified School District (District) was represented by Debra K. Ferdman, Attorney at Law, Miller Brown & Dannis. Sharon Snyder, Due Process Specialist for the Los Angeles Unified School District was present on March 5, 7, 8, 12, 15, and 20-23, 2007. Greg Turnbull, Due Process Specialist for the Los Angeles School District, was present on March 6, 2007, and March 13, 2007.

Student's original Due Process/Mediation Request (Complaint) was filed on June 30, 2005. Student's motion to amend the Complaint was granted by OAH on July 17, 2006. An amended due process complaint was filed on July 21, 2006, (Amended Complaint) and all hearing dates were vacated and new statutory timelines for completing the hearing were established. On August 10, 2006, OAH ruled that a three-year statute of limitations applies to this case and that the applicable time period for issues in this hearing is June 19, 2002, to July 21, 2006. OAH ruled that the proffered issue of failure of the District to provide copies of documents was a discovery issue not a cognizable claim under IDEA. Accordingly, Issue number 3 of the Complaint was stricken. Student's motion for reconsideration of OAH's order was denied by OAH as untimely on February 28, 2007.

ISSUES

1. Did the District assess Student in all areas of suspected disability from June 19, 2002, to the filing of the amended complaint on July 21, 2006?
2. Did District commit a procedural violation by failing to have the required participants at Student's November 11, 2002 Individualized Educational Program (IEP) meeting?
3. Did District deny Student a Free Appropriate Public Education (FAPE) by failing to provide a qualified translator and appropriate translation for all IEP meetings from June 19, 2002, to July 21, 2006, to allow parents to participate in the IEP process?
4. Did the District deny Student a FAPE from June 19, 2002, until September 2005 by failing to identify Student's unique educational needs in receptive and expressive language?
5. Did the District deny Student a FAPE from June 19, 2002, until December 2005 by failing to identify Student's unique educational needs in basic reading, written expression, and spelling?
6. Did District deny Student a FAPE by failing to consider and timely implement the recommendations contained in the November 15, 2005 Psycho-educational Independent Educational Evaluation (IEE) performed by Dr. Robert Patterson?
7. Did District deny Student a FAPE by delaying identification of Student's needs by delaying the approval of an IEE for Speech and Language?
8. Did the District deny Student a FAPE by failing to fully and timely implement the Deaf Hard of Hearing (DHH) in-home itinerant teacher services contained in the February 17, 2006 IEP?

9. Is Student entitled to compensatory education in the amount of 240 hours of Lindamood-Bell language processing services, reimbursement for Lindamood-Bell assessments and transportation?

CONTENTIONS OF THE PARTIES

Student, already eligible for special education services as Deaf/Hard of Hearing, contends that District did not assess him in all areas of suspected disability. He further contends that District unnecessarily delayed a speech and language Individual IEE and identification of his unique needs in language. Student contends that he was denied a FAPE when District failed to consider the recommendations of a psycho-educational IEE. Student also contends that his parents were denied the ability to fully participate in the IEP meeting because they were not provided adequate Spanish language interpretation of meetings and translation of documents. Student contends that he was denied a FAPE when his unique needs were not identified. Student contends that he was denied a FAPE when in-home teaching services identified in his 2005-2006 IEP were not timely provided. For the denial of FAPE, student contends that he is entitled to compensatory education in the form of 240 hours of Lindamood-Bell language program, reimbursement for Lindamood-Bell assessments and transportation.

District contends that it has appropriately assessed Student in all areas of suspected disability and provided a FAPE to Student at all times. District contends that it considered the IEE by Dr. Patterson as required and implemented recommendations as needed. District further contends that it did not delay the Speech and Language IEE. Instead, it was attempting to obtain consent to conduct its own assessment. District contends that it provided adequate Spanish translation services to facilitate parent participation in the IEPs. District contends that it implemented the in home teaching services as soon as possible given staffing and administrative constraints, provided compensatory time for missed sessions and, that all times Student was provided with a FAPE.

FACTUAL FINDINGS

Jurisdiction

1. Student is a twelve-year-old boy with severe to profound sensorineural hearing loss. He is in fifth grade at Farmdale Elementary School. Student has a special education eligibility classification of Deaf/Hard of Hearing (DHH) and Speech and Language Impairment. Student was first diagnosed as DHH at the age of two at which time he began to wear hearing aides.

Background

2. Student was retained in first grade in order to facilitate mainstreaming in a general education classroom. In school, he uses hearing aides and an amplification system. The device amplifies the teacher's voice for Student. Student has bilateral hearing loss which has deteriorated since first diagnosis. Student has severe hearing loss in the right ear and profound hearing loss in the left ear. Student's first language and home language is Spanish. His parents speak to him in Spanish and he answers in English. Student has always received instruction in English, but has limited English proficiency.

3. For the January 11, 2002 triennial IEP, an assessment in articulation was conducted using the Photo Articulation Test (PAT-3), Medida Espanola de Articulacion (MEDA), and a language sample. The assessments revealed that Student's speech was intelligible 80 to 90 percent of the time and that he had moderate deficits in articulation. The Kaufman Survey of Educational Achievement (KSEALS), Brigance Inventory of Early Development 0-7 years (Brigance), Teacher Assessment of Grammatical Structures (TAGS) and observation were used to assess reading, language and math performance. Student performed in the average range in math and reading. Student scored far below average in the vocabulary subtest of KSEALS demonstrating deficits in language development. The TAGS assessment revealed that Student was functioning at the simple sentence level and beginning to use complex sentences. The Auditory Skills Instructional Planning System Assessment (ASIPS) was used to examine Student's performance in auditory training. Student was able to discriminate between words in which vowels and consonants differed, to discriminate between some sets of rhyming words, and to follow and sequence directions.

4. As of June 19, 2002, Student was provided special education services pursuant to an IEP dated January 11, 2002, and amendment IEP dated June 7, 2002. Student's unique educational needs were identified in articulation, math, language, reading and auditory training. A program was designed to meet those unique needs with goals established for each area of need. Student's placement was in a mainstream general education classroom half the day and half of the day in a special day class. Student received support from a DHH special education teacher on a pullout basis three times per week. Student received speech therapy with a speech and language pathologist once each week for 30 minutes to focus on improvement of his articulation.

First Grade Repeated (2002-2003 School Year)

5. There were no IEP meetings conducted for Student during the month of November 2002. The next IEP meeting was held on December 18, 2002.

6. For the December 18, 2002 IEP meeting, Student was assessed using the Kaufman Test of Educational Achievement (KTEA), ASIPS, TAGS, informal assessment, and observation. On the KTEA reading-decoding subtest, Student received a standard score of 102, which is equivalent to 1.3 grade level. In spelling, Student received a standard score of 114, which is equivalent to 1.9 grade level. In reading comprehension, Student received a

standard score of 96, which is the grade level equivalent of 1.0. In math computation, Student received a standard score of 96 which is the grade equivalent of 1.5 and a standard score of 77 in math applications which is below first grade level. Student was able to identify and read words at first grade level, but was weak in reading comprehension and articulation.

7. An annual IEP was held on December 18, 2002. In attendance at the meeting were: Student's parents, administrator Wade Hayashida, special education teacher/interpreter Jackie Solorzano, general education teacher Noemi Banuelos, and speech pathologist Monica Chin.

8. Student had met his previous goals for language, auditory training, and articulation. However, Student had not met his math and reading goals. The IEP team discussed the various assessments and observations to identify Student's unique educational needs. Needs were identified in reading fluency, reading comprehension, math applications, auditory training and articulation. A program was designed to meet his unique educational needs with goals for each area of need. It was noted that Student was close to grade-level in reading and writing, but his overall language development lagged by approximately one and one-half years. The IEP team determined that Student should continue receiving special education services to allow him to access the general education curriculum and to allow him to catch up with his same age non-disabled peers.

9. The meeting was translated into Spanish for parents. Parents were able to and did participate in the meeting. Parents received all documents they requested translated into Spanish after the meeting. Parents did not have any difficulty understanding the translation although translation may not have been verbatim.

10. Student was assessed in all areas of suspected disability for the 2002-2003 school year including receptive language, expressive language, basic reading, written expression and spelling.

11. All of Student's unique educational needs including those in receptive language, expressive language, basic reading, written expression, and spelling were identified and an educational program was designed for Student with goals, services and placement designed to address his unique educational needs for the 2002-2003 school year. Student received educational benefit from the IEP and a FAPE for the 2002-2003 school year.

Second Grade (2003-2004 School Year)

12. For the December 12, 2003 IEP meeting, student was assessed using the KTEA, ASIPS and teacher observation. On the KTEA, Student received a standard score of 92 in reading decoding, with a 2.7 grade equivalent. Student received a standard score of 86 in spelling, with a 2.1 grade equivalent. Student received a standard score of 86 in reading comprehension, with a grade level equivalent of 2.0. In math computation, Student received

a standard score of 79, with a grade level equivalent of 2.3. In Math application, Student received a standard score of 77, with a grade equivalent of 2.0. Student's performance was at grade level on these assessments.

13. On the December 12, 2003, an annual IEP meeting was held. In attendance were: Student's parents, Student's teenage sister, school principal/administrator Leonor Martinez, special education teacher Teresa Moren, general education teacher Angela Yong, and interpreter Sonia Retana. Student met all of his prior goals in reading, oral language, mathematics and auditory training. In the present levels of performance portion of the IEP, it was noted that Student was performing at grade level in reading decoding, spelling and reading comprehension, but that he struggled with reading comprehension. Student scored at grade level in math computations and applications, but struggled with double digit addition and subtraction. It was also noted that Student had difficulty with writing complete sentences and putting his thoughts to paper. Student was progressing well with his articulation in speech therapy, but continued to have deficits that required reliance on tactile and visual cues and repetition to identify and imitate the "z" sound. The audiologist noted that with hearing aids, Student's hearing fell within the mild to moderate loss range and that the hearing aides had been under repair recently.

14. After consideration of assessments, observation and performance, the IEP team determined Student's unique educational needs. A program was designed to address Student's unique educational needs with goals drafted for mathematics, reading, spelling, articulation, and audiology. Student's placement was in the general education mainstream class for 75 percent of the day and 25 percent of the time in a special day class. Student was to receive focused instruction in language development, reading comprehension and writing. Student was to receive speech and language therapy in the area of articulation for 30 minutes once per week, and audiological services for 10 minutes once a week. Additionally, it was noted that the FM trainer was to be used and that Student should receive repeated instruction on an individual basis and preferential seating in the front of the classroom. Student's parents consented to the IEP.

15. All IEP meetings were translated into Spanish for parents during the 2003-2004 school year. Parents were able to and did participate in the IEP meeting. Parents received all documents they requested translated into Spanish after the meeting. Parents did not have any difficulty understanding the translation although translation may not have been verbatim.

16. Student was assessed in all areas of suspected disability for the 2003-2004 school year including receptive language, expressive language, basic reading, written expression and spelling.

17. All of Student's unique educational needs were identified including those in receptive language, expressive language, basic reading, written expression and spelling and an educational program was designed for Student with goals, services and placement

designed to address his unique educational needs for the 2003-2004 school year. Student received educational benefit from the IEP and a FAPE for the 2003-2004 school year.

Third Grade (2004-2005 School Year)

18. For the November 23, 2004 annual IEP meeting, Student was assessed using the KTEA, teacher observation and informal observation. In reading decoding, he received a standard score of 90, with a grade equivalent of 2.4. In reading comprehension, he received a standard score of 9, with a grade equivalent of 1.9. He received a reading composite standard score of 88, with a grade equivalent of 2.1, math application standard score of 87, with grade equivalent of 1.9, math computation standard score of 105 with a grade equivalent of 3.5, and math composite standard score of 93 with a grade equivalent 2.9. The KTEA, and teacher observations indicated that Student had some difficulty understanding details when reading. The KTEA showed Student at a grade equivalent of 2.4 in reading decoding, 1.9 in reading comprehension and 2.1 in reading composite. In math, the KTEA scores and work samples indicated that Student had some difficulty with addition, subtraction, regrouping, rounding numbers and understanding place values. The KTEA grade equivalent score for math application was 1.9, math computation 3.5 and math composite 2.9. The KTEA spelling subtest indicated a 3.0 grade equivalent for Student. Based upon teacher observation and work samples, it was noted that Student had some difficulty in recognizing the use of correct word order in English in written sentences and had problems writing a paragraph with consistent focus.

19. Monica Chin, the speech pathologist, was unable to attend the November 23, 2004 IEP because of a family emergency. She contacted Student's mother the morning of the IEP and discussed Student's progress and goals. She explained that Student had not met his goals because his performance was not consistent and that maximum cues were required. She asked about Student's hearing and confirmed with Student's mother that Student appeared not to be hearing from his left ear and was able to hear very little out of his right ear. According to his mother, the hearing from the right ear was unstable. Chin explained that the goals of the IEP were written with the understanding that Student could hear with his hearing aides and amplification. However, deterioration in his hearing had significantly impacted the goals and an amendment IEP would be needed. Chin advised parent that with deteriorated hearing, Student was not physically able to meet the goals regardless of the amount of therapy or the strategies used. Chin recommended that the IEP be amended to include an assessment for itinerant DHH services so that Student could be taught to use his residual hearing effectively and to begin lip reading. Chin prepared a written memorandum dated December 1, 2004, detailing the conversation.

20. In attendance at the November 23, 2004 annual IEP meeting were: Student's parents, school principal/administrator Leonor Martinez, special education teacher Rebecca Chua, general education and interpreter teacher Patty Astorga. The IEP team discussed the assessments and observations to determine Student's unique educational needs. The team noted that Student did meet his previous reading, mathematics and audiological goals. He had not met his writing goals, spelling goals or articulation goals.

21. The audiologist noted in then-present levels of performance that Student had stopped using amplification in his left ear and was experiencing some hearing changes in the left ear. He noted that the Sonas audiological report did not show any changes in Student's hearing. With respect to auditory training, teacher observations noted that Student had difficulty paraphrasing what he had heard or what was read aloud to him. Student was able to discriminate directions and follow single familiar directions and sequence two to three critical elements in a message.

22. The speech and language pathologist noted in the present levels of performance portion of the IEP that Student was attentive and cooperative. She noted that Student would require written cues until he could memorize the different contexts requiring the "s" and "z" sounds. Student remained eligible for special education services as Hard of Hearing and Speech or Language impaired.

23. The IEP team determined that Student had unique educational needs in the areas of audiology, reading, writing, math, auditory training, and articulation. A program was designed to address Student's unique educational needs with goals for each area of need. Student was to continue receiving audiological services once a week for 10 minutes, speech pathologist services in the area of articulation for 30 minutes per day once a week, use of auditory trainers and amplification. He was to sit in the front of the class and have instructions repeated. Student was mainstreamed in a general education class, with support from a DHH special education teacher as needed. The parents disagreed with the IEP because they wanted more time with the speech pathologist. The parents requested an informal conference to resolve the issue.

24. On January 13, 2005, audiologist Tim Yamaski administered the Test of Auditory Comprehension (TAC) to Student. Yamasaki has a doctorate in Audiology from the Arizona School of Health Sciences, and a Bachelor of Arts from California Polytechnic University, Pomona, in Behavioral Science. He has 12 years of experience as an education audiologist with the District and seven years of experience as an audiologist in private sector practice. Yamasaki holds a state audiologist license, an inactive dispenser's license and an American Speech, Language and Hearing Association certificate. According to Yamasaki's analysis, Student's performance on the TAC was above average for his age and degree of hearing loss. Student passed subtests through levels seven and eight of the 10 subtests. Student was able to demonstrate ability to sequence three events and recall five details of a story presented by audition alone. He was not able to pass subtest nine and 10 that require the same skills with items presented in background noise. At hearing, Yamasaki related that Student had severe hearing loss in the right ear and profound hearing loss in the left ear. According to Yamasaki, Student's hearing at lower frequencies was stronger and his hearing loss was not flat. Yamaski indicated that he would not expect Student to have the ability to hear without amplification.

25. An amendment IEP meeting was held on March 3, 2005, in part, as a result of the informal dispute resolution process. The meeting participants were Student's parents, principal/administrator Leonor Martinez, special education teacher Rebecca Chua, general

education teacher Patricia Astorga, speech pathologist Monica Chin, educational audiologist Tim Yamasaki, DHH case manager Joyce Kantor, translator Idalit Suarez and educational advocate Rodney Ford. The IEP team discussed Student's failure to meet his speech goal. Student's mother was concerned about Student's ability to meet his past speech goal.

26. The IEP team noted that Student was unable to identify and imitate contrasting phrases with the "s" and "z" sounds. He also had some problems with "d" used in the past tense. He made frequent grammatical errors, word omissions and incorrect substitutions of words in spontaneous conversation. He had increased difficulty with background noise. It was noted that Student's performance on the TAC did not require him to draw conclusions. He was only asked to listen, comprehend and pick out pictures. The IEP team discussed Student's mainstreaming in the general education program. He had been mainstreamed because it appeared that he was capable of performing in the general education classroom. Parents expressed their concerns that student was frustrated with his inability to comprehend his lessons and homework in reading and the math word problems. He was unable to do his homework independently.

27. The team determined that Student's expressive and receptive language ability were a primary concern of his parents. Expressive and receptive language had not been recently assessed and the team agreed that assessment was necessary. Parents requested an IEE of Student's needs. The team determined that pending further assessment, Student would receive targeted intervention in a special day class two times per week for one hour each session and individual and small group instruction in the special day class to meet his unique needs. The parents consented to the IEP, but objected to the DHH class support because they did not believe it would provide sufficient support for Student's needs. Parent's asserted that Student needed instruction in a one-on-one setting. Parents disagreed with the level of service, but consented to the IEP.

28. All IEP meetings during the 2004-2005 school year were translated into Spanish for parents. Parents were able to and did participate in the meeting. Parents received all documents they requested translated into Spanish after the meeting. Parents did not have any difficulty understanding the translation although translation may not have been verbatim.

29. Student was assessed in all areas of suspected disability for the 2004-2005 school year including receptive language, expressive language, basic reading, written expression and spelling.

30. All of Student's unique educational needs including those in receptive language, expressive language, basic reading, written expression and spelling were identified and an educational program was designed for Student with goals, services and placement designed to address his unique educational needs for the 2004-2005 school year. Student received educational benefit from the IEP and a FAPE for the 2004-2005 school year.

Fourth Grade (2005-2006 School Year)

31. On April 7, 2005, Jose J. Gonzales, a Due Process Specialist for the Los Angeles Unified School District, contacted Student's parents to discuss their disagreement with the IEP and their request for an independent educational evaluation and DHH support in a one-to-one setting. The contact was made pursuant to the District's Informal Dispute Resolution Program (IDR). Gonzalez offered an assessment plan which would include health and development including audiology with pure tone discriminate and speech reception both with and with out hearing aides, language function and academic assessments. A follow up IEP meeting to discuss the assessments and the effects on Students needs. Parents did not respond to the April 7, 2005 letter. Instead, the forwarded the letter to their advocate Rodney Ford. Ford attempted to contact the District several times, to no avail. Because they were unable to obtain authorization from the Student's parents, District personnel were not authorized to communicate directly with Ford.

32. On May 16, 2002, parents, through advocate Rodney Ford filed a Complaint with the California Department of Education (CDE) alleging that District had failed to timely respond to parents' request for a speech and language IEE. CDE ordered District to provide information concerning the IEE process to Student and that an IEE be conducted by September 12, 2005. District postponed its own assessments and authorized the IEE as instructed.

33. Judy Nelson conducted an independent speech and language assessment on August 11, 2005. Nelson received a Bachelor of Arts in Music from California State University at Hayward in 1981, a music therapy certification from California State University of Northridge in 1993, and a Master of Science in Communicative Disorders in 2001. Nelson is a private speech and language pathologist and the clinical director for the Encino office of Speech, Language and Educational Associates, a private practice. She has five years of experience as a speech and language pathologist. Her clinical and internship experience includes conducting speech-language services at an elementary school, an aphasia clinic, and a hospital. Nelson is also an associate professor of music at California State University, Northridge and the co-founder and associate clinical advisor of the Music Therapy Wellness Center. Nelson has written articles and has extensive experience in a variety of settings including schools and hospitals with a variety of populations including the elderly, children and the disabled while conducting music therapy.

34. Nelson administered the Auditory Word Discrimination subtest and Auditory Processing (Thinking & Reasoning) subtest of the Test of Auditory-Perceptual Skills-Revised (TAPS-R), the Receptive One Word Vocabulary Test (ROWVT), the Expressive One Word Vocabulary Test (EOWVT); the Story Retell portion of the Goldman-Fristoe Test of Articulation-2 (GFTOA-2); and elicited a spontaneous language sample. The auditory processing subtest was administered to determine Student's comprehension of spoken language at the sentence level. The ROWPVT is a test for receptive vocabulary in oral speech. Student scored an age equivalent of 4 years and 4 months. The test requires

listening to a word and choosing the picture that matches that word from a choice of two to six pictures. Student scored in the severely below average range for receptive vocabulary.

35. EOWPVT was used to assess expressive vocabulary. It requires the listener to select a picture of the item named. Student scored an age equivalent of 4 years and 4 months in the severely below average range. Nelson noted that the September 22, 2004 Sonas Hearing Care Associates audiogram revealed severe hearing loss and that Student could not hear speech sounds within normal conversational speech range.

36. Nelson described Student as enthusiastic and cooperative. Nelson credibly testified that Student's profound bilateral sensorineural hearing loss and lack of lip reading skills make it is unlikely that Student can comprehend longer, more complex sentences. As a result, Student is severely delayed in acquiring common vocabulary as well as linguistic concepts including sentence structure, morphological endings and verb tenses. Nelson recommended that Student be given a total communication approach, beginning with the use of sign language to accompany all verbal instruction, in order to assist him in acquiring and using age-level vocabulary and linguistic concepts. Nelson opined that Student would require one-on-one speech/language services one hour weekly to address overall receptive and expressive language development in both oral speech and sign language. She also recommended goals in receptive and expressive language and sign language.

37. Nelson recommended that spoken and sign language communication goals should include: (A) Student will generate sentences with age-level syntax and vocabulary in response to simple "wh" questions; and (B) Student will independently generate narratives regarding classroom activities and curriculum with age-appropriate sequence and details.

38. Nelson recommended that sign language communication goals include that Student would identify up to the four key characters, events, and key concepts from an age-level short story.

39. District did not unnecessarily delay the approval of the speech and language IEE or the identification of Student's unique educational needs in speech and language. Student's parents failed to cooperate with District's attempts to secure authorization to conduct its own assessments before approving an IEE. When contacted by California Department of Education (CDE), District postponed its own assessments and approved the IEE as it was instructed by CDE.

40. On September 26, 2005, an IEP meeting was held to amend the November 23, 2004 IEP. In attendance at the IEP meeting were: Student's parents, his teenage sister, advocate Rodney Ford, interpreter Sonia Retana, speech pathologist Monica Chin, special education teacher Rebecca Chua, principal/administrator Leonor Martinez, and DHH coordinator Dr. Robert Perry. Nelson's Speech and Language Assessment was discussed at the meeting. Monica Chin, the District Speech pathologist indicated that the report only addressed language and not speech. Chin was not familiar with the TAPS-R test. According to Chin, the classroom teacher addresses language and the District's speech pathologist only

addresses articulation in speech therapy. The possible acquisition of a cochlear implant was discussed. Chin believed a cochlear implant would be beneficial to student. Chin agreed that lip reading and sign language would benefit Student. Parents were asked to visit a total communication program classroom for consideration of a change in program. No additional goals were drafted at this meeting.

41. The meeting was translated into Spanish for parents. Parents were able to and did participate in the IEP meeting. Parents received all documents they requested translated into Spanish after the meeting. Parents did not have any difficulty understanding the translation although translation may not have been verbatim. Parents consented to the IEP.

42. On October 6, 2005, parents and advocate Rodney Ford toured the total communication classroom at Multnomah School with Dr. Perry. Parents did not want Student to be transferred to Multnomah because the classroom was comprised mainly of students using sign language. Student had been mainstreamed in a regular general education classroom and received instruction on an oral basis most of his academic career. Parents did not believe Multnomah to be an appropriate placement for Student.

Psycho-Educational IEE by Dr. Robert Patterson

43. As a result of mediation, parents and the District agreed to a psycho-educational IEE. On September 27, 2005, at the request of Student's parents, District retained Dr. Robert Patterson to conduct an IEE. Patterson is a licensed clinical psychologist. He also has general elementary and secondary school teaching credentials, general school services credentials for pupil personnel services and school psychology and community college instructor and counselor credentials. He received a Bachelor of Arts degree in Biology, Psychology and Education from Whittier College in 1959. He received a Master of Arts in Educational Psychology from California State University at Long Beach in 1962. He received a Master of Arts Degree in Zoology and animal behavior from California State University at Fullerton in 1971. He received a Master of Arts in Developmental Psychology from Chapman University in 1983 and a doctorate in Psychology and Family Therapy in 1988 from the United States International University in San Diego. In Addition to experience in private practice, Patterson served as a school psychologist for the Tustin Unified School District for 12 years.

44. Patterson did not use Student's amplification system when he administered the assessment. Patterson did not observe Student at school or speak to any District teachers, staff or service providers for his assessment. These deficiencies are significant and affect the value and weight to be accorded to the data obtained and interpretation of that data.

45. Patterson performed a psycho-educational assessment of Student on November 2, 2005. Patterson administered the Comprehensive Tests of Nonverbal Intelligence, a non-verbal Intelligence quotient (IQ) examination. The instructions were given in pantomime and orally. The test has three component categories. Analogical reasoning is tested through pictorial and geometric analogies. Sequential reasoning is assessed using pictorial sequences

and the geometric sequences. Student received a standard Nonverbal IQ score of 99, which is at the 47th percentile for students of his age, an average-range score.

46. Patterson administered the Peabody Individual Achievement Test-Revised (PIAT-R) to assess achievement. Patterson noted that in the reading recognition test, Student must decode words. Student frequently had difficulty decoding and often deleted letters. His overall performance on the reading recognition test was at the 2.6 grade level with a standard score of 81 at the 10th percentile for students of his age.

47. On the reading Comprehension test, Student was called upon to read a paragraph and then select the picture that best described what he read. On this test, Student performed at the 2.6 grade level, with a standard score of 85, at the 16th percentile for students of his age, in the mid-low average range. Patterson noticed that when Student read aloud he consistently deleted words, which adversely affects his reading comprehension.

48. On the Mathematics test, Student had difficulty with applied math word problems, deleting extraneous material and equivalents. Overall, he performed at the 3.5 grade level with a standard score of 84, at the 14th percentile for students his age.

49. The Spelling test is a recognition word test. Student is auditorily presented with a word and asked to choose from four different spellings of the word. After some difficulty understanding the components of the test, Student was able to perform. He performed at the 3.6 grade level, with a standard score of 88, at the 21st percentile for students of his age.

50. On the written expression test, Student was shown a picture and asked to write a story. Student had difficulty writing complete sentences, formulating what he wanted to write, connecting the sentences, utilizing capitalization, punctuation, and spelling rules. It appeared to Patterson that Student had difficulty getting his thoughts on paper. His writing performance was a standard score of 77, at the 6th percentile for Students of his age.

51. Patterson administered portions of the Woodcock-Johnson Education Test Battery-Third Revision (WJ-III). In the Calculations test, it was clear that Student did not know number combinations because he still counted with his fingers. He did not know fractions or long division and had difficult with multiple-digit multiplications. He was able to perform straightforward calculations with a standard score of 101, at the 54th percentile, at the 5.3 grade level.

52. On the Spelling test, Student had difficulty with production spelling, reversing letters, deleting letters and apparently not hearing many of the sounds within the word. His overall performance in spelling was a standard score of 79, at the 8th percentile, at the 2.6 grade level. This was inconsistent with his performance on the spelling test, which Patterson believed meant that he required visual and auditory presentation.

53. The reading fluency test measures student's ability to read very short sentences quickly and decide if statements are true or false under time constraints. Student received a standard score of 83, at the 13th percentile, at the 3.6 grade level.

54. The math fluency test required Student to complete simple addition, subtraction and multiplication under time constraints. Student was very rapid utilizing finger counting techniques and received a standard score of 83, at the 13th percentile, at the 3.6 grade level.

55. The writing fluency test measures the student's skill writing simple sentences quickly. The student is shown a picture and three words. The student must use the set of three words without changing them and may add words if needed to write simple sentences consistent with what is depicted in the picture. Student performed with a standard score of 91, at the 28th percentile, at the 4.2 grade level, which, to Patterson, meant that Student was able to write with visual organization and presentation of language. Student had difficulties organizing the language independently.

56. Patterson administered the Bender Visual Gestalt-Second Edition to assess psychomotor functions. The test has four parts: a copy test, a recall phase, a motor test and a memory perception test. Student was asked to copy a design as seen on a card. Student was asked to re-draw the designs from memory after the card is removed. Student is asked to draw a line from one dot to the next dot staying within a framework and was shown a series of four figures and asked to match one of the figures to a sample. Student performed in the 76th to 100th percentile range on motor and perception tests. On copying simple figures, he received a standard score of 104, at the 60th percentile, but on the memory of figures he performed at a low average range showing a significant difference with a standard score of 88, at the 21st percentile.

57. Patterson administered the Peabody Picture Vocabulary Test-Third Revision (PPVT-III) to measure receptive language. Student received a standard score of 56, below the 1st percentile with an age equivalency of five years, three months of age. Patterson opined that it is not unusual for students who are hard of hearing, with auditory processing difficulties, to have language processing difficulties. Patterson testified that Student appears to have other processing difficulties, besides his hearing difficulty and is missing basic vocabulary at every single age level of the test. The subtest for achievement functioning measures oral language development and word knowledge. The test required Student to identify pictured objects. Student received a standard score of 67, at the 1st percentile for students of his age. He was often lacking language specificity and was performing at the age equivalency of 4 years and 8 months.

58. The general information test was administered to test comprehensive knowledge. Student performed with a standard score of 58, below the 1st percentile, at the age equivalency of 5 years and 4 months.

59. Patterson assessed Student's processing speed using the visual matching subtest. The test required student to find two numbers that are the same in a series of six numbers beginning from single-digit to multiple-digit numbers. He performed in the mid-low average range, with a standard score of 86, at the 17th percentile with a 3.8 grade level equivalency.

60. Patterson assessed auditory processing, the ability to analyze, synthesize and discriminate auditory stimuli, with the Sound Blending and Incomplete Words Test of the Woodcock-Johnson Psycho-Educational Test Battery-Third Revision (WJ-III). The test is a measure of short-term memory. It requires the student to hold a span of numbers in immediate awareness memory while performing a mental operation of reverse sequencing on the numbers. Student had significant difficulty reversing three digit numbers. He performed with a standard score of 72, at the 3rd percentile for students of his age, at the first grade equivalency. Student was able to retain and reverse only 9 percent of the numbers, an average student of his age, would be able to hold and reverse 90 percent of the letters during the same time span.

61. The visual auditory test was administered to measure long term memory retrieval. The test shows the student a series of stick-like figures called rebuses. Each rebus is given a common name in the English language, the page is turned and the student has to code a series of sentences made from the rebuses. As each successive page is turned, the student becomes increasingly responsible for additional rebus word-pair sets. This is a task of associative and meaningful memory where the student is asked to learn and recall rebuses that are pictographic representation of words. Student performed with a standard score of 73, at the 4th percentile for students of his age, at the grade equivalence of 1.2. According to Patterson, Student missed 30 percent of what an average Student would get correct.

62. Patterson assessed social-emotional functioning by administering the Piers-Harris Self-concept Scale. The test is a series of questions to which the student responds. Based upon Student's responses, his overall score was average. Student scored above average in his expressed confidence in his intellectual abilities, his expressed ability to respond to academic and teacher queries in the classroom and in happiness. Student scored in the low range of the popularity scale noting that he felt different, worried about tests and often felt left out of things.

63. For Adaptive Functioning, Patterson had Student's mother complete the ABS-2: 2AAMR Adaptive Behavior Scales for Schools. Student scored in the average range on independent function that relates to eating, toileting, maintaining a clean and neat appearance, taking care of clothing, dressing and undressing. Student scored below average in physical development which involves adaptive and coping skills: below average in economic activity which deals with the ability to manage financial affairs associated with the handling of money, running errands: language development which is a scale that deals with proficiency in communication, receptive and expressive abilities and how people use those skills in social situations; number and time concepts involving telling time, and performing basic arithmetic; and prevocational/vocational activities which are school performance-

related and socialization skills which deal with how the student interacts with others. Student scored in the average range in self-direction which deals with maintaining an active life style, taking initiative and perseverance. Student received a high average score in the responsibility cluster dealing with caring for one's possessions, and responsibility for carrying out tasks, punctuality and self-control.

64. According to Patterson, Student performs in the mid-average range when nonverbal measures of cognition are used. His achievement function is in the low-average range for reading, reading comprehension, applied mathematics and recognition spelling. Student performs in the low-average range in math and reading fluency. Student's performance in written expression and spelling are borderline below average.

65. Based on the assessment results, Patterson opined that Student is below average in his language functioning, processing speed, auditory processing, working memory and visual auditory pairing. Additionally, his recall of figures is in the low-average range. According to Patterson, Student meets the definition of specific learning disability because there are significant discrepancies between his ability and achievement in basic reading, written expression and production spelling. Patterson based his conclusion upon the difference in Student's average score on the CTONI non-verbal intelligence test and his lower achievement levels on standardized tests. Patterson believes that the difficulties are an auditory processing problem independent of Student's hard of hearing eligibility. Patterson attributed the discrepancy in ability and achievement to auditory processing associated with weaknesses in memory and recall

66. Patterson indicated that Student's English proficiency level was not clear, but Student performed significantly below his English level of performance when given simple Spanish language test and he therefore, believed that English was the appropriate language for the assessment. Patterson testified that Student's difficulty within the learning environment does not appear to be due to any physical disability, discipline, culture or economic factor.

67. Patterson recommended that Student be taught by visual modality with a sight-based reading program because he is having difficulty processing sounds. He recommended use of a program such as "framing your thoughts" from Project Read to assist with the development of written language. The program does not require Student to generate language himself; instead, the material is visually presented on 3x5 cards and student would arrange them to make sentences. The program would help Student learn to manipulate language. Patterson recommended a total communication approach to speech and language development including lip reading and possible sign language, to assist in building concepts of language so that Student can acquire appropriate vocabulary and linguistic concepts.

68. Patterson testified that Student needs one-to-one speech and language service to address his overall receptive and expressive language development for both oral and sign language. Patterson recommended that goals for Student include having Student increase his syntax and vocabulary and ability to answer "wh" questions with a narrative response.

Patterson also recommended that Student be given some assistance dealing with emotions, socialization and adaptive functioning skills.

69. On December 9, 2005, an amendment IEP meeting was held. In attendance at the meeting were: Student's parents, administrator/principal Teresita Saracho de Palma, assistant principal Leonor Martinez, special education teacher Sherry Sevilla, general education teacher Betty Chang school psychologist Laura Interiano, school speech pathologist Monica Chin, advocate Rodney Ford, and DHH case manager Dr. Robert Perry. Dr. Patterson presented his report. Interiano served as the translator for the meeting. There was little discussion of the report because District had not received the report in time to review it before the meeting.¹ Dr. Patterson's recommendations were noted in the IEP document. No goals were written at this meeting, it was solely a presentation of the report.

70. The meeting was translated into Spanish for parents. Parents were able to and did participate in the IEP meeting. Parents received all documents they requested translated into Spanish after the meeting. Parents did not have any difficulty understanding the translation although translation may not have been verbatim. Parents consented to the IEP.

71. On January 13, 2006, a follow-up amendment IEP meeting was held wherein Dr. Patterson's report was discussed. In attendance at the meeting were: Student's parents, administrator/principal Teresita Saracho de Palma, administrative designee Leonor Martinez, special education teacher Rebecca Chua, general education teacher Betty Chang, school psychologist/ interpreter Laura Interiano, speech and language pathologist Monica Chin, DHH case manager Dr. Robert Perry, and Student's Aunt Idalit Gonzalez.

72. Patterson was not present and was not invited to the meeting to discuss his report. The IEP team discussed the assessments and observations. Laura Interiano, District school psychologist disagreed with Patterson's report particularly with respect to his conclusion that Student has a learning disability that is "independent of his hard of hearing eligibility." She reasoned that: (A) not all of the tests were nonverbal, (B) Student is an English language learner, (C) Student has hearing loss and did not use amplification until, he was two years old, (D) the normative data from the instruments used to assess Student was not for individuals that are both hard of hearing and English language learners, and (E) amplification was not used during the assessment. Interiano agreed with Patterson's conclusion that Student has auditory processing and memory weaknesses, but she disagreed with his conclusion that Student's auditory processing deficit and memory issues were independent of his hearing loss. She based her opinion on her own assessment, the

¹ Patterson's engagement letter with the District stated that a report must be prepared by November 16, 2005 and forwarded to the District in time for the IEP. Although Patterson mailed his report to Student's advocate Rodney Ford and to District, neither received it. On December 5, 2005, Ford asked for the report to be faxed to both District and himself. Ford received his copy, but the Farmdale School principal, Leonor Martinez, did not receive the school's copy with sufficient time to prepare for the IEP. Although there was discussion of canceling the IEP, Student objected to the proposed cancellation and the meeting was held as previously scheduled.

conclusions of IEE Judy Nelson, and her understanding of the law pertaining to the special education eligibility classification of specific learning disability.² Interiano credibly testified that Student's auditory processing deficits and memory weakness are a result of his hearing disability and complicated by his lack of English language proficiency. Student does not have expressive communication skills in Spanish although he does understand the Spanish language.

73. The IEP team determined that Student had unique educational needs in the areas of reading, writing, math, auditory training and articulation. The IEP team designed a program to address Student's unique needs with goals, services and placement designed to address his unique educational needs.

74. The IEP team offered a mainstream general education placement with an itinerant DHH teacher to assist Student in the classroom and exposure to sign language and development language coordination with the classroom teacher. It was also agreed that the resource teacher would continue working on the writing goal contained in the November 23, 2004 IEP and would collaborate with the classroom teacher and itinerant DHH teacher on exposure to sign language until the triennial IEP meeting. Student's advocate Rodney Ford disagreed with the eligibility determination. Parents disagreed with the level of speech and language service and requested more time with the speech and language pathologist. Student's parents signed the IEP.

75. The meeting was translated into Spanish for parents. Parents were able to and did participate in the IEP meeting. Parents received all documents they requested translated into Spanish after the meeting. Parents did not have any difficulty understanding the translation although translation may not have been verbatim.

76. On February 2, 2006, and February 8, 2006, District speech pathologist Monica Chin conducted an assessment of Student. She utilized the Comprehensive Assessment of Spoken Language (CASL), the Goldman Fristoe Test of Articulation-2 (GFTA-2) and a language sample to assess Student. The tests are standardized for children proficient in English and without significant hearing loss. The Antonyms test analyzes aspects of word knowledge and language expression. Student scored an age equivalent of 6.6 years on the test. The Syntax construction test is designed to assess the ability of the examinee to generate sentences using a variety of morphosyntactic rules emphasizing the rules to formulate and express sentences. Student scored age equivalent of 4 years old on this test. The paragraph comprehension test is designed to measure the comprehension of syntax through spoken narratives. Student scored an age equivalent of 6.3 years on the test. On the test of nonliteral language that is designed to assess the ability to comprehend figurative speech, indirect requests and sarcasm, Student scored an age equivalent of 6.6

² As a practical matter, a determination of eligibility under the classification of specific learning disability should not be a significant concern. Once a Student is determined to be eligible for special education, a school district is required to craft an IEP to meet his unique educational needs regardless of the classification.

years. The test of pragmatic judgment is designed to measure the knowledge and use of pragmatic rules. Student scored an age equivalent of 6.6 years on the test. Student was 10 years and 11 months old at the time of the assessment. Chin determined that Student had functional language skills with a severe deficit in morphology/syntax. She recommended that the deficit be addressed in a collaborative/consultative model in the regular classroom curriculum.

77. Chin credibly testified that Student's speech was intelligible 99 percent of the time. He made occasional errors with the "ch/sh" sounds, which are characteristic of both English language learners and the DHH population. He made some speech errors with the "nd/n," "k/t" and "s/st" combinations. According to Chin, Student's speech is only minimally impaired and he no longer qualifies for speech therapy in the area of articulation.

78. On February 16, 2006, school psychologist Laura Interiano performed a psycho-educational assessment of Student. Interiano has a Bachelor of Arts degree from Willamette University in Political Science/Spanish and a Master of Science in Counseling from California State University, Los Angeles. She also has a general education teaching credential. The purpose of her assessment was to determine if any changes were necessary to Student's eligibility, placement or related services after having reviewed the IEE by Dr. Robert Patterson wherein Patterson opined that student met the eligibility criteria for Specific Learning Disability (SLD). Interiano acknowledged that Patterson's administration of the Comprehensive Test of Nonverbal Intelligence (CTONI) was appropriate. However, she disagreed with his interpretation that a SLD existed.

79. Student wore his hearing aides and amplification system during the assessment. Interiano is bilingual and did explore the limits of Student's understanding in Spanish. During the assessment, Student was given Spanish language support to augment his understanding. Interiano noted a lot of sound discrimination difficulty and difficulty understanding. She noted Student had difficulty understanding the instructions for standardized tests. She found that Student had impacted receptive and expressive language. Interiano attributes his language development problem to his hearing loss, delayed diagnosis of hearing loss and lack of proficiency in the English language. She administered the Wide Range Assessment of Memory and Learning, Second Edition (WRAML-2), Comprehensive Test of Phonological Processing (CTPP), Behavioral Assessment System for Children, Second Edition-Teacher Form (BASC-2) and BASC-2-Self Report Child, conducted observations, interviewed Student's teachers, interviewed school audiologist Tim Yamasaki, reviewed report cards, school records and all assessment data including assessments from the Open Court general education reading program.

80. The WRAML-2 is designed to assess memory. On the WRAML-2, core subtests, Student scored in the low-average range on story memory, verbal learning and numbers/letters. He scored in the average range on design memory, and finger windows. Student scored in the superior range on Picture memory. On the Memory Data portion of the exam, Student scored low-average in verbal memory, average in attention/concentration and above average in visual memory and a general memory score of average.

81. On Comprehensive Test of Phonological Processing, Student scored below average on Elision and word blending. Elision is a word game where students are asked to form new words when phonemes are removed from larger words and in word blending. Student scored low-average in memory for digits and nonword repetition. Student scored well below average in phonological awareness, low average in phonological memory and average in rapid naming.

82. On the BASC-2, teacher form, Student scored within the average range on all areas except withdrawal. In withdrawal, he scored a 63, which is consistent with at-risk. On the adaptive scales, Student scored at-risk on functional communication, but within the average range in all other categories. On the BASC-2, Self-report Child form, Student scored in the average range on all clinical scales and all adaptive scales except self-reliance. In self-reliance his score indicated clinical significance.

83. Interiano observed that Student was not an active participant in social interactions except with friends from the special day class. He also appeared to tune out and miss portions of the lessons, not keeping up with the pace of lessons given auditorily. He performed better in the art class where the classroom was quieter, he sat closer to the teacher and was given visual and concrete supports including pictures and written cues.

84. Interiano observed that it was sometimes difficult for Student to understand conversation depending on the topic of discussion. Interiano opined that Student is affected by his hearing impairment and his language impairments. She concluded that his cognitive ability is within the average range, but his hearing and language impairments are impacting his conceptualization, associative and cognitive expression resulting in below grade level performance.

85. Interiano credibly testified that Student's learning profile is typical of a hard of hearing student and not typical of a child with a learning disability. She explained that his decline in academic performance in the third grade is typical of English language learners as the language based-content of instruction dramatically increases in the third grade. Interiano readily admitted that Student has auditory processing deficits, but his auditory processing deficits are a result of his severe hearing loss and not independent of his early, profound hearing loss. Interiano believes that Student's predicament is further complicated by the fact that although he is instructed in English, and speaks in English, Student is not English proficient. Student's native language is Spanish and he still receives auditory input in Spanish at home. Spanish language assistance does augment Student's ability to understand as Interiano demonstrated by using Spanish cues and instructional augmentation. Dr. Patterson, the independent evaluator, is not bilingual and acknowledged that he could not entirely rule out a lack of English proficiency as a complicating factor.

86. Interiano's recommendations include use of pre-teaching, use of the Open Court general education instructional component for second language learners, reinforcement in small group or individualized format, use of scaffolding techniques, encouraging more

active participation, including calling on Student when he has not volunteered and a behavioral support plan or school counseling.

87. On February 17, 2006, a triennial IEP meeting was held.³ In attendance were: Student's parents, advocate Rodney Ford, principal/administrator Teresita Saracho de Palma, assistant principal/administrative designee Leonor Martinez, general education teacher Betty Chang, special education teacher Rebecca Chua, school psychologist Laura Interiano, speech pathologist Monica Chin, educational audiologist Tim Yamasaki, translator Rossanna Ravelli, and DHH Case manager Dr. Robert Perry.

88. The general education teacher noted that Student met his goals in writing, audiology, auditory training and articulation, but did not meet all of his goals in reading and math. Based upon Interiano's psycho-educational assessment, it was determined that Student did not have an auditory processing deficit independent of his hearing loss and was therefore not considered eligible for special education in the separate category of specific learning disability. The general education teacher noted in multiple places on the present levels of performance portions of the IEP, that Student's auditory processing deficits affecting thinking and reasoning affected his ability to maintain a rate of learning commensurate with his ability. After discussion of the various assessments, observations and present levels of performance, the IEP team determined that Student's unique educational needs were in reading, math, writing and educational audiology. The IEP team designed a program to address Student's unique educational needs with goals, services and placement designed to address Student's unique educational needs.

89. The placement offer for the remainder of the 2005-2006 school year and extended school year 2006 (ESY2006) was that Student would continue to attend Farmdale School mainstreamed in the general education class. Student would continue to be eligible for special education services as a hard of hearing student and a student with language and speech impairment. Student would continue to receive speech and language services once a week for 30 minutes, educational audiologist assistance for 10 minutes once a week, and instructional modification that included repeated instruction and extra time to finish tasks. Student was to continue use his hearing aides, and amplification. He was to receive support from special education and general education teachers including pre-teaching language arts at home, transportation and ESY. Listed within the IEP document, but not specifically within the section entitled "offer of FAPE" were pre-teaching services in language arts to be conducted in the home and introduction of sign language by the DHH teacher. Student was also to receive re-teaching services in the classroom during independent time.

90. The meeting was translated into Spanish for parents. Parents were able to and did participate in the IEP meeting. Parents received all documents they requested translated

³ At the triennial IEP meeting, Ford complained that the triennial IEP was late and should have been held in December. District staff responded that parents did not sign a triennial assessment plan until January 13, 2006, which delayed the IEP since assessments were required for the triennial IEP. Assessment reports were not provided to parents in advance of the meeting.

into Spanish after the meeting. Parents did not have any difficulty understanding the translation although translation may not have been verbatim. Parents consented to the IEP.

91. During the period of April 21, 2006, to May 6, 2006, advocate Rodney Ford and Dr. Robert Perry exchanged email about the District's failure to commence the in home instruction. The District's Carlson school home instruction program was unable to provide instruction in the home because the IEP did not specify the amount and duration of time. Rather than convening another IEP meeting, Ford asked that a document be prepared for parent to sign.

92. The District did provide an in-home DHH teacher beginning the week on May 8, 2006. However, the teacher had a family emergency during the summer and never returned.⁴

93. All IEP meetings during the 2005-2006 school year were translated into Spanish for parents. Parents were able to and did participate in the meeting. Parents received all documents they requested translated into Spanish after the meeting. Parents did not have any difficulty understanding the translation although translation may not have been verbatim.

94. Student was assessed in all areas of suspected disability for the 2005-2006 school year including receptive language, expressive language, basic reading, written expression and spelling.

95. All of Student's unique educational needs were identified including those in receptive language, expressive language, basic reading, written expression and spelling and an educational program was designed for Student with goals, services and placement designed to address his unique educational needs for the 2005-2006 school year. Although Student received educational benefit, the DHH in-home itinerant teaching services were not fully or timely implemented and consequently denied Student a FAPE for the 2005-2006 school year.

96. District considered the recommendations made by Dr. Patterson in the November 15, 2005 psycho-educational evaluation. District did not implement all of the recommendations made by Patterson in his report and was not legally obligated to do so. Student was not denied a FAPE on that basis.

⁴ Ford contacted Perry on September 6, 2006, and inquired about when a teacher would be available. Perry had significant difficulty finding someone that knew sign language to take the assignment. In November of 2006, the in-home teaching resumed. The parties agreed to 30 hours of compensatory time in in-home teaching as is memorialized in the November 9, 2006 IEP.

2006-2007 School Year (Fifth Grade)

97. On November 9, 2006, an amendment IEP meeting was held. In attendance were: administrator/principal Leonor Martinez, special education teacher Rebecca Chua, general education teacher Vy Tran, DHH Case Manager Dr. Robert Perry and Student's attorney Tania Whiteleather. Parents did not attend the meeting. The IEP team added the Voyager Passport reading intervention program for 40 minutes a day, clarified the provision of two hours per week of in-home pre-teaching with Open Court reading materials and added two additional hours per week of in-home pre-teaching compensatory for the period of September 5, 2006, to November 9, 2006, and 20 minutes per day interactive journal writing before school. The Voyager Passport Program is an intensive reading intervention program.

Compensatory Education

98. Monica McDearman, an associate clinical director for the Lindamood-Bell program, testified that the company records indicate that on July 25, 2006, the Lindamood-Bell Company performed an assessment of Student. The assessment included a standard battery of tests, which the company administers to prospective new clients regardless of primary language, language proficiency or hearing disability. McDearman did not administer the assessment, did not make the recommendations for programs and had never met Student. McDearman received extensive training in the Lindamood-Bell program assessments and has a bachelor's degree in Psychology from the University of California, Los Angeles. McDearman had no training or experience working with the DHH population and no working knowledge of the effect of profound hearing loss on development or performance in the DHH population.

99. The tests administered were standardized on a population of typically-developing English proficient students. McDearman was knowledgeable about the tests administered by the company. The Peabody Picture Vocabulary Test-III was administered to Student. Student received a standard score of 54, equating to an age equivalent of 5.3 years. The Detroit Tests of Learning Aptitude-4 Word Opposites was administered to Student resulting in a standard score of 1, below the 1st percentile. The Detroit Tests of Learning Aptitude, Verbal absurdities was administered to Student. The test resulted in a mental age score of less than 5.3 years. The Detroit Tests of Learning Aptitude-2, subtest for oral directions was administered to Student and resulted in a standard score of 1, less than the 1st percentile. The Test of Problem Solving-3, administered to Student, showed a standard score of 55, within the 1st percentile with an age equivalent of 6 years old. The Woodcock Reading Mastery Test-NU was administered to Student. Student received a Standard score of 81, in the 11th percentile with a grade equivalent of 2.3. Student received a Standard Score of 77, in the 8th percentile, at the 3.0 grade level in the Slosson Oral Reading Test-R. In the Wide Range Achievement Test-Revised/3, Student received a Standard Score of 75 in Spelling at the 5th percentile on the 2.0 grade level. In the arithmetic subtest, Student received a standard score of 78, in the 7th percentile at the third grade level. Student scored at the 3.9 grade level in the Gray Oral Reading test. For the Gray Oral Reading Test 4, Student received a standard score of 7, at the 4.2 grade level for reading rate, a standard score of 7, at

the 16th percentile at the fourth grade level for accuracy, a standard score of 6, at the 9th percentile for 3.7 grade level for fluency and a standard score of 7, at the 16th percentile for the 3.7 grade level in comprehension. The Lindamood Auditory Conceptualization Test 3 was administered to Student. Student received a standard score of 74, at the 4th percentile for 2.0 grade level equivalency. Student also took two informal writing tests and a symbol imagery test. The tests did not result in grade level equivalency or standard scores.

100. Karen Crabtree, the clinic director recommended that Student receive an intensive sensory-cognitive instruction four hours per day, five days per week for six weeks using the (A) Seeing Stars program to develop phonemic awareness, symbol imagery to increase visual memory and reading and spelling skills; (B) Phoneme sequencing program; (C) the visualizing and verbalizing for Language Comprehension and Thinking Program; and (D) The on Cloud Nine math program. Crabtree recommended that Student receive 120 hours of instruction “to determine his response and to provide recommendations for further instruction.” Student offered McDearman’s testimony and test results to support his claim for compensatory education.

101. The test results are consistent with other standardized testing which results show that Student has delay in reading, language, writing and some math skills. The delays appear more pronounced in some of the Lindamood Bell tests because the tests are given orally and have no accommodations for DHH disability. The normative data for the tests is an English proficient non-disabled, hearing population. The evidence does not support a finding of compensatory education because Student has been offered a FAPE at all times between June 19, 2002, and July 26, 2006, except to the extent that the District was unable to provide some of the in home itinerant teacher services in the period of June 2006 to November 2006.

102. The failure to provide thirty hours of DHH in-home itinerant teacher services has been addressed by the parties by the agreement to 30 hours of compensatory in-home itinerant DHH teacher services as set forth in the November 9, 2006 IEP. The evidence does not support any additional award of compensatory education in this matter.

LEGAL CONCLUSIONS

Applicable Law

1. Student, as the petitioner, has the burden of proving the essential elements of his claim. (*Schaffer v. Weast* (2005) 546 U.S. 49 [126 S.Ct. 528].)

2. Under both state and federal law, students with disabilities have the right to a free appropriate public education. (20 U.S.C. § 1400; Ed. Code, § 56000.) The term “free appropriate public education” means special education and related services that are available to the student at no cost to the parents, that meet the state educational standards, and that conform to the student’s IEP. (20 U.S.C. § 1401(9).)

3. A district is required to assess a child in all areas related to a suspected disability, and no single procedure may be used as the sole criterion for determining whether the child has a disability or for determining an appropriate educational program for the child. (Ed. Code, § 56320, 20 U.S.C. § 1414(a)(2), (3).) Before any action is taken with respect to the initial placement of an individual with exceptional needs, an assessment of the pupil's educational needs shall be conducted. (Ed. Code, § 56320, Cal. Code Regs., tit. 5, § 3030 (j).) Thereafter, special education students must be reassessed every three years or more frequently, if conditions warrant, or if the pupil's parent or teacher requests a new assessment and that a new IEP be developed. (Ed. Code, § 56381.) Tests and assessment materials must be administered by trained personnel in conformance with the instructions provided by the producer of such tests. (20 U.S.C. § 1414(a)(2), (3); Ed. Code, § 56320, subds. (a) & (b).)

4. Tests and assessment materials must be validated for the specific purpose for which they are used; must be selected and administered so as not to be racially, culturally or sexually discriminatory; must be provided and administered in the student's primary language or other mode of communication unless this is clearly not feasible. Tests must be administered by trained personnel in conformance with the instructions provided by the producer of such tests. (20 U.S.C. § 1414(a)(2), (3); 34 C.F.R. § 300.532, subds. (a) & (c); Ed. Code, § 56320, subds. (a) & (b).) Assessments must be conducted by individuals who are knowledgeable of the student's disability, and any psychological assessment, including individually administered tests of intellectual or emotional functioning and must be administered by a credentialed school psychologist. (Ed. Code, §§ 56320(b)(3), (g), 56324.) The assessment materials must assess specific areas of educational need and not merely provide a single general intelligence quotient. (20 U.S.C. § 1414(b)(2)(B); 34 C.F.R. § 300.532, subd. (d); Ed. Code, § 56320, subd. (c).) All tests administered must be reported in writing. (Ed. Code, § 56327.)

5. When a parent disagrees with an assessment obtained by the public educational agency, the parent has the right to an independent educational evaluation (IEE) from qualified specialists at public expense unless the educational agency is able to demonstrate at a due process hearing that its assessment was appropriate. (Ed. Code, §§ 56329(b) & (c), 56506 subd. (c); 34 C.F.R. § 300.502.) If a parent requests an IEE at public expense, the public agency must, without unnecessary delay, either initiate a due process hearing to show that its evaluation is appropriate, or ensure that an IEE is provided at public expense, unless the agency demonstrates in a hearing that the evaluation obtained by the parent did not meet agency criteria. (34 C.F.R. § 300.502, subd. (b)(2).) (*Pajaro Valley Unified School District v. J.S.* (N.D. Cal. 2006) 2006 U.S. Dist. Lexis 90840; *Norton v. Orinda Union School District* (9th Cir. 1999) 1999 U.S. App. Lexis 3121.

6. The results of an IEE must be considered by the public agency, if it meets agency criteria, in any decision made with respect to the provision of FAPE to the child. (20 U.S.C. § 1415 (b)(1) & (d)(2); 34 C.F.R. § 300.502(c)(1).)

7. California law permits two methods for determining a specific learning disability: (1) the severe discrepancy method; and 2) the “response to intervention” (RTI) method. (Ed. Code, § 56337.) The severe discrepancy method is described in California Code of Regulations, title 5, section 3030, subdivision (j). Under that provision, a child has a specific learning disability if the child has a disorder in one or more basic processes (such as auditory or visual processing) and “has a severe discrepancy between intellectual ability and achievement in one or more of the academic areas specified in section 56337, subdivision (a) of the Education Code.”

8. Specific learning disability does not include “learning problems that are primarily the result of visual, hearing, or motor disabilities, of mental retardation, of emotional disturbance, or of environmental, cultural, or economic disadvantage.” (34 C.F.R. § 300.8(c)(10)(ii); Ed. Code, § 56337, subd. (a).)

9. The IEP is a written document for each child who needs special education and related services. The contents of the IEP are mandated by the IDEA. The IEP must include an assortment of information, including a statement of the child’s present levels of academic achievement and functional performance. The IEP must also include a statement of measurable annual goals and objectives that are based upon the child’s present levels of academic achievement and functional performance and a description of how the child’s progress toward meeting the annual goals will be measured. Finally, the IEP must include when periodic reports of the child’s progress will be issued to the parent, and a statement of the special education and related services to be provided to the child. (20 U.S.C. § 1414(d)(1)(A); 34 C.F.R. §§ 300.346, 300.347.)

10. An IEP team consists of (1) parents, (2) one regular education teacher, (3) one special education teacher of the pupil, (4) a representative of the local education agency (LEA), (5) an individual who can interpret the instructional implications of the assessment results, (6) at the discretion of the parents or LEA, other individuals who have knowledge or special expertise regarding the pupil, including related services personnel, as appropriate, and (7) the individual with exceptional needs. (Ed. Code, § 56341, subd. (b)(1-7).) Participants on the IEP team are expected to be knowledgeable as to the student’s disability and educational history. (*Shapiro v. Paradise Valley Unified School District No. 69* (9th Cir. 2003) 317 F.3d 1072, 1076, 1078.) The IEP team is required to meet at least annually to review student’s progress and the plan. (Ed. Code, § 56343, subd. (d).) The term of an IEP is one year. The annual IEP replaces the prior IEP. Service providers may be included at the discretion of the parent or LEA, but they are not mandatory members of the IEP team. (*Shaw v. District of Columbia* (D.D.C. 2002) 238 F.Supp.2d 127, 140-141; 34 C.F.R. § 300.344(a)(6) [now 34 C.F.R. § 300.321(a)(6)].)

11. A procedural requirement, found in both State and federal law, requires that the parents of a child with a disability be afforded an opportunity to participate in meetings with respect to the identification, assessment, educational placement and provision of a FAPE to the child. (Ed. Code, §§ 56304, 56342.5; 34 C.F.R. § 300.501(b).) Thus, parents are required members of the IEP team. (§ 1414(d)(1)(B)(i); 34 C.F.R. § 300.321(a)(1); Ed.

Code, § 56341, subd. (b)(1).) Education Code section 56341.1 also requires the IEP team to consider, among other matters, the strengths of the pupil and the results of the initial assessment or most recent assessment of the pupil. The IEP team must consider the concerns of the parents throughout the IEP process. (20 U.S.C. § 1414(c)(1)(B), (d)(3)(A)(i), (d)(4)(A)(ii)(III); 34 C.F.R. §§ 300.305(a)(i), 300.324(a)(1)(ii), (b)(1)(ii)(C); Ed. Code, § 56341.1, subds. (a)(1), (d)(3) & (e).)

12. A parent has meaningfully participated in the development of an IEP when he is informed of his child's problems, attends the IEP meeting, expresses his disagreement regarding 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; *Fuhrmann v. East Hanover Bd. of Educ.* (3rd Cir. 1993) 993 F.2d 1031, 1036 [parent who has an opportunity to discuss a proposed IEP and whose concerns are considered by the IEP team has participated in the IEP process in a meaningful way].)

13. Regarding substantive appropriateness under the IDEA, the Supreme Court addressed the level of instruction and services that must be provided to a student with disabilities to satisfy the IDEA's requirements. The Court determined that a student's IEP must be designed to meet the unique needs of the student, be reasonably calculated to provide the student with some educational benefit, and comport with the student's IEP. However, the Court determined that the IDEA does not require school districts to provide special education students with the best education available or to provide instruction or services that maximize a student's abilities. (*Rowley v. Board of Hendrick Hudson* (1982), 458 U.S. 176, 198 [102 S.Ct. 3034, 73 L.Ed.2d 690].) The Court stated that school districts are required to provide only a "basic floor of opportunity" that consists of access to specialized instructional and related services, which are individually designed to provide educational benefit to the student. (*Id.* at p. 200.)

14. To determine whether a District offered a student a FAPE, the focus is on the adequacy of the placement the District actually offered, rather than on the placement preferred by the parent. (*Gregory K. v. Longview School District* (9th Cir. 1987) 811 F.2d 1314.) Under *Rowley*, *supra* at 179, a challenge to an IEP requires resolution of two issues: (1) whether the school district complied with the procedural requirements of IDEA, and (2) whether the challenged IEP was reasonably calculated to enable the child to receive educational benefits. If the school district's program was designed to address student's unique educational needs, was reasonably calculated to provide some educational benefit, and comported with the IEP, then the District provided a FAPE, even if student's parents preferred another program and even if his parents' preferred program would have resulted in greater educational benefit. The factual showing required to establish under *Rowley* that a student has received some educational benefit is not demanding. For a student in a mainstream class, "the attainment of passing grades and regular advancement from grade to grade are generally accepted indicators of satisfactory progress." (*Walczak v. Florida Union Free Sch. Dist.* (2d. Cir. 1998) 142 F.3d 119, 130.) A district need not guarantee that a student will make a month's academic progress in a month's instruction; a student may benefit even though his progress is far less than one grade level in one school year. (See,

e.g., *Houston Indep. Sch. Dist. v. Bobby R.*, *supra*, 200 F.3d at p. 349 n.3.) A two-month gain in reading in 10 instructional months has been held an adequate showing. (*Delaware Valley Sch. Dist. v. Daniel G.* (Pa. Cmwlth. 2002) 800 A.2d 989, 993-94.)

15. A student derives benefit under *Rowley* when he improves in some areas even though he fails to improve in others. (See, e.g., *Fort Zumwalt Sch. Dist. v. Clynes* (8th Cir. 1997) 119 F.3d 607, 613; *Carlisle Area School v. Scott P.*, *supra*, 62 F.3d at p. 530.) He may derive benefit while passing in four courses and flunking in two. (*Cypress-Fairbanks Indep. Sch. Dist. v. Michael F.* (S.D.Tex. 1995) 931 F.Supp. 474, 481.) A showing of progress does not require that a D student become a C student and thus rise in relation to his peers. Progress may be found even when a student's scores remain severely depressed in terms of percentile ranking and age equivalence, as long as some progress toward some goals can be shown. (*Coale v. Delaware Dept. of Educ.* (D.Del. 2001) 162 F.Supp.2d 316, 328.)

16. A child is not required to be classified by his or her disability as long as each child who has a disability listed in paragraph three of section 1401 of title 20 of the United States Code and who, by reason of this disability, needs special education and related services as an individual with exceptional needs defined in Education Code section 56026. A disabled child's IEP must be tailored to the unique education needs of that particular child who, by reason of disability, needs special education and related services (*Heather v. State of Wisconsin* (1997) 125 F.3d 1045.) The term "unique educational needs" is to be broadly construed to include the student's academic, social, emotional, communicative, physical and vocational needs. (*Seattle Sch. Dist. No.1 v. B.S.* (9th Cir. 1996) 82 F.3d 1493, 1500.)

17. When a LEA fails to provide FAPE to a student with a disability, the student is entitled to relief that is "appropriate" in light of the purposes of the IDEA. (*School Committee of the Town of Burlington v. Department of Education* (1996) 471 U.S. 359, 374 [85 L.Ed.2d 385, 105 S.Ct. 1996]; 20 U.S.C. § 1415 (i)(C)(iii).) Based on the principle set forth in *Burlington*, federal courts have held that compensatory education is a form of equitable relief which may be granted for the denial of appropriate special education services to help overcome lost educational opportunity. (*Parents of Student W. v. Puyallup School District* (9th Cir. 1994) 31 F.3d 1489, 1496.) The right to compensatory education accrues when the district knows, or should know, that student is receiving an inappropriate education. Compensatory education does not, however, necessarily involve an obligation to provide day-for-day or session-for-session replacement for opportunity or time missed. (*Id.* at p. 1497). The purpose of compensatory education is to "ensure that the student is appropriately educated within the meaning of IDEA." (*Ibid.*) Both reimbursement and compensatory education issues are equitable issues requiring a balancing of the behaviors of the parties.

18. An award to compensate for past violations must rely on an individualized assessment, just as an IEP focuses on the individual student's needs. (*Reid v. District of Columbia* (D.D.C. Cir. 2005) 401 F.3d 516, 524.) When determining an award of compensatory education, the inquiry must be fact-specific. (*Ibid.*) The award must be special education services the school district should have supplied in the first place. (*Ibid.*)

Determination of Issues

Issue 1.

Did the District assess Student in all areas of suspected disability from June 19, 2002, to the filing of the amended complaint on July 21, 2006?

1. Based upon Factual Findings 6, 10, 12, 16, 18, 24, 29, 76 through 86 and 94 and Legal Conclusions 3 and 4, Student had been assessed in all areas of suspected disability before July 21, 2006.

Issue 2.

Did District commit a procedural violation by failing to have the required participants at Student's November 11, 2002 Individualized Educational Program (IEP) meeting?

2. Based upon Factual Finding 5, the District did not convene an IEP meeting for Student on November 11, 2002, and therefore no violation exists.

Issue 3.

Did District deny Student a FAPE by failing to provide to qualified translator and appropriate translation for all IEP meetings from June 19, 2002, to July 21, 2006, to allow parents to participate in the IEP process?

3. Based upon Factual Findings 9, 15, 28, 41, 70, 75, 90 and 93 and Legal Conclusions 10 through 12, District provided adequate translations of IEP meetings and documents. Parents were allowed the opportunity and did participate in the IEP process. Student was not denied a FAPE on that basis.

Issue 4.

Did the District deny Student a FAPE from June 19, 2002, until September 2005, by failing to identify Student's unique educational needs in receptive and expressive language?

4. Based upon Factual Findings 8, 11, 14, 17, 19 through 27, 30 through 38, 43 through 73, and 76 through 88 and Legal Conclusions 9, 13 through 17, Student was not denied a FAPE because his unique educational needs in receptive and expressive language were identified and assessed in the period of June 19, 2002, to September 2005.

Issue 5.

Did the District deny Student a FAPE from June 19, 2002, until December 2005 by failing to identify Student's unique educational needs in basic reading, written expression, and spelling?

5. Based upon Factual Findings 8, 11, 14, 17, 19 through 27, 30 through 38, 43 through 73 and 76 through 88 and Legal Conclusions 9, 13 through 17, Student was not denied a FAPE because his unique educational needs in reading, written expression, and spelling were identified and assessed in the period of June 19, 2002, to December 2005

Issue 6.

Did District deny Student a FAPE by failing to consider and timely implement the recommendations contained in the November 15, 2005 Psycho-educational Independent Educational Evaluation (IEE) performed by Dr. Robert Patterson?

6. Based upon Factual Findings 43 through 68 and Legal Conclusion 6, District did consider, but did not implement all of the recommendations made by Dr. Robert Patterson in his psycho-educational assessment report. However, there is no legal requirement that District implement any recommendations made in an IEE. Student was not denied a FAPE on that basis.

Issue 7.

Did District deny Student a FAPE by delaying identification of Student's needs by delaying the approval of an IEE for Speech and Language?

7. Based upon Factual Findings 31 through 42 and Legal Conclusions 5 and 6, the speech and language IEE was delayed for several months. The delay was caused by District's attempts to clarify the type of IEE desired by parents and its attempts to secure parents' permission for District's own assessment before consenting to the IEE. Although District had the right to conduct its own assessment, it agreed to an IEE after receiving a determination from the CDE that it had not acted in a timely manner in providing information about an IEE. The evidence did not establish that there was a resulting failure to identify Student's needs or that Student was denied of FAPE on that basis.

Issue 8.

Did the District deny Student a FAPE by failing to fully and timely implement the DHH in home itinerant teacher services contained in the February 17, 2006 IEP?

8. Based upon Factual Findings 89 through 92, 95 and 102, and Legal Conclusions 2, 9 and 13 through 17, Student was denied a FAPE when the District failed to fully and timely implement the DHH in-home itinerant teacher services to provide sign language instruction and pre-teaching services in Student's home for two hours per day two, days per week. District was not able to find personnel capable of performing the task. District admitted that it failed to implement the DHH services until May 8, 2006 and failed to ensure continuity of service throughout the 2005-2006 school year and ESY.

Issue 9

Is Student entitled to compensatory education in the amount of 240 hours of Lindamood-Bell Language processing services, reimbursement for Lindamood-Bell assessments and transportation?

9. Based upon Factual Findings 95, 97 through 102 and Legal Conclusion 18, the District failed to fully and timely implement the DHH in home itinerant teacher services to provide sign language instruction and pre-teaching services in Student's home for two hours per day two days per week. District was not able to find personnel capable of performing the task. District admitted that it failed to implement the DHH services until May 8, 2006. Student was denied a FAPE to the extent that the 30 hours of DHH services were not provided. However, the evidence did not support a finding that 240 hours of compensatory education from the Lindamood-Bell program was appropriate. Student was denied approximately 30 hours of DHH teacher services. District is currently providing 30 additional hours of DHH services to Student as compensatory education pursuant to an agreed upon November 9, 2006 IEP. No additional compensatory education is warranted.

ORDER

1. Student's request for relief from Respondent Los Angeles Unified School District is denied.
2. Student's request for reimbursement for Lindamood-Bell assessments is denied.
3. Student's request for compensatory education is denied.

PREVAILING PARTY

Pursuant to California Education Code section 56507, subdivision (d), the hearing decision must indicate the extent to which each party has prevailed on each issue heard and decided. Student prevailed on one issues. District prevailed on eight issues.

RIGHT TO APPEAL THIS DECISION

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

April 25, 2007

A handwritten signature in black ink that reads "Glynda B. Gomez". The signature is written in a cursive style with a horizontal line underneath the name.

GLYNDA B. GOMEZ
Administrative Law Judge
Office of Administrative Hearings
Special Education Division