

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

PARENT ON BEHALF OF STUDENT,

v.

SAN LORENZO UNIFIED SCHOOL
DISTRICT.

OAH Case No. 2015091115

DECISION

Student filed a due process hearing request (complaint) with the Office of Administrative Hearings, State of California, on September 25, 2015, naming San Lorenzo Unified School District.

Administrative Law Judge B. Andrea Miles heard this matter in San Lorenzo, California, on November 19, 23, and 24, 2015 and December 1 and 3, 2015.

Gail S. Hodes, Attorney at Law, represented Student. Student's mother attended the hearing. Student's father attended the hearing when he testified.

Shawn Olson Brown, Attorney at Law, represented San Lorenzo. Edward Diolazo, Director of Special Services, attended the hearing on behalf of San Lorenzo.

A continuance was granted for the parties to file written closing arguments and the record remained open until December 29, 2015. Upon timely receipt of the written closing arguments, the record was closed and the matter was submitted for decision.

PROCEDURAL MATTERS

1. On December 16, 2015, Student filed a Request to Submit Supplemental Evidence, a declaration from Student's mother, and a copy of Student's December 2015 report card. Student's motion was denied in a separate order.

2. On December 29, 2015, San Lorenzo filed a Motion to Exclude Petitioner's Closing Brief on the basis that it was untimely. However, the evidence shows that Student filed his closing brief with OAH in a timely manner. Student served his closing brief on Student approximately 25 minutes after filing his brief with OAH. As no response to closing briefs is permitted, the 25 minute delay in serving San Lorenzo did not harm San Lorenzo in any manner. San Lorenzo's motion is denied.

ISSUES¹

1. Did San Lorenzo deny Student a free appropriate public education by failing to appropriately assess Student during the 2014-2015 school year, in the following areas of suspected disability:

- a. speech and language;
- b. academics; and
- c. social-emotional functioning?

2. Did San Lorenzo deny Student a FAPE by failing to assess Student's occupational therapy needs during the 2014-2015 school year?

3. Did San Lorenzo deny Student a FAPE by failing to assess Student during the 2015-2016 school year, in the following areas of suspected disability:

- a. speech and language;
- b. academics;
- c. social-emotional functioning; and
- d. occupational therapy needs?

4. Did San Lorenzo deny Student a FAPE by failing to make him eligible for special education and related services from May 24, 2014, to the time of hearing as a student

¹ At the start of the hearing Student moved to make certain amendments to the issues previously memorialized in the November 13, 2015 Order Following Prehearing Conference. Student withdrew two of his issues in their entirety. Student moved for and was permitted to make changes to add the word "appropriately" to Issue 1. Student moved to amend Issue 4 to reflect the date of May 24, 2013. That motion was denied. The ALJ has reorganized and renumbered the remaining issues for clarity. These are the issues heard and decided. The ALJ has the authority to redefine a party's issues providing no substantive changes are made. (*J.W. v. Fresno Unified School Dist.* (9th Cir. 2010) 626 F.3d 431, 442-443.)

with a speech and language disability, other health impairment, and specific learning disability?

5. Did San Lorenzo deny Student a FAPE by failing to provide an appropriate educational program to meet his individual and unique needs from September 2013, to the time of hearing, by failing to provide Student with:

- a. appropriate academic support;
- b. appropriate occupational therapy support;
- c. appropriate behavior support;
- d. appropriate supervision for safety awareness issues; and
- e. an emergency plan for Student regarding his severe health risk of anaphylactic allergic reaction?

6. Did San Lorenzo violate Parents' and Student's procedural rights by failing to fund a psychoeducational independent educational evaluation for Student pursuant to Parent's November 20, 2014 request?

SUMMARY OF DECISION

This Decision holds that Student did not meet his burden of proving that Student was eligible for special education under the categories of speech and language, other health impairment, and specific learning disability beginning May 24, 2014 and ending at the time of the hearing. Based on that finding, San Lorenzo did not deny Student a FAPE at any time alleged in the issues in this case.

The Decision also holds that San Lorenzo did not deny Student a FAPE during the 2014-2015 school year for failing to appropriately assess Student in the areas of speech and language, academics, and social-emotional functioning, and for failing to assess Student's occupational therapy needs. Student did not meet his burden of proving that San Lorenzo denied Student a FAPE during the 2014-2015 school year by failing to assess Student in the areas of speech and language, academics, social-emotional functioning, and occupational therapy needs.

This Decision finds that although San Lorenzo committed the procedural violation of unduly delaying the funding of Student's independent psychoeducational and academic assessments, this delay did not result in a denial of FAPE for Student.

FACTUAL FINDINGS

Jurisdiction

1. Student is a six-year-old boy who resided with his mother, father, and four brothers within the geographical boundaries of San Lorenzo School District at all times relevant to this case. During the last six months, prior to the hearing, Student's paternal grandmother resided with Student and his family. Although English is Student's primary language, in the home he is exposed to Chinese and Spanish.

2. San Lorenzo has not found Student eligible for special education. In this case, Student challenges his eligibility for special education.

Prior to Entering Kindergarten

3. Student's paternal grandmother worked as a social worker at Golden Gate Regional Center for approximately 15 years. When Student was approximately two years old, Grandmother became concerned that Student's communication and social skills were not developing at the same rate as his peers. She recommended that Parents have Student evaluated at their local regional center. In addition to other services, regional centers provide early intervention services to children under the age of three, who have a developmental disability or are at risk of having a developmental disability.

4. At 28 months of age, the Regional Center of the East Bay assessed Student to determine whether he qualified for early intervention services. Regional Center found Student eligible for early intervention services due to a 33 percent delay in in his adaptive and social-emotional skills. The assessment noted that Student had some delay in the development of his fine motor skills; however, Student refused to try to perform some of the assessment's fine motor tasks, which lowered Student's score on the assessment. Additionally, Regional Center conducted a bilingual speech and language assessment. The assessment found Student's receptive language skills to be within normal limits and Student's expressive language skills mildly delayed. The delay was not significant enough for the assessor to recommend that Student receive speech and language services as an early intervention service.

5. At approximately 30 months of age, Student began receiving early intervention services through Regional Center. Student received two to five hours weekly of specialized instruction both at home and at Regional Center. The goal of the services was to help Student develop age-appropriate adaptive and social skills. During that same period, Student attended Alameda County Office of Education's Infant Development Center Program two days a week for two hours a day. At the age of three, Regional Center discontinued providing Student services due to the eligibility requirements limiting the early intervention services to children below the age of three.

6. Upon discontinuation of services, Student's case manager at Regional Center referred Student to San Lorenzo for a comprehensive assessment to determine whether Student qualified for special education. On March 29, 2012, San Lorenzo held a Student Study Team meeting to discuss the basis for the referral. Mother, Student's Regional Center case manager, and a program specialist from San Lorenzo attended the meeting. During the meeting, Mother and case manager expressed concerns that Student might have sensory issues. Student did not like to have his hands dirty, he hated to wear shoes and socks, he had tantrums, he did not like to have his hair combed, and he did not like loud noises. Additionally, Mother and case manager expressed concerns that Student lacked safety awareness and had food allergies. At the meeting, the team determined that San Lorenzo would assess Student for special education eligibility.

SAN LORENZO'S INITIAL ASSESSMENT²

7. In May 2012, San Lorenzo conducted an initial psychoeducational assessment and speech and language assessment. The speech and language assessment determined that Student presented with a phonological disorder, but average receptive and expressive language skills.

8. San Lorenzo performed a psychoeducational assessment of Student in May 2012. That assessment assessed Student's cognitive development, pre-academic skills, adaptive behavior skills, sensory and motor skills, and social-emotional development.

9. The motor skills portion of the assessment looked at how well Student was able to use his arms and legs for movement and how well he was able to use his hands and fingers to manipulate objects. The assessment noted that Student held his writing utensil with a fistful grasp, but he could copy vertical lines and circles. The use of a fistful grasp was not abnormal for a child Student's age. Student was able to manipulate large and small objects, but Student was not copying letters or using scissors. No significant sensory seeking or sensory sensitivities were observed.

10. The social-emotional portion of the assessment found that Student demonstrated appropriate eye contact and attention during the evaluation. However, Student's attention span was approximately 10 minutes with some verbal and physical prompts during preferred activities and approximately three to five minutes with non-preferred activities. He consistently showed an interest in playing with other children, although he had difficulty initiating play. He needed significant physical prompting and support at his preschool program to take turns with peers.

² The terms "assessment" and "evaluation" are synonyms. Federal statutes and regulations generally use the term "evaluation" for special education. California statutes and regulations generally use the term "assessment." This Decision will use the term "assessment" since that is the common usage in California, except when referring to a federal statute or independent educational evaluations.

11. Although the assessment determined that Student continued to show mild cognitive and pre-academic skill delays, the assessors did not believe that those delays rose to the level of Student meeting eligibility criteria for special education. Ultimately, the assessors concluded that Student met the eligibility requirements for special education under the category of speech and language impairment due to an articulation disorder.

JUNE 5, 2012 IEP TEAM MEETING

12. On June 5, 2012, San Lorenzo held an IEP team meeting to review the results of the assessments and to determine whether Student qualified for special education. The IEP team consisted of Mother; the school psychologist, who performed the initial assessment of Student; the speech-language pathologist, who performed the initial assessment of Student; the special day class preschool teacher, Nicole Kelly; special education coordinator, Thomas Mills; a general education teacher; and early intervention program teacher. The IEP team concluded that Student met the eligibility requirements for speech and language impairment due to an articulation disorder.

13. After determining Student's needs, the IEP team developed IEP goals for Student for the 2012-2013 school year. Student's June 5, 2012 IEP included five goals in the areas of pre-academics, socialization, and speech. The speech goal addressed Student's articulation disorder.

14. The June 5, 2012 IEP offered Student placement in a special education preschool class 120 minutes a day, five days a week. The IEP also offered Student 60 minutes weekly of speech and language services in a group setting in a special education classroom. Mother agreed to the offered IEP.

2012-2013 SCHOOL YEAR

15. During the 2012-2013 school year, Student was placed in a special education preschool class located on Royal Sunset Elementary School's campus. Student attended the special education class two hours a week, five days a week. Additionally, Student attended a general education Head Start preschool program five days a week.

16. The special education preschool class consisted of six to eight special education students. The class provided an integrated service approach. All students in the class received occupational therapy services from an occupational therapist one time a week and a sensory motor program was infused into the daily curriculum.

17. Nicole Kelly, a certified special education teacher, taught Student in the special education preschool classroom during the 2012-2013 school year. Two other adult staff members assisted the students in the class. Throughout the school year, Ms. Kelly worked with Student on his pre-academic and socialization IEP goals. Student performed well in the special education preschool class and Student demonstrated the highest skill level of the students in the class. Student met all of his IEP goals during that school year.

SAN LORENZO'S MAY 2013 ASSESSMENTS

18. In preparation for Student's annual IEP team meeting, San Lorenzo conducted an assessment in the areas of pre-academics, gross and fine motor skills, social-emotional, speech and language, and daily living skill in May 2013. The purpose of the assessment was to help gauge Student's present level of performance and to determine Student's progress on his goals. Denise Bilderback, a licensed speech and language pathologist, conducted a speech and language assessment and Ms. Kelly conducted the other assessments. Both assessors detailed their findings in written reports, which they provided to Parent.

PSYCHOEDUCATIONAL ASSESSMENT

19. As part of her assessment, Ms. Kelly utilized the Standardized Brigance Inventory of Early Learning Development II to measure Student's progress on his IEP goals. Student was three years and 11 months old at the time Ms. Kelly administered the Brigance. Student's performance on the Brigance was consistent with Ms. Kelly's observations of Student's progress during the school year.

20. Student's fine motor skills were assessed. Student continued to hold writing instruments with a fist grasp, although, with prompting, Student was able to hold the writing instrument with a proper tripod grasp. Student did not require intervention in that area, because Student's use of a fist grip was not unusual for a child Student's age. As part of her assessment, Ms. Kelly observed Student in his general education preschool classroom and spoke with Student's general education teacher. Student's general education teacher was concerned that Student's fine motor skills needed strengthening. However, the general education teacher agreed with Ms. Kelly that Student's fine motor skills were developmentally appropriate and could be strengthened in the general education setting without special education interventions.

21. Throughout the preceding school year, Ms. Kelly saw an improvement in Student's social-emotional development. At the beginning of the school year, Student was impatient and self-focused, but as the year progressed, Student learned the classroom rules and learned to wait to take his turn. At the time of the assessment, Ms. Kelly felt that Student's attention level was typical for a child Student's age. Student's general education teacher shared with Ms. Kelly that Student was easily distracted in the classroom, but with prompting, he could be redirected to the task at hand.

22. Ms. Kelly recommended exiting Student from special education. She based her opinion on the progress Student made during the school year. Ms. Kelly believed that Student would be better served during the next school year in the less restrictive environment of the general education classroom.

SPEECH AND LANGUAGE ASSESSMENT

23. Ms. Bilderback conducted the speech and language assessment to ascertain Student's present levels of performance in the areas of articulation and expressive language skills. Ms. Bilderback was familiar with Student's progress because she had provided Student with speech and language services throughout the 2012-2013 school year. During the assessment, Ms. Bilderback assessed Student's articulation by using the Fisher-Logemann Test of Articulation Competence and assessed Student's expressive language skills by analyzing a sample of 51 of Student's utterances. At the time of the assessment, Student was three years and nine months old.

24. The results of the Fisher-Logemann Test, demonstrated some articulation errors, but those errors were typical for a child Student's age. Student's previously identified speech articulation deficits, which were not typical of his age, had been remediated through speech therapy.

25. Ms. Bilderback collected a 51 utterance language sample over several therapy sessions in order to assess Student's expressive language skills. When the 51 utterances from the sample were averaged together, Ms. Bilderback found Student averaged 4.7 morphemes per utterance. A morpheme is the smallest grammatical unit in language. A child Student's age should average between 3.2 to 5.0 morphemes per utterance. Student's test score placed him on the high end of the average range of his age group. Additionally, using the 51 utterances, Ms. Bilderback determined that Student used a variety of grammatical forms correctly and that he largely spoke in complete sentences. He occasionally spoke in incomplete sentences, however, that behavior was normal for a child Student's age.

26. Based on Student's progress during speech therapy and the results of the assessment, Ms. Bilderback found that Student no longer required special education speech and language services and that he should be exited from special education. Although Student contends that Student still required speech and language special education services and should not have been exited at that time, Student did not provide any evidence that contradicted the results of Ms. Bilderback's assessment.

MAY 24, 2013 IEP TEAM MEETING

27. On May 24, 2013, San Lorenzo held an IEP team meeting to discuss Student's progress over the past school year and to determine his eligibility for special education. The IEP team consisted of Mother, Student's Head Start teacher, Head Start site supervisor, a San Lorenzo special education program specialist, Ms. Kelly, and Ms. Bilderback.

28. Ms. Bilderback shared her assessment results and personal observations with the IEP team. Ms. Bilderback did not find Student's receptive language skills or expressive language skills to be areas of need. She based her opinion regarding Student's receptive language skills on the results of the June 2012 speech and language assessment, which found Student's receptive language skills to be in the average range, and her own personal

observations. Ms. Bilderback's observations that Student was able to follow directions in the classroom and was able to answer questions about the stories that were read to him supported that finding. Additionally, both Ms. Kelly and Student's Head Start preschool teacher's observations of Student's classroom behavior were consistent with Ms. Bilderback's findings regarding Student's receptive language skills.

29. Both Ms. Kelly and Student's Head Start teacher expressed that Student had made great progress during the school year. The IEP team discussed concerns regarding Student's fine motor skills, particularly, that Student would get frustrated using scissors, and that he continued to use a fist grasp of writing instruments. However, Student's fine motor skills were not atypical for a child Student's age.

30. Student met all of his IEP goals during the 2012-2013 school year. He made progress in the areas of pre-academics, communication, and social-emotional development. Neither Ms. Kelly's assessment nor Ms. Bilderback's assessment found that Student met the eligibility requirements for special education. Although Student still had some areas of concern, such as fine motor skill and attention level, the IEP team concluded that Student's needs could be met in the general education classroom and that Student should be exited from special education. Mother signed the May 24, 2013 IEP, which exited Student from special education.

2013-2014 School Year

31. During the 2013-2014 school year, Student attended a Head Start preschool in San Lorenzo. Neither party presented evidence regarding Student's progress in school during that school year. However, during that period Mother, Father, and Grandmother continued to have concerns that Student was not developing as the same rate as his older brothers. Parents and Grandmother continued to be concerned about Student's lack of safety awareness.

32. On July 23, 2014, with the help of a special education advocate, Mother sent Edward Diolazo, San Lorenzo's director of special services, a letter indicating that she was concerned about Student's education progress and requesting that San Lorenzo assess Student for special education.

2014-2015 School Year

33. At the beginning of the 2014-2015 school year, Student attended kindergarten at Del Ray Elementary School with Ms. Groves as his teacher. Ms. Groves expressed concerns about Student's academic performance and reduced attention level to Mother. Ms. Groves's comments to Mother combined with Mother's observations of Student at home furthered Mother's belief that Student needed special education interventions. During the hearing, neither party called Ms. Groves to testify as a witness to support their case.

AUGUST 27, 2014 504 PLAN MEETING AND STUDENT STUDY TEAM MEETING

34. On August 27, 2014, San Lorenzo held a Section 504³ meeting to create a plan to address Student's needs that stemmed from his severe food allergies. Student was highly allergic to soy, citrus, pears, kiwi, and eggs. Ingesting any of those foods put Student at risk of going into anaphylactic shock. Mother wanted Student to carry his EpiPen⁴ and inhaler at all times. The 504 team determined that before that requested accommodation could be provided, the school nurse needed to evaluate Student to determine whether Student was mature enough to carry his inhaler and EpiPen with him. The team, which included Mother, agreed that Mother would obtain emergency plan of action from Student's doctor and submit it to the school. The idea was that school staff would implement that emergency plan in the event that Student experienced an allergic reaction or asthmatic episode. Additionally, the 504 plan indicated that the school nurse would train school staff and volunteers on the use of the EpiPen in the event that Student experienced an allergic reaction. The 504 plan called for staff members to encourage Student to use his inhaler prior to any exercise and to gargle and rinse his mouth post use of the inhaler.

35. Accommodations related to Student's food allergies were included in the Section 504 plan. The Section 504 plan required an adult to supervise Student in the cafeteria and classroom when food was present to avoid Student ingesting any of the foods to which he was allergic. In the classroom, the staff was to avoid the use of the identified allergens in class project, at parties, and in cooking. The Section 504 plan called for non-food items to be used as incentives, prizes, gifts, and awards. The staff was to encourage Student to wash his hands before and after eating in an effort of minimizing exposure to allergens.

36. On the same day as the 504 meeting, San Lorenzo held a Student Study Team meeting to discuss Mother's concerns about Student's progress in school. The participants of the Section 504 meeting comprised the Student Study Team. At the meeting, Mother expressed her concerns about Student's mumbling, delayed speech pattern, short attention span, underdeveloped fine motor skills, and social immaturity. Ms. Groves shared with the team that she was concerned about Student's performance in the classroom.

³ A 504 plan is an accommodation plan created pursuant to Section 504 of the Rehabilitation Act of 1973. (29 U.S.C. § 794; see 34 C.F.R. § 104.1 et. seq. (2000).) Generally, the law requires a school district to provide program modifications and accommodations to children who have physical or mental impairments that substantially limit a major life activity such as learning.

⁴ An EpiPen is a portable medical device that contains epinephrine, which can be injected into the body to reverse an allergic reaction.

37. In preparation for the Student Study Team Meeting, Merle Barkan⁵, one of San Lorenzo's speech and language therapists, conducted a screening of Student's articulation and language skills. Ms. Barkan conducted the screening to gather additional information and to determine whether Student required a more comprehensive speech and language assessment.⁶ As part of the screening, Ms. Barkan informally talked with Student to gauge his clarity of speech and to see whether Student exhibited any articulation errors. She then tested Student's articulation and language skills. Student passed the articulation portion of the screening, but failed the oral language portion of the screening. Based on the screening results, Ms. Barkan determined that Student required further testing to determine whether Student had a language disorder. Ms. Barkan presented her findings at the Student Study Team Meeting and recommended that Student be assessed further to determine whether he was eligible for special education under the category of speech and language impairment.

38. Based on the discussion at the meeting, the Student Study Team recommended that San Lorenzo conduct a comprehensive assessment of Student, including an assessment of Student's speech and language skills. As a result of the Student Study Team's recommendation, on September 10, 2014, Mother was provided with an assessment plan, which requested permission from Parents to assess Student for special education in the areas of academics, health, intellectual development, speech and language, social-emotional, and adaptive behavior. Mother signed the assessment plan on the same day and requested that San Lorenzo provide her with copies of the assessment reports five days prior to any IEP team meeting that would be held to discuss the results of the assessments.

SPEECH AND LANGUAGE ASSESSMENT

39. In October 2014, Ms. Barkan conducted a speech and language assessment of Student. The purpose of the assessment was to identify Student's present levels of performance in the area of speech and language and to determine whether Student met the special education eligibility requirements for speech and language impairment.

40. The assessment consisted of both formal and informal measures. The testing occurred over three 20-minute sessions. Ms. Barkan conducted the testing in conformance with the instructions provided by the producers of the tests. Student maintained an

⁵ Ms. Barkan has been a licensed speech and language pathologist since 1985. She received her certificate of clinical competence from the American Speech, Language, and Hearing Association in 1985. Ms. Barkan has worked for San Lorenzo as a speech and language pathologist for approximately 15 years. During that time, she has worked primarily with elementary school age children. Prior to working for San Lorenzo, Ms. Barkan worked as a private speech and language pathologist. Although, Ms. Barkan could not provide the exact number of speech and language assessments, she estimates the number to be in the high hundreds.

⁶ This Decision makes no findings regarding the circumstances surrounding the speech and language screening as it is not at issue in this Decision.

appropriate level of attention throughout the testing process. Student's level of attentiveness during the testing stood out to Ms. Barkan because of the concerns Mother had expressed about Student's inattentiveness during the Student Study Team meeting. During the testing, Student did not exhibit any delays in processing assessment questions or exhibit any impulsivity in his answers.

41. In preparation for the assessment, Ms. Barkan reviewed Student's student file, which contained Student's prior speech and language assessments and prior IEP. Ms. Barkan used the Fisher-Longemann Test of Articulation Competence to evaluate Student's articulation. The Fisher-Longemann examines a student's phonological systems and facilitates accurate and completed analysis and categorization of articulation errors.

42. The results of the Fisher-Longemann was consistent with San Lorenzo's speech and language assessment from May 2013, which indicated that Student no longer required speech therapy due to an articulation disorder. Any articulation errors Student exhibited during the testing were normal for a child Student's age. Based on the results of the Fisher-Longemann, Student did not meet the criteria for speech and language disorder because Student did not display reduced intelligibility or an inability to use the speech mechanism that significantly interfered with his communication and attracted adverse attention.

43. To assess Student's language skills, Ms. Barkan utilized the Clinical Evaluation of Language Fundamentals Preschool, Second Edition. The Clinical Evaluation is comprised of a series of subtests that assess the language skills of preschool-aged children who will be participating in an academic-oriented setting. The Clinical Evaluation uses multiple testing measures to assess Student's expressive and receptive language skills.

44. In addition to individual subtest scores, the Clinical Evaluation offers index scores that provide information about a child's strengths and weaknesses across receptive and expressive modalities, language content, and language structure. The test's scaled and standard scores reflect a comparison to the scores of other students of the same age. The test also provides a percentile rank of a student's performance compared to the rankings of other students who are of the same chronological age as Student. A percentile ranking score falling between 16 and 84 is considered within the average range.

45. Student scored in the average to just below average on all but one of the receptive language subtests. On the Word Classes Receptive subtest, Student scored in the second percentile rank, which is considered below average. The Word Classes portion of the test evaluates a child's ability to understand and express relationships between words that are related by semantic class relationships using the Word Classes Receptive subtest and the Word Classes Expressive subtest. Student's below average score on the Word Classes Receptive subtest surprised Ms. Barkan because Student did well on the Word Classes Expressive subtest with a percentile ranking of 25. Typically, a child would not do well on the expressive portion of Word Classes while doing poorly on the receptive portion. During her testimony, Ms. Barkan could not fully explain the discrepancy in Student's scores on the

Word Classes subtests, except to say that Student's other receptive language test scores did not support Student's low score on the Word Classes Receptive subtest. Despite that test score discrepancy, the results yielded from the assessment were a reliable indicator of Student's language skills.

46. Due to Student's low score on the Word Classes subtest, the Clinical Evaluation revealed that Student had a weakness in the area of receptive language. However, Student's composite receptive language score placed him in the 10th percentile of his peers or just below average. This result was due in part to Student's score on the receptive language subtest, Sentence Structure. The Sentence Structure subtest required Student to point to a picture that illustrated the given sentence. The subtest evaluates a student's ability to interpret spoken sentences of a given length and complexity and to select the pictures that illustrate the referential meaning of the sentence. Student scored in the 63rd percentile on that subtest.

47. Ms. Barkan did not formally assess Student's speech fluency and parameters of voice because those areas of Student's speech appeared unremarkable during her interactions with Student and so required no further analysis. During the test, Ms. Barkan noted that Student's intelligibility was "good." Ms. Barkan did not find that Student had an abnormal voice, which was characterized by persistent, defective voice quality, pitch, or loudness.

48. All of the speech and language tests and assessment materials used by Ms. Barkan were validated for the specific purpose for which they were used. She selected the tests and assessments and administered so as not to be racially, culturally, or sexually discriminatory. Ms. Barkan administered the entire assessment in the student's primary language of English.

49. Ultimately, Ms. Barkan determined that Student did not meet the eligibility criteria for a speech and language disorder. She based her determination on the fact that Student did not present with an articulation disorder, fluency disorder, abnormal voice, or meet the criteria for a language disorder. Ms. Barkan found that Student did not meet the eligibility requirements for a language disorder because Student did not score below the 7th percentile in the areas of syntax, semantics, pragmatics, and morphology on two or more subtests. Student only scored at or below the 7th percentile on one subtest. When looking at Student's performance overall on the Clinical Evaluation of Language, Student scored in the 23rd percentile.

50. Deborah Burns McCloskey, a private speech and language therapist who Student called to testify as an expert witness, opined that Ms. Barkan's report was missing a subtest score for Basic Concepts and that she was interested in that test score result. Ms. Burns McCloskey reviewed Ms. Barkan's report prior to conducting her own testing. She indicated that the review of Ms. Barkan's report caused her to have some questions about Ms. Barkan's findings.

51. Student contends that Ms. Barkan's report is not reliable based on Ms. Burns McCloskey's testimony that she believed a subtest score was missing and that the test score may have been low. Despite this allegation, Student made no attempt to question Ms. Barkan about the alleged missing test score and any possible discrepancy in her reported data. Several times, Student's counsel asked Ms. Burns McCloskey whether she believed Ms. Barkan's assessment was inadequate. Despite counsel's repeated question, Ms. Burns McCloskey never indicated that she believed Ms. Barkan's assessment to be inadequate. Ms. Burns McCloskey only stated that she would have performed more testing but not that more testing was required for the assessment to have been valid. It is determined that results of San Lorenzo's October 2014 speech and language assessment were accurate and reliable.

ACADEMIC ASSESSMENT

52. In late September 2014 and early October 2014, when Student was five years and four months old, Kimi Sugioka conducted an academic assessment of Student. The intent of the assessment was to determine whether Student had academic deficits and to provide academic information to be used in conjunction with the psychoeducational assessment.

53. Ms. Sugioka has been a credentialed resource specialist program teacher for over 25 years. She spent the last 10 of those years working as a resource specialist program teacher at Del Ray Elementary School. Ms. Sugioka has multiple teaching credentials, including a learning handicapped credential, which she received in 1986. She also possesses her resource specialist program certification. During the course of her career, she completed 600 to 800 special education academic assessments.

54. As part of the academic assessment, Ms. Sugioka administered the Woodcock Johnson Test of Academic Achievement, Third Edition. The Woodcock Johnson is a standardized test that assesses the academic achievement levels of students between the ages of five and high school. Student completed most of the Woodcock Johnson subtests; however, Student was unable to complete several of the subtests due to fact that he had not received academic instruction in areas covered by those subtests. At the time of testing, Student had just begun kindergarten. Ms. Sugioka used the Brigance Inventory of Basic Skills information to supplement the findings from the Woodcock Johnson.

55. Student was cooperative during the testing and was able to work on the testing tasks for 10 to 15 minute stretches. Although Student experienced some attention issues during the testing, with prompting, Ms. Sugioka was able to redirect Student back to the testing task.

56. All of the academic tests and assessment materials used by Ms. Sugioka were validated for the specific purpose for which they are used. She selected the tests and assessments and administered so as not to be racially, culturally, or sexually discriminatory.

Ms. Sugioka administered the entire academic assessment in the student's primary language of English.

57. Ms. Sugioka's written report summarized her findings from the testing, her observations, and her opinion regarding Student's performance. Ms. Sugioka analyzed Student's reading skills, math skills, written expression, oral expression, and listening comprehension. In the area of listening comprehension, Student experienced some difficulty once the testing tasks became more complex. More specifically, Student had difficulty following layered instructions. However, Student's composite score in listening comprehension placed Student in the 55th percentile or average range.

58. Although, the academic testing showed some academic weaknesses, those weaknesses did not rise to the level of academic deficits. At the time he was tested, Student was only able to write his first name, read some letters and single words, but he had just started receiving academic instruction in those areas because Student had just started kindergarten. Ms. Sugioka's findings from the Brigance Inventory, which measured developmental milestones, did not yield results which supported special education eligibility or intervention.

PSYCHOEDUCATIONAL ASSESSMENT

59. In late September 2014, Nicole Saleta, a school psychologist with San Lorenzo, conducted a psychoeducational assessment of Student. Ms. Saleta was properly trained and qualified to conduct psychoeducational assessments. Ms. Saleta received her master of science degree in psychology, with an emphasis in school psychology, in 2003. She received her pupil personnel services credential in counseling in 2003 and her pupil personnel services credential in school psychology in 2004.

60. Ms. Saleta has worked for San Lorenzo as a school psychologist since 2005. Each year she performs 70 to 80 psychoeducational assessments of students. Of the 900 to 1,000 psychoeducational assessments she has conducted during her career, approximately half were of elementary students. 60 to 80 percent of the assessments she has conducted during her career focused on determining whether students were eligible for special education under the category of specific learning disability. Many of the assessments she conducts focus on more than one eligibility category.

61. Ms. Saleta was familiar with Student because she attended the Section 504 meeting and the Student Study Team meeting on August 27, 2014. During those meetings she was privy to both Mother's and Ms. Grove's insights regarding Student. The purpose of the assessment was to determine Student's current level of cognitive, psychomotor, and social-emotional functioning and to make recommendations regarding whether Student fit the eligibility criteria for special education. Prior to conducting the assessment, Ms. Saleta reviewed Student's records and previous assessments in order to gain further context to her findings.

62. As part of the assessment, she observed Student in his kindergarten classroom. During that time, Ms. Saleta observed Student lacked some focus, however, Student's behavior was not atypical for a kindergarten student early in the school year. Student responded well to cues from the teacher to focus or to slow his speaking when he became excited. She witnessed Student pick up a pencil with his pincher grip but use a fist grip to write. Student's use of a fist grip to draw and write was a concern that Mother had voiced.

63. As part of the assessment, Ms. Saleta administered the Differential Ability Scales, Early Years; the Beery-Buktenica Development Test of Visual-Motor Integration, Fifth Edition; the Wide Range Assessment of Memory and Learning; the Adaptive Behavior Assessment System; and the Behavior Assessment System for Children, Second Edition. All of the psychoeducational tests and assessment materials used by Ms. Saleta were validated for the specific purpose for which they are used. The tests and assessments were selected and administered so as not to be racially, culturally, or sexually discriminatory. Ms. Saleta administered the entire assessment in the student's primary language of English.

64. Student showed strengths in the areas of verbal memory, visual memory for pictorial and meaningful information, early math concepts, and adaptive skills. Student performed below the level of his same age peers in the areas of attention, task persistence, social skills, and immature communication skills.

65. The Differential Ability Scale, which consisted of a series of subtests, tested Student's cognitive ability. The Differential Ability Scale showed that Student performed consistently in the average range in the areas of verbal, nonverbal, and spatial reasoning problem solving, as well as, early number concepts.

66. Student was able to employ visual motor integration skills to copy abstract drawings during this portion of the assessment. Although, Student turned pages using a pincer grip, he used a fist grip to hold the pencil when he copied the designs. Student's use of a fist grasp was not atypical for a child Student's age. Additionally, Student's use of a pincer grip to turn pages demonstrated that he had the ability to use a pincer grip. Student did not establish that his use of a fist grip to draw and write did not indicate that an assessment of Student's occupational therapy needs was required.

67. The Wide Range Assessment of Memory and Learning assessed Student's visual memory and verbal memory skills. Overall, Student performed in the average range on this test showing stronger visual memory for common, meaningful information for drawing abstract designs from memory. Student performed in the average range on the verbal memory subtests.

68. In order to assess Student's social-emotional and adaptive development, Ms. Saleta employed the Adaptive Behavior Assessment System. The Adaptive Behavior Assessment is a norm-referenced assessment of the adaptive skills of individuals. Adaptive skills are those practical skills required by a person to be able to function and meet environmental demands, including the skills necessary to effectively and independently care

for oneself and to interact with others. Ms. Groves, Student's teacher, completed a questionnaire for this portion of the assessment. Student's adaptive skills were found to be in the average range.

69. To assess Student's social-emotional skills Ms. Saleta used the Behavior Assessment System for Children. This assessment consisted of a questionnaire completed by Ms. Groves. Ms. Groves's responses on the questionnaire indicated that Student exhibited clinically significant behaviors in the areas of atypicality⁷, withdrawn⁸, and functional communication. Student exhibited at-risk behavior in the areas of hyperactivity, anxiety, attention problems, and social skills. A finding of clinically significant behavior indicates that those areas of behavior should be addressed. Whereas, a finding of at-risk behavior indicates that the behavior is a cause for concern and the behavior should be monitored.

70. Although Student showed at-risk behaviors in the areas of hyperactivity and attention problems, these behaviors were not negatively impacting Student's school performance. Ms. Saleta felt that Student's behavior should be monitored through the school year to determine whether interventions were needed. Some of Student's inattention was due to transitioning from a preschool classroom to a kindergarten classroom. Additionally, Student's scores on the Wide Range Assessment showed Student's ability to focus.

71. Ms. Saleta reviewed the results of the academic testing performed by Ms. Sugioka. The results showed Student's academic skills to be in the low average to average range. No particular part of the academic testing caused Ms. Saleta to be particularly concerned.

72. Based on her testing and the results of the academic testing, Ms. Saleta determined that Student did not meet the eligibility criteria for specific learning disorder. Student did not present with a processing disorder that adversely affected his learning. Although Ms. Saleta's written report contained the data to address the issue of whether Student exhibits a significant discrepancy between his academic and ability scores she did not reach a finding on this issue because Student did not present with processing deficits and so, on that basis alone, she determined that Student did not meet the eligibility criteria for a specific learning disorder.

73. Ms. Saleta did not find that Student met the eligibility criteria for other health impairment. Previously, Student had been diagnosed with food allergies and asthma and was receiving Section 504 accommodations to address those health issues. Ms. Saleta found no evidence that Student's food allergies and asthma were negatively affecting Student's educational performance.

⁷ Atypicality refers to when a person does not behave in a typical manner.

⁸ Withdrawn refers to when a person refuses to communicate at times.

74. Ms. Saleta did not make a finding as to whether Student fit the criteria for other health impairment based on a diagnosis of attention deficit hyperactive disorder (ADHD) because she was unaware of any such diagnosis. Mother had not reported during the Section 504 meeting or the Student Study Team meeting that Student had a diagnosis of ADHD. The record is unclear as to when and by whom Student was diagnosed with ADHD. Although Mother testified that she had informed the principal of the school that Student “had” ADHD, the first documentation on the subject was provided by Mother in September 2015. Mother provided a letter to San Lorenzo from Student’s doctor, Caren Vance, dated September 10, 2015. The letter mentioned that Student “struggles” with ADHD. However, the letter did not specify whether this was a formal diagnosis and who diagnosed Student with ADHD. Additionally, the letter never specified the manner in which Student’s ADHD symptoms manifest. The evidence shows that although Student presented with some attentional issues at school, Student was able to be redirected through prompting.

75. Ms. Saleta’s written report contained the results of the testing and Ms. Saleta’s finding that Student did not require special education services. Additionally, her report provided some recommendations as to means of assisting Student in the areas of weakness she observed. All of those recommendations could be implemented without special education services. Student did not present any evidence that contradicted the validity of Ms. Saleta’s testing or her findings that Student did not meet the eligibility criteria for specific learning disability and other health impairment.

NOVEMBER 5, 2014 IEP TEAM MEETING

76. At Parent’s request, San Lorenzo provided Parents with copies of San Lorenzo’s assessment reports prior to the IEP team meeting. The assessors provided copies of the assessments to the other members of the IEP team prior to the IEP team meeting.

77. On November 5, 2014, San Lorenzo held an IEP team meeting to review the completed assessments and to determine whether Student met the eligibility criteria for special education. Mother attended the IEP team meeting; however, she remained at the meeting for a short period of time. Shortly after the IEP team meeting convened, Mother asked that the other members of the IEP team tell her whether Student was eligible for special education. The district team members attempted to explain that the IEP team first needed to discuss the assessments and then decide Student’s eligibility as a team. Mother demanded to know the findings of the district team members. As everyone present at the meeting, including Mother, had reviewed the assessments that found that Student did not fit the eligibility criteria, Ms. Saleta told Mother that it was likely the district members of the IEP team would not find Student eligible.

78. Upon learning that information, Mother informed the other team members that she was leaving. Mother refused to sign the attendance page of the IEP. Once Mother left, the remaining IEP team members discussed the assessments and Student’s eligibility. The IEP team, except for Mother, determined that Student did not meet the eligibility criteria for special education.

PARENTS REQUEST FOR INDEPENDENT EDUCATIONAL EVALUATIONS

79. Parents disagreed with the findings of San Lorenzo's speech and language assessment, psychoeducational assessment, and academic assessment. On November 20, 2014, on behalf of Student, Student's special education advocate, Geri Baskind, requested that San Lorenzo fund an independent speech and language evaluation and independent psychoeducational evaluation for Student.

80. On December 1, 2014, Edward Diolazo notified Ms. Baskind that San Lorenzo agreed to fund the requested independent educational evaluations. Mr. Diolazo requested that Ms. Baskind provide San Lorenzo with the names of the assessors whom she preferred to conduct the assessments. Mr. Diolazo also informed her that he was assigning, Thomas Mills, San Lorenzo's special education coordinator, to follow up on the request. On that same day, Ms. Baskind emailed both Mr. Diolazo and Mr. Mills the names and contact information of the assessors Parents were requesting. The Parents requested that San Lorenzo retain Cynthia Peterson to conduct the psychoeducational and academic assessment and that San Lorenzo retain Deborah Burns McCloskey to conduct the speech and language assessment.

81. On February 6, 2015, Mr. Mills notified Ms. Baskind that Ms. Burns McCloskey had agreed to conduct the speech and language assessment and that San Lorenzo had sent Ms. Burns McCloskey the contract. Initially, the independent speech and language assessment was delayed due to some issues with the contract. At the end of March 2015, Ms. Burns McCloskey began her assessment of Student.

82. On December 17, 2014, Mr. Mills sent an email to Cynthia Peterson to inquire whether she was available to conduct the academic and psychoeducational assessments of Student. On January 7, 2015, Mr. Mills spoke with Ms. Peterson about retaining her. Ms. Peterson indicated that she would be available to conduct the assessments in March or April 2015. However, Ms. Peterson indicated that she would not conduct the assessment for a flat fee nor would she provide a cap for the amount she would charge for the assessment. San Lorenzo had a reasonable policy that prohibited entering into contracts for assessments without a price cap or prearranged fee.

83. Mr. Mills notified Student's advocate of the situation and offered to contact other assessors that San Lorenzo had used in the past for academic and psychoeducational assessments. Student's advocate declined and requested that Mr. Mills contract with Ellea Bernou to conduct the assessments. Mr. Mills contacted Ms. Bernou on January 9, 2015 and emailed her on January 20, 2015. Ms. Bernou responded that she was available, but would not be able to conduct the assessments until the third week of March 2015. Ms. Bernou initially agreed to conduct the assessments; however, on February 17, 2015 Ms. Bernou sent Mr. Mills an email stating that she was declining due to Student's young age.

84. On February 20, 2015, Mr. Mills emailed Carina Grandison, another assessor Student had requested, to inquire whether she was available to conduct the assessments. On February 26, 2015, Mr. Mills again emailed Dr. Grandison about whether she was available to conduct the assessments. The following day, Dr. Grandison responded by email indicating that she would be available to conduct the assessment in April, based upon her current case load.

85. Mr. Mills testified that on April 7, 2015, he sent Dr. Grandison an email about proceeding with Student's assessment, but he never received a response email from Dr. Grandison. Dr. Grandison testified that she did not receive an April 7, 2015 email from Mr. Mills and that she did not have any contact with Mr. Mills regarding Student or regarding being retained by San Lorenzo to conduct an independent educational evaluation after February 27, 2015. During the hearing, Mr. Mills implied that a portion of the delay in obtaining an independent assessor was due to Dr. Grandison's failure to respond to his April 7, 2015 email.

86. Mr. Mills's testimony regarding contacting Dr. Grandison by email in April is discounted, as it was unreliable. On direct examination, Mr. Mills testified that he had not received a response from Dr. Grandison after inquiring about her availability in February. However, upon having his memory refreshed during cross-examination through the production of Dr. Grandison's February 27, 2015 email, he changed his testimony, stating that he was confused and that he had not received a response to the April 7, 2015 email he had sent Dr. Grandison. Mr. Mills was unable to produce the April 7, 2015 email. Additionally, Mr. Mills was unable to provide a reasonable explanation as to why he would have waited until April to attempt to retain Dr. Grandison to conduct the assessments, when he believed her to have a large caseload and busy schedule. In order for Dr. Grandison to be available to perform the assessment of Student in April, San Lorenzo needed to have retained her services earlier in the spring, while she still had availability in April.

87. Mr. Mills waited until May 27, 2015, to notify Mother that San Lorenzo had not retained Dr. Grandison and to ask Mother to identify another assessor. On May 29, 2015, Mother provided Mr. Mills with Melanie Johnson's name. On June 10, 2015, Mr. Mills contacted Ms. Johnson. Ms. Johnson agreed to conduct the assessment, but indicated that she was not available to begin the assessment until late August 2015. On July 16, 2015, Mr. Mills mailed Ms. Johnson a contract. On September 8, 2015, after Student's testing was to begin, Mr. Mills contacted Ms. Johnson because he had not received the signed contract from her. Ms. Johnson indicated that she had returned the contract, but Mr. Mills had not received it. Mr. Mills sent another contract to Ms. Johnson and on September 17, 2015, Mr. Mills received the signed contract from Ms. Johnson. However, Ms. Johnson indicated that now she would not be available to conduct the assessments until sometime between October 17, 2015 and January 30, 2015. At the time of the hearing, Ms. Johnson was scheduled to assess Student during the school's winter break.

TRANSITION TO LORENZO MANOR ELEMENTARY SCHOOL

88. In January 2015, Student transferred from Del Rey Elementary School to Lorenzo Manor Elementary School at Parent's request. Parents requested the transfer because Mother had become upset with Ms. Groves and Del Rey's principal, Robert Patrick. Mother felt that Ms. Groves and Mr. Patrick were not making an effort to address Student's needs.

89. At Lorenzo Manor, Student attended half-day, general education kindergarten. Towards the beginning of Student's transition to Lorenzo Manor, Cyndi Liang, Student's kindergarten teacher provided Parents with a progress report that stated that Student was working below grade level. Throughout the remainder of the school year, Ms. Liang expressed her concerns about Student's performance in class to Mother and in two other progress reports.

90. On May 4, 2015, Ms. Liang provided Parents with a progress report indicating that Student continued to perform below grade level in the areas of reading, writing, math, and written and oral language convention. According to the progress report, Ms. Liang was concerned because Student was not able to work independently, which she expected of students at that stage of the school year. Less weight is given to these progress reports because Student chose not to call Ms. Liang as a witness to explain her concerns and the basis of her opinion contained in the progress reports and the effect, if any, of Student's school move during the school year. Additionally, despite Ms. Liang's concerns reported in the progress reports, she recommended that Student be promoted to first grade at the end of the 2014-2015 school year. There was no evidence that Student was below grade level in any subject at the end of the school year.

INDEPENDENT SPEECH AND LANGUAGE EVALUATION

91. Ms. Burns McCloskey is a licensed speech and language pathologist, who currently works in private practice.⁹ As part of her practice, Ms. Burns McCloskey contracts with various school districts to perform independent speech and language evaluations of students. She also provides speech and language services to students who attend non-public schools.

92. During the testing, Student became distracted often turning around to talk with Mother, who attended most of the testing. However, the testing period was lengthy as Ms. Burns McCloskey conducted the assessment over three sessions with each session taking several hours to complete. To help Student focus on the testing, Ms. Burns McCloskey gave

⁹ Ms. Burns McCloskey has been a licensed speech and language pathologist since 1985. She received her Certificate of Clinical Competence that same year. From 1981 to 1987, Ms. Burns McCloskey worked as a speech and language therapist with San Francisco Unified School District. She conducts approximately 25-30 speech and language assessments per year. She has experiencing assessing children of Student's age.

Student frequent motor and sensory breaks. Student was under the age of six at the time of testing.

93. As part of her assessment, Ms. Burns McCloskey administered the Comprehensive Assessment of spoken Language Test, the Peabody Picture Vocabulary Test, Third Edition, the selected subtests from the Language Processing Test, and the Goldman Fristoe Test of Articulation, Two. Additionally, she collected an informal language sample, which she analyzed. Ms. Burns McCloskey compiled the results of the testing, her observations, and her recommendations in a written report. Ms. Burns McCloskey provided her written report to Parents and San Lorenzo.

94. In order to assess Student's speech articulation, she administered the Goldman Fristoe Test of Articulation, Two. During the testing, she noted that Student's previously identified articulation errors had resolved. The only articulation errors she found were typical for a child Student's age and would resolve as Student matured. Based on the results of the test, she determined that Student did not meet the eligibility criteria for a speech and language impairment based on an articulation disorder.

95. Ms. Burns McCloskey collected a sample of approximately 20 spontaneous utterances from Student during the course of the assessment. A child's language development follows a sequential format as a child ages. The length of a child's utterances increase as their language skills develop. In order to conduct a proper analysis of Student's mean length utterance, a sample of 50 spontaneous utterances must be collected. Ms. Burns McCloskey was unable to collect 50 spontaneous utterances, so she used the ones she collected to perform an informal analysis. Ms. Burns McCloskey noted that the length of Student's utterances were within the norm, but that Student's utterances contained odd word usage.

96. At the time Ms. Burns McCloskey began her assessment of Student, school was still in session. However, Ms. Burns McCloskey chose not to observe Student in the classroom or contact Student's kindergarten teachers, Ms. Phillips or Ms. Liang, for information about Student's performance in the classroom and any concerns that they may have had about Student's speech and language skills. Instead, Ms. Burns McCloskey relied on second hand information provided by Mother, prior assessments, and the narrative portion of Student's IEP's for information about Student's performance in the classroom. Ms. Burns McCloskey completed her report on June 9, 2015.

97. Neither in her written report nor during her testimony did Ms. Burns McCloskey address whether Student met the eligibility criteria for a speech and language impairment due to having an abnormal voice, characterized by persistent, defective voice quality, pitch, or loudness. Although, Mother had previously expressed concerns about Student mumbling neither Ms. Burns McCloskey nor Ms. Barkan found that Student mumbled.

98. Additionally, Ms. Burns McCloskey did not address whether Student met the eligibility criteria for speech and language impairment due to having a fluency disorder characterized by when the flow of verbal expression including rate and rhythm of speech adversely affects communication between Student and the listener. Although Ms. Burns McCloskey's report noted that Student inconsistently demonstrated reduced speech intelligibility, she provided no further analysis on that point.

99. The bulk of Ms. Burns McCloskey's testing focused on determining whether Student had a language disorder. Ms. Burns McCloskey administered the Language Processing Test to Student to assess Student's ability to attach meaning to language and effectively formulate responses. The Language Processing Test also provides information regarding Student's language output and fluency. However, Ms. Burns McCloskey did not provide any interpretation of the Student's performance on the test in regards to fluency.

100. The Language Processing Test is comprised of two pretests and six subtests. Ms. Burns McCloskey did not provide Student the full means and measures subtest because that subtest is designed for students age six or older. The subtests are constructed to yield information about specific areas of language processing in a hierarchical order. As the test progresses, each subtests becomes more complex and difficult. Student's lowest subtest score on the Language Processing Test was Associations. The Associations subtest requires students to name items that are typically associated with given item. For example, a student told the word "shoe" and asked to list other items associated with the word shoe. Example of an appropriate response would be sock, foot, or shoelace. Student scored in the 7th percentile on the Associations subtest, which is considered the least difficult of the subtests.

101. As Student progressed through the subtests, his scores drastically improved. However, Student did not complete the final subtest, Attributes. In her report, Ms. Burns McCloskey did not provide Student's standard score or percentile ranking for the Attributes subtest. The Attributes subtest looks at a student's ability to attach meaning independently to a stimulus item. In her report, Ms. Burns McCloskey did not provide a score for the Attributes subtest because Student did not complete the subtest. She also referenced in both her testimony and her report that Student's lowest subtest score on the Comprehensive Assessment was on Associations. However, on cross-examination, when asked to identify on which two subtests Student scored below the 7th percentile, Ms. Burns McCloskey identified those two subtests as Antonyms and Attributes. She testified that Student's failure to complete the Attributes subtest equaled a "zero" score on the subtest. Ms. Burns McCloskey's testimony on that subject was inconsistent with her reporting of Student's score on Attributes both in her report and in her testimony on direct examination. Student established that he scored below the 7th percentile in the area of Antonyms, which is in the area of semantics. Even if the evidence supported that Student's score on the Attributes subtest was zero score, Student did not introduce any evidence that this subtest assessed the qualifying areas of morphology, syntax, semantics, or pragmatics. Therefore, he failed to establish that he scored below the 7th percentile on a second subtest in any of the qualifying areas.

102. In her report, Ms. Burns McCloskey did not indicate that Student met the eligibility requirements for a speech and language impairment. She did specify that Student presented with a language disorder and required speech and language intervention to address both his expressive and receptive deficits. However, she did not provide any analysis in her report to support that Student met the special education criteria for a language disorder. For this reason, and those stated above, little weight is given to Ms. Burns McCloskey's testimony that Student met the special education for a language disorder.

2015-2016 School Year

103. At the beginning of the 2015-2016 school year, Student entered first grade at Lorenzo Manor. As of the completion of the hearing in this matter, Student attended Lorenzo Manor. Student was placed in a general education classroom with Alex Phillips assigned as Student's teacher. Ms. Colt, a mentor teacher, worked closely with Ms. Phillips in Student's classroom during that same time period.

SEPTEMBER 16, 2015 SECTION 504 MEETING

104. On September 16, 2015, San Lorenzo held a Section 504 meeting. During that meeting, Mother expressed her concerns about Student's fine motor, gross motor, and speech and language skills. Per the Section 504 meeting notes, Ms. Phillips reported concerns that Student was not reading, his number sense was below that of his classmates, and that he was not interested in writing.

105. Ms. Phillips asked Carmen Conchola, a resource specialist teacher with San Lorenzo, to observe Student in the classroom because of the concerns Mother had expressed to her. Ms. Conchola shared her observations at the Section 504 meeting. She observed Student on the first full day of first grade. Transition to first grade can be difficult for students because they are now being required to attend school for a full school day, whereas, in kindergarten students only attend school for a half day. In addition, the academic demands of first grade are at a much higher level than those of kindergarten. Ms. Conchola noted that Student was more active than the other students and required redirection several times to stay on task, but that Student responded to the redirection. The team discussed Ms. Conchola's observations, Ms. Phillip's concerns, and Mother's concerns at the meeting. The team, except for Mother, agreed that Student's progress would be monitored and reevaluated once Student had the opportunity to adjust to the new demands of first grade.

106. However, the team did agree that due to Mother's repeated concerns about Student's motor development that an occupational therapy assessment of Student would be conducted by San Lorenzo. On September 16, 2015, San Lorenzo provided Mother with an assessment plan indicating that one of San Lorenzo's occupational therapists would conduct a motor development assessment of Student. Parents' permission was needed in order to conduct the assessment. The record is unclear as to when Mother returned the signed assessment plan to San Lorenzo and Mother did not date the signed assessment plan, but it

was at least several weeks. As of the date of the date of the hearing, San Lorenzo had not yet conducted the assessment.

STUDENT'S PERFORMANCE FROM THE BEGINNING OF SCHOOL YEAR TO HEARING

107. Either Ms. Phillips or Ms. Colt would have been able to testify about Student's academic performance and classroom conduct during the 2015-2016 school year. Student included both of these teachers as potential witnesses on his proposed witness list, which was submitted as part of his November 12, 2015 Prehearing Conference Statement, but Student chose not to call either teacher as a witness. Instead, Student submitted an October 7, 2015 progress report from Ms. Phillips indicating that Student was working "far" below grade level. The progress report stated that Student was making little or no progress towards "end of the year standards" in the areas of reading, writing, and math. Despite that statement, the progress report did not indicate that Student was at risk of retention. The only suggested intervention by Ms. Phillips, on the progress report, was that Parents make sure that Student read every night at home. The progress report lacks context regarding the information contained within it. The progress report does not support a finding that Student exhibited a severe discrepancy between ability and achievement.

108. At hearing, no evidence was presented to support a finding that Student's needs in the area of speech and language, academics, social-emotional functioning, fine motor skills, and gross motor skills had declined from the 2014-2015 school year to the 2015-2016 school year, thus indicating that further assessments were needed.

LEGAL CONCLUSIONS

*Introduction: Legal Framework Under the IDEA*¹⁰

1. This hearing was held under the Individuals with Disabilities Education Act (IDEA), its regulations, and California statutes and regulations intended to implement it. (20 U.S.C. § 1400 et. seq.; 34 C.F.R. § 300.1 (2006)¹¹ et seq.; Ed. Code, § 56000 et seq.; Cal. Code Regs., tit. 5, § 3000 et seq.) The main purposes of the IDEA are: (1) to ensure that all children with disabilities have available to them a free appropriate public education (FAPE) that emphasizes special education and related services designed to meet their unique needs and prepare them for employment and independent living, and (2) to ensure that the rights of children with disabilities and their parents are protected. (20 U.S.C. § 1400(d)(1); See Ed. Code, § 56000, subd. (a).)

¹⁰ Unless otherwise indicated, the legal citations in the introduction are incorporated by reference into the analysis of each issue decided below.

¹¹ All subsequent references to the Code of Federal Regulations are to the 2006 version.

2. A FAPE means special education and related services that are available to an eligible child at no charge to the parent or guardian, meet state educational standards, and conform to the child’s individualized education program (IEP). (20 U.S.C. § 1401(9); 34 C.F.R. § 300.17; Cal. Code Regs., tit. 5, § 3001, subd. (p).) “Special education” is instruction specially designed to meet the unique needs of a child with a disability. (20 U.S.C. § 1401(29); 34 C.F.R. § 300.39; Ed. Code, § 56031.) “Related services” are transportation and other developmental, corrective and supportive services that are required to assist the child in benefiting from special education. (20 U.S.C. § 1401(26); 34 C.F.R. § 300.34; Ed. Code, § 56363, subd. (a) [In California, related services are also called designated instruction and services].) In general, an IEP is a written statement for each child with a disability that is developed under the IDEA’s procedures with the participation of parents and school personnel that describes the child’s needs, academic and functional goals related to those needs, and a statement of the special education, related services, and program modifications and accommodations that will be provided for the child to advance in attaining the goals, make progress in the general education curriculum, and participate in education with disabled and non-disabled peers. (20 U.S.C. §§ 1401(14), 1414(d)(1)(A); Ed. Code, §§ 56032, 56345, subd. (a).)

3. In *Board of Education of the Hendrick Hudson Central School District v. Rowley* (1982) 458 U.S. 176, 201 [102 S.Ct. 3034, 73 L.Ed.2d 690] (*Rowley*), the Supreme Court held that “the ‘basic floor of opportunity’ provided by the [IDEA] consists of access to specialized instruction and related services which are individually designed to provide educational benefit to” a child with special needs. *Rowley* expressly rejected an interpretation of the IDEA that would require a school district to “maximize the potential” of each special needs child “commensurate with the opportunity provided” to typically developing peers. (*Id.* at p. 200.) Instead, *Rowley* interpreted the FAPE requirement of the IDEA as being met when a child receives access to an education that is reasonably calculated to “confer some educational benefit” upon the child. (*Id.* at pp. 200, 203-204.) The Ninth Circuit Court of Appeals has held that despite legislative changes to special education laws since *Rowley*, Congress has not changed the definition of a FAPE articulated by the Supreme Court in that case. (*J.L. v. Mercer Island School Dist.* (9th Cir. 2010) 592 F.3d 938, 950 [In enacting the IDEA 1997, Congress was presumed to be aware of the *Rowley* standard and could have expressly changed it if it desired to do so.].) Although sometimes described in Ninth Circuit cases as “educational benefit,” “some educational benefit” or “meaningful educational benefit,” all of these phrases mean the *Rowley* standard, which should be applied to determine whether an individual child was provided a FAPE. (*Id.* at p. 951, fn. 10.)

4. The IDEA affords parents and local educational agencies the procedural protection of an impartial due process hearing with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a FAPE to the child. (20 U.S.C. § 1415(b)(6) & (f); 34 C.F.R. 300.511; Ed. Code, §§ 56501, 56502, 56505; Cal. Code Regs., tit. 5, § 3082.) The party requesting the hearing is limited to the issues alleged in the complaint, unless the other party consents. (20 U.S.C. § 1415(f)(3)(B); Ed. Code, § 56502, subd. (i).) Subject to limited exceptions, a request for a due process hearing must be filed within two years from the date the party initiating the request knew

or had reason to know of the facts underlying the basis for the request. (20 U.S.C. § 1415(f)(3)(C), (D); Ed. Code, § 56505, subd. (1).) At the hearing, the party filing the complaint has the burden of persuasion by a preponderance of the evidence. (*Schaffer v. Weast* (2005) 546 U.S. 49, 56-62 [126 S.Ct. 528, 163 L.Ed.2d 387]; see 20 U.S.C. § 1415(i)(2)(C)(iii) [standard of review for IDEA administrative hearing decision is preponderance of the evidence].)

Issue 1: Did San Lorenzo Deny Student a FAPE by Failing to Assess Student Appropriately During the 2014-2015 School Year?

5. Before any action is taken with respect to the initial placement¹² of a special education student, an assessment of the student's educational needs shall be conducted. (Ed. Code, § 56320.) No single procedure may be used as the sole criterion for determining whether the student has a disability or determining an appropriate educational program for the student. (20 U.S.C. § 1414 (b)(2)(B); Ed. Code, § 56320, subd. (e).)

6. Assessments must be conducted by individuals who are both "knowledgeable of [the student's] disability" and "competent to perform the assessment, as determined by the school district, county office, or special education local plan area." (Ed. Code, §§ 56320, subd. (g), 56322; see, 20 U.S.C. § 1414(b)(3)(A)(iv).)

7. 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; and must be provided and administered in the student's primary language or other mode of communication unless this is clearly not feasible. (20 U.S.C. § 1414(a)(3)(A)(i)-(iii); Ed. Code, § 56320, subd. (a).)

8. An assessor must produce a written report of each assessment that includes whether the student may need special education and related services and the basis for making that determination. (Ed. Code, § 56327, subds. (a), (b).)

SPEECH AND LANGUAGE

9. Student contends that San Lorenzo denied him a FAPE by failing to assess Student appropriately in the area of speech and language during the 2014-2015 school year. More specifically, Student contends that San Lorenzo's speech and language assessment was not reliable. San Lorenzo contends that its speech and language assessment was conducted appropriately.

10. Ms. Barkan, who conducted San Lorenzo's speech and language assessment, was knowledgeable and competent to perform the assessment, as determined by the school district, county office, or special education local plan area. Ms. Barkan, a certified speech

¹² Although, Student previously received special education services, it is considered an initial placement because Student was exited from special education.

and language pathologist, possesses many years of experience conducting speech and language assessments of students of Student's age. (Ed. Code, §§ 56320, subd. (g), 56322; see, 20 U.S.C. § 1414(b)(3)(A)(iv).)

11. The test and assessment materials used during the assessment were validated for the specific purpose for which they were used and were administered so as not to be racially, culturally, or sexually discriminatory. Ms. Barkan administered the assessment in Student's primary language of English. (20 U.S.C. § 1414(a)(3)(A)(i)-(iii); Ed. Code, § 56320, subd. (a).)

12. Upon completion of her assessment, a written report of the assessment results, including findings that Student did not meet the special education criteria for speech and language disorder was included in the written report. (Ed. Code, § 56327, subds. (a), (b).)

13. Student's contention that San Lorenzo's assessment was not reliable because it failed to include a subtest score and only used one test for assessing Student's language skills is not supported by the evidence. The test used by Ms. Barkan was comprised of numerous subtests to assess Student's language skills. Although Ms. Burns McCloskey opined that she would have conducted further testing, she did not indicate that San Lorenzo's assessment was unreliable or insufficient. The assessment used multiple means to determine whether Student met the criteria for special education services. The assessment was appropriate and procedurally compliant. Thus, San Lorenzo did not deny Student a FAPE by failing to assess appropriately in the area of speech and language during the 2014-2015 school year.

ACADEMICS

14. Student contends that San Lorenzo denied Student a FAPE by failing to assess Student appropriately in the area of academics. Specifically, Student alleges that the academic testing was unreliable, inconsistent, and incomplete. San Lorenzo contends that Student was assessed appropriately in the area of academics.

15. Ms. Sugioka, who conducted San Lorenzo's academic assessment, was knowledgeable and competent to perform the assessment, as determined by the school district, county office, or special education local plan area. Ms. Sugioka, has over 25 years of experience assessing student's in the area of academics. She is a certified and certificated resource specialist program teacher, who has worked with children of Student's age for the last 10 years. (Ed. Code, §§ 56320, subd. (g), 56322; see, 20 U.S.C. § 1414(b)(3)(A)(iv).)

16. The test and assessment materials used by Ms. Sugioka were validated for the specific purpose for which they were used and were administered so as not to be racially, culturally, or sexually discriminatory. The assessment was administered in Student's primary language of English. (20 U.S.C. § 1414(a)(3)(A)(i)-(iii); Ed. Code, § 56320, subd. (a).)

17. Ms. Sugioka created a written report, which contained the results of the academic assessment and her observations. (Ed. Code, § 56327, subd. (a).) There was no evidence that the instructions were not followed when administering the test. Although, Ms. Sugioka's written report did not contain a specific finding as to whether Student required special education services, the written report was designed to be utilized in conjunction with the psychoeducational evaluation conducted by Ms. Saleta. Ms. Saleta used the academic assessment to determine that Student did not exhibit a significant discrepancy between his academic and ability scores. Ms. Saleta's written psychoeducational report contained her finding that Student did not require special education services.

18. The evidence does not support Student's contention that San Lorenzo's academic assessment was unreliable, inconsistent, and incomplete. The academic assessment used multiple means of testing to determine whether Student exhibited academic deficits. When Ms. Sugioka felt that she needed supplemental information to make her determination she utilized a second assessment. The academic achievement assessment was appropriate and procedurally compliant. Therefore, San Lorenzo did not deny Student a FAPE by failing to assess Student appropriately in the area of academics during the 2014-2015 school year.

SOCIAL-EMOTIONAL FUNCTIONING

19. Student contends that San Lorenzo denied him a FAPE by failing to assess his social-emotional needs appropriately during the 2014-2015 school year. Student takes issue with the psychoeducational assessment's findings that Student did not require special education services based on the results of the social-emotional needs. San Lorenzo contends that social-emotional functioning was not an area of suspected need, but San Lorenzo provided the testing at Mother's request. San Lorenzo also asserts that it assessed Student's social-emotional functioning appropriately.

20. As part of the psychoeducational assessment, Ms. Saleta, conducted an assessment of Student's social-emotional functioning. Ms. Saleta, a credentialed school psychologist with approximately 10 years of experience, was knowledgeable and competent to perform the assessment. (Ed. Code, §§ 56320, subd. (g), 56322; see, 20 U.S.C. § 1414(b)(3)(A)(iv).)

21. The assessment materials used by Ms. Saleta were validated for the specific purpose for which they are used and were administered so as not to be racially, culturally, or sexually discriminatory. Ms. Saleta administered the assessment in Student's primary language of English. (20 U.S.C. § 1414(a)(3)(A)(i)-(iii); Ed. Code, § 56320, subd. (a).)

22. Upon completion of her assessment, Ms. Saleta included her findings in the written psychoeducational report. The psychoeducational report contained her findings that Student did not require special educational services. (Ed. Code, § 56327, subds. (a) and (b).)

23. Ms. Saleta utilized both the Behavior Assessment System for Children and the Adaptive Behavior Assessment System to assess Student's social-emotional functioning. Both tests yielded results with which Student does not take issue. Student contends the assessment was not appropriate because Ms. Saleta did not obtain Mother's input on the Behavior Assessment System for Children and the Adaptive Behavior Assessment System and because Ms. Saleta determined that Student did not require special education services. Student did not meet his burden of proving that Ms. Saleta's findings were incorrect or that the assessment was improperly conducted. Student did not present any evidence that Mother's input on the Behavior Assessment System for Children and the Adaptive Behavior Assessment System was required for the results of the assessment to be accurate or reliable. The assessment was procedurally complaint and appropriate. Therefore, Student did not meet his burden of proving that San Lorenzo did not assess Student's social emotional functioning appropriately during the 2014-2015 school year.

Issue 2: Did San Lorenzo Deny Student a FAPE by Failing to Conduct Occupational Therapy Assessment During the 2014-2015 School Year?

24. Student contends that San Lorenzo denied him a FAPE by failing to assess his occupational therapy needs during the 2014-2015 school year. San Lorenzo argues that it assessed Student's motor skills and so assessed Student's occupational therapy needs.

25. The determination of what tests are required is made based on information known at the time. (See *Vasherresse v. Laguna Salada Union School Dist.* (N.D. Cal. 2001) 211 F.Supp.2d 1150, 1157-1158 [assessment adequate despite not including speech/language testing where concern prompting assessment was deficit in reading skills].)

26. Mother and Student's teachers expressed some concerns that Student continued to use a fist grip to hold his pencil, instead of using a pincer grip. In San Lorenzo's 2014 psychoeducational assessment, Ms. Saleta assessed Student's visual motor integration skills through the Differential Ability Scales test. During the test, Student used a fist grip to copy the provided designs. Despite Student's use of the fist grip he was able to copy the designs. During that same assessment, Student was able to turn pages using a pincer grip, so it was evident that Student had the ability to use a pincer grip. The information known to San Lorenzo during the 2014-2015 school year did not support the need for Student to receive an occupational therapy assessment. (*Vasherresse v. Laguna Salada Union School Dist.* (N.D. Cal. 2001) 211 F.Supp.2d 1150, 1157-1158.) Therefore, Student did not meet his burden of proving that San Lorenzo denied him a FAPE by failing to assess his occupational therapy needs during the 2014-2015 school year.

Issue 3: Did San Lorenzo Deny Student a FAPE by Failing to Assess During the 2015-2016 School Year?

27. Student contends that San Lorenzo denied him a FAPE by failing to conduct assessments in the areas of speech and language, academics, social-emotional functioning, and occupational therapy needs during the 2015-2016 school year. San Lorenzo contends

that Student's needs did not warrant any further testing during the 2015-2016 school year in the areas of speech and language, academic, and social-emotional functioning. Furthermore, San Lorenzo asserts that it agreed to assess Student's occupational therapy needs at Mother's request and so did not fail to assess Student's occupational therapy needs during the 2015-2016 school year.

28. Student did not present any evidence that Student's needs had changed in the areas of speech and language, academics, and social emotional functioning since the prior assessments that had been conducted in those suspected areas of need. Without a change in Student's needs, San Lorenzo would not have a duty to reassess Student, as San Lorenzo had already assessed Student in those areas.

29. As found in Issue 2, San Lorenzo did not have a duty to assess Student's occupational therapy needs in 2014-2015. Without a change in Student's motor skills, San Lorenzo would not have a duty to assess Student's occupational therapy needs during the 2015-2016 school year, up to the date of hearing. Student did not provide evidence that Student's motor needs changed during the 2015-2016 school year. Despite the lack of a change in Student's motor needs, San Lorenzo agreed to conduct an assessment. For these reasons, San Lorenzo did not deny Student a FAPE by failing to assess Student's needs in the area of speech and language, academics, social-emotional, and occupational therapy needs during the 2015-2016 school year.

Issue 4: Did San Lorenzo Deny Student a FAPE by Failing to Find Student Eligible for Special Education from March 24, 2014 to the Date of the Hearing?

30. Under the IDEA, only some children with certain disabilities are eligible for special education. (20 U.S.C. § 1401(3)(A); Ed. Code § 56026, subd. (a).) For purposes of special education eligibility, the term "child with a disability" means a child with intellectual disabilities, hearing impairments (including deafness), speech or language impairments, visual impairments (including blindness), serious emotional disturbance, orthopedic impairments, autism, traumatic brain injury, other health impairments, a specific learning disability, deaf-blindness, or multiple disabilities, and who, by reason thereof, needs special education and related services. (20 U.S.C. § 1401(3)(A)(i), (ii); 34 C.F.R. § 300.8(a).) Similarly, California law defines an "individual with exceptional needs" as a pupil who is identified by an IEP team as "a child with a disability" pursuant to 20 U.S.C. section 1401(3)(A), who requires special education due to his or her disability, and instruction and services cannot be provided with modification of the regular school program. (Ed. Code § 56026, subds. (a), (b).)

31. California Code of Regulations, title 5, section 3030 includes a list of conditions that may qualify a child as an individual with exceptional needs and thereby entitle the child to special education if required by the degree of the child's impairment. Thus, there are many students who have varying levels of deficits, areas of need, and disabilities, who do not qualify for special education because they do not fall within one of the narrow categories specified by law. Additionally, even if a student's deficit, need, or

disability falls within one of the categories, a student may still not qualify for special education because student's instruction or services could be provided with modification of the regular school program.

32. In deciding whether a student needs special education, courts apply the *Rowley* standard to determine whether the student can receive some educational benefit from the general education classroom. (*Hood v. Encinitas Union School Dist.* (9th Cir. 2007) 486 F.3d 1099, 1106-1107 (*Hood*) [decided under former Ed. Code, § 56337].) *Hood* demonstrates that a child may have a specific learning disability, yet not be found eligible for special education, because the child's needs can be met with modification of the general education classroom. The Ninth Circuit held, "In essence, the Hoods assert that the law guarantees a learning-disabled child of superior ability enough individualized attention and services ... to elicit optimum performance from the child, when clearly no such requirement exists for children without disabilities, gifted or not." (*Id.* at 1108.)

33. In *County of San Diego v. California Special Education Hearing Office, et al.* (9th Cir. 1996) 93 F.3d 1458, 1467, the Court specified that "educational benefit" is not limited to academic needs, but instead includes the social and emotional needs that affect academic progress, school behavior, and socialization.

SPEECH AND LANGUAGE

34. Student contends that San Lorenzo denied Student a FAPE by failing to find Student eligible for special education under the category of speech and language impairment beginning May 24, 2014. San Lorenzo contends that Student did not meet the eligibility criteria for a speech and language impairment.

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

- (a) Articulation disorder: the child displays reduced intelligibility or an inability to use the speech mechanism, which significantly interferes with communication and attracts adverse attention;
- (b) Abnormal voice: a child has an abnormal voice, which is characterized by persistent, defective voice quality, pitch, or loudness;
- (c) Fluency Disorders: a child has a fluency disorder when the flow of verbal expression including rate and rhythm adversely affects communication between the pupil and listener; and

- (d) Language Disorder: the pupil has an expressive or receptive language disorder, in pertinent part, when he or she scores at least 1.5 standard deviations below the mean, or below the 7th percentile, for his or her chronological age or developmental level, on two or more standardized tests in one or more of the following areas of language development: morphology, syntax, semantics, or pragmatics.

(Ed. Code, § 56333; Cal. Code Regs., tit. 5, § 3030, subd. (b)(11).)

36. In June 2012, San Lorenzo found Student eligible for special education under the category of speech and language impairment due to an articulation disorder. During the 2012-2013 school year Student received speech therapy to address his articulation disorder. The speech therapy was successful in remediating Student's articulation deficits. Upon reassessment it was determined that Student no longer exhibited articulation deficits in the areas which had been addressed during the speech therapy nor in any other areas of articulation other than those standard for his age group. On May 24, 2013, Student's IEP team, including Mother, exited Student from special education. Subsequent testing supported the speech and language assessment, which found that Student's speech articulation disorder was remediated.

37. In June 2014, Parents requested that San Lorenzo assess Student for special education. In late September 2014 and early October 2014, San Lorenzo assessed Student to determine whether he met the eligibility criteria for a speech and language impairment. The results of the assessment found that Student did not meet the criteria for a speech and language impairment. As discussed above, Student argues that San Lorenzo's assessment was deficient and that San Lorenzo should have found Student eligible for special education on the basis that he exhibited a language disorder that adversely affected his educational performance. Student did not assert, nor did the evidence support, that Student exhibited an articulation disorder, abnormal voice, or fluency disorder. In support of his position, Student argues that the independent speech and language assessment conducted in spring 2015 proves that Student fits the eligibility criteria.

38. However, Student did not meet his burden of proving that he met the criteria for a speech and language disorder under the category of a language disorder. The criteria set forth in Education Code section 56333 requires that in order to establish that a student has an expressive or receptive language disorder, he must score at least 1.5 standard deviations below the mean, or below the 7th percentile, for his age on two or more standardized tests in one or more of the following areas of language development: morphology, syntax, semantics, or pragmatics. Although Student established that he scored below the 7th percentile on one subtest in the area of semantic, he failed to prove by a preponderance of the evidence that he had a second subtest score at least 1.5 standard deviations below the mean, or below the 7th percentile, in the language development areas of morphology, syntax, semantics, or pragmatics. Therefore, San Lorenzo did not deny Student a FAPE by failing to find him eligible for special education and related services under the special education category of speech and language impairment beginning May 24, 2014 to the date of the hearing.

OTHER HEALTH IMPAIRMENT

39. Student argues he is eligible for special education under the category of other health impairment due to his Student's diagnosis of ADHD. San Lorenzo contends that Student did not prove that he meets the eligibility criteria of other health impairment.

40. A student may be eligible for special education in the category of other health impairment if he "has limited strength, vitality, or alertness, including a heightened alertness to environmental stimuli, that results in limited alertness with respect to the educational environment that ... is due to chronic or acute health problems ... and [a]dversely affects a child's educational performance" (Cal. Code Regs., tit. 5, § 3030, subd. (b)(9).)

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

42. Student presented unsupported evidence, in the form of a letter from Student's doctor, stating that Student "struggles" with ADHD. The September 2015 letter does not indicate who diagnosed Student with ADHD or when that diagnosis occurred. The only other evidence provided by Student regarding Student's diagnosis of ADHD came from Mother's testimony who indicated that Student had ADHD. However, Mother was not able to specify when Student had been diagnosed. Alone, a diagnosis of ADHD does not support a finding that Student meets the eligibility criteria for other health impairment. In order to be eligible, the student must show that his educational performance is adversely affected by the disorder, and must demonstrate a need for special education and related services by meeting the eligibility criteria for other health impairment set forth above. (Ed. Code, §56339, subd. (a).) In this case, Student did not meet his burden of showing that his educational performance is adversely affected by ADHD. Although Student was reported to be inattentive and hyper at times, with redirection Student was able to successfully return to the task at hand. Therefore, San Lorenzo did not deny Student a FAPE by failing to find him eligible for special education services beginning May 24, 2014 to the time of the hearing.

SPECIFIC LEARNING DISABILITY

43. Student contends that San Lorenzo denied Student a FAPE by failing to find him eligible for special education under the category of specific learning disability and that the undisputed evidence shows that Student exhibits a processing a disorder and a severe discrepancy between achievement and intellectual ability. San Lorenzo argues that the

assessments show that Student did not fit the criteria of a specific learning disability and that Student failed to meet his burden of proof on this issue.

44. Eligibility under the category of specific learning disability requires that a pupil have a disorder in one or more of the basic psychological processes involved in understanding or in using language, which may manifest itself in the imperfect ability to listen, think, speak, read, write, spell, or perform mathematical calculations. The term "specific learning disability" includes conditions such as perceptual disabilities, brain injury, minimal brain dysfunction, dyslexia, and developmental aphasia. (20 U.S.C. §1401(30); Ed. Code, § 56337, subd. (a).) Basic psychological processes include attention, visual processing, auditory processing, sensory-motor skills, cognitive abilities including association, conceptualization, and expression. (Cal. Code Regs., tit. 5, § 3030, subd. (b)(10).)

45. Attention deficit hyperactivity disorder may be an underlying condition for specific learning disability eligibility. A student "whose educational performance is adversely affected by a suspected or diagnosed attention deficit disorder or attention deficit hyperactivity disorder" and who meets the eligibility criteria for specific learning disability under Education Code section 56377 and California Code of Regulations, tit. 5, section 3030, subdivision (j), is entitled to special education and related services. (Ed. Code, § 56339, subd. (a).)

46. A school district shall determine that a child has a specific learning disability using one of two methods: the severe discrepancy method, or the response to intervention method.¹³ (20 U.S.C. § 1414(b)(6); 34 C.F.R. §§ 300.307, 300.309(a)(1) & (2); Ed Code, 56337, subs. (b), (c).) The severe discrepancy method requires that a student have a severe discrepancy between achievement and intellectual ability in oral expression, listening comprehension, written expression, basic reading skills, reading comprehension, mathematical calculation, or mathematical reasoning. (20 U.S.C. § 1414(b)(6)(A); Ed. Code, § 56337, subd. (b)[authorizes the continued use of a discrepancy method to determine eligibility for specific learning disability]; Cal. Code Regs., tit. 5, § 3030, subd. (j).) The severe discrepancy shall not be primarily the result of limited school experience or poor school attendance. (Cal. Code Regs., tit. 5, § 3030, subd. (j)(5).)

47. A child may have a specific learning disability if he does not "achieve adequately for the child's age or to meet State-approved grade-level standards" in specified academic areas when provided with appropriate learning experiences and instruction. (34 C.F.R. § 300.309(a)(1).) State law specifies that intellectual ability, for the purpose of calculating a severe discrepancy, includes both acquired learning and learning potential, and shall be determined by a systematic assessment of intellectual functioning. (Cal. Code Regs., tit. 5, § 3030, subd. (j)(2).) The level of achievement, for the purpose of calculating a severe

¹³ Response to intervention was not used by San Lorenzo in this case nor did either party raise it as part of an argument regarding eligibility, thus it will not be addressed in this Decision.

discrepancy, includes the student's level of competence in materials and subject matter explicitly taught in school and shall be measured by standardized achievement tests. (Cal. Code Regs., tit. 5, § 3030, subd. (j)(3).)

48. In California, a severe discrepancy, for the purposes of determining a specific learning disability, is demonstrated by comparing standardized achievement and ability test scores and finding that they are more than 1.5 standard deviations apart. Using a standard deviation of 15, a 1.5 standard deviation would be a difference of 22 points. If found, the discrepancy must be corroborated by other assessment data, which may include other tests, scales, observations, and work samples. (See, Cal. Code Regs., tit. 5, § 3030, subd. (j)(4)(A).)

49. Despite Student's claim that Student has a processing disorder and that he exhibits a severe discrepancy between his intellectual ability, the evidence does not support Student's claim. Student failed to introduce any evidence to support that Student demonstrated a severe discrepancy by comparing standardized achievement and ability test scores and finding that they are more than 1.5 standard deviations as required in California. The evidence in this case simply does not support a finding that Student meets the eligibility criteria for specific learning disability. San Lorenzo's assessment determined that Student did not have a disorder in one or more of the basic psychological processes involved in understanding or in using language, which manifests itself in the imperfect ability to listen, think, speak, read, write, spell, or perform mathematical calculations. Although Student has challenged the validity of that assessment, Student has not provided any independent evidence showing that he meets the criteria for a specific learning disability and this Decision finds the assessment valid.

50. Although ADHD may be an underlying condition for specific learning disability eligibility, the student's educational performance must be adversely affected by the ADHD and the Student must meet the specific learning disability eligibility criteria set forth in Education Code section 56377 and California Code of Regulations, tit. 5, section 3030, subdivision (j). As analyzed above, Student did not present sufficient evidence to show that ADHD adversely affects Student's educational performance. Additionally, Student did not prove that Student met the specific learning disability criteria as analyzed in the preceding paragraph. For this reason and those stated above, Student did not meet his burden of proving that San Lorenzo denied Student a FAPE by failing to find him eligible for special education under the category of specific learning disability beginning May 24, 2014 to the date of the hearing.

Issue 5: Did San Lorenzo Deny Student a FAPE by Failing to Provide an Appropriate Educational Program?

51. Student argues that San Lorenzo denied him a FAPE from September 2013 until the time of hearing by failing to provide Student with appropriate academic support; appropriate occupational therapy support; appropriate behavior support; appropriate

supervision for safety awareness issues; and an emergency plan for Student regarding his severe health risk of anaphylactic allergic reaction.

52. An administrative law judge has the authority to determine whether a student is eligible for special education and related services under the IDEA. (*Hacienda La Puente Unified School Dist. v. Honig* (9th Cir. 1992) 976 F.2d 487, 492-493.) If a district has failed to properly identify a student as eligible for special education, and therefore failed to develop an appropriate IEP for the student, the district has denied the student a FAPE. (*Cari Rae S., supra*, 158 F.Supp.2d 1190, 1196.)

53. As found in Issue 4, Student does not meet the eligibility requirements of special education for speech and language impairment, other health impairment, and specific learning disability. As Student has not been found eligible for special education, San Lorenzo has had no duty to provide Student with a FAPE.

Issue 6: Did San Lorenzo Deny Student a FAPE by Failing to Fund Psychoeducational and Academic Independent Educational Evaluations?

54. Student argues that San Lorenzo's delay in funding the independent psychoeducational and academic assessments constituted an unnecessary delay thereby denying Student a FAPE. San Lorenzo contends that the delay in funding the independent psychoeducational and academic assessments did not constitute an unnecessary delay, as the delay was not the fault of San Lorenzo.

55. Under certain conditions, a student is entitled to obtain an independent educational evaluation at public expense. (20 U.S.C. § 1415(b)(1); 34 C.F.R. § 300.502(a)(1); Ed. Code, § 56506, subd. (c) [parent has the right to an independent educational evaluation as set forth in Ed. Code, § 56329]; see also 20 U.S.C. § 1415(d)(2) [requiring procedural safeguards notice to parents to include information about obtaining an independent educational evaluation].) "Independent educational evaluation means an evaluation conducted by a qualified examiner who is not employed by the public agency responsible for the education of the child in question." (34 C.F.R. § 300.502(a)(3)(i).) To obtain an independent educational evaluation, the student must disagree with an evaluation obtained by the public agency and request an independent educational evaluation. (34 C.F.R. § 300.502(b)(1), (b)(2).)

56. When a student requests an independent educational evaluation, the public agency must, without unnecessary delay, either file a request for due process hearing to show that its assessment is appropriate or ensure that an independent education evaluation is provided at public expense. (34 C.F.R. § 300.502(b)(2); Ed. Code, § 56329, subd. (c).)

57. Whether a district's delay is unnecessary within the meaning of the above regulation is a fact-specific inquiry. Many decisions have found delays shorter than the delay in this matter unnecessary. In *Pajaro Valley Unified School Dist. v. J.S.* (N.D. Cal. Dec. 15, 2006, C06-0380 PVT) 2006 WL 3734289, p. 3, for example, the court determined

that the school district unnecessarily delayed filing its due process request because it waited almost three months to do so. (See also *Taylor v. District of Columbia* (D.D.C. 2011) 770 F.Supp.2d 105, 107-108, 111 [four month delay unnecessary]; *Student v. Temecula Valley Unified School Dist.* (OAH, Jan. 14, 2013, No. 2012020458 [four- and-one-half month delay unnecessary]; *Student v. Los Angeles Unified School Dist.* (OAH, Dec. 14, 2012, No. 2012090139 [70 day delay unnecessary]; *Student v. Los Angeles Unified School Dist.* (OAH, July 7, 2011, No. 2011020188) [90-day delay unnecessary]; *Lafayette School Dist. v. Student* (OAH, July 1, 2009, No. 2008120161)[74-day delay unnecessary]; *Fremont Unified School Dist. v. Student* (OAH, June 1, 2009, No. 2009040633) [four month delay unnecessary]; *Student v. Los Angeles Unified School Dist.* (OAH, June 20, 2007, No. 2006120420 [64-day delay unnecessary]; cf. *H.S. v. San Jose Unified School Dist.* (N.D.Cal. May 6, 2013, No. C 12-06358 SI) 2013 WL 1891398, pp. 2-4 [seven month delay unnecessary].)

58. Here, the substantial delay in providing Student with the independent education evaluations was due in part to the unavailability of Student's requested assessors. However, San Lorenzo's failure to follow up with assessors in a timely manner caused an unnecessary delay. In particular, San Lorenzo's failure to contract with Dr. Grandison, despite her availability to complete the assessments, and its delay in notifying Parents it had failed to contract with Dr. Grandison caused an unnecessary delay. As of the date of the hearing, the independent psychoeducational and academic assessments, which San Lorenzo agreed to fund in December 2014, had not been completed. This lengthy delay constitutes an unnecessary delay on San Lorenzo part to fund Student's requested independent educational evaluations.

59. In *Rowley*, the Supreme Court recognized the importance of adherence to the procedural requirements of the IDEA. (*Id.* at 205-206.) However, a procedural error does not automatically require a finding that a FAPE was denied. A procedural violation results in a denial of FAPE only if it impedes the child's right to a FAPE, significantly impedes the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the parents' child, or causes a deprivation of educational benefits. (20 U.S.C. § 1415(f)(3)(E)(ii); Ed. Code, § 56505, subd. (f)(2).); see *W.G. v. Board of Trustees of Target Range School Dist. No. 23* (9th Cir. 1992) 960 F.2d 1479, 1484.)

60. A procedural violation denies a child a FAPE only if it impedes the child's right to a FAPE, significantly impedes the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the child, or causes a deprivation of educational benefits. (20 U.S.C. § 1415(f)(3)(E)(ii); see *W.G. v. Board of Trustees of Target Range School District No. 23* (9th Cir. 1992) 960 F.2d 1479, 1484 [superseded by statute on other grounds, as stated in *R.B. v. Napa Valley Unified School Dist.* (9th Cir.2007) 496 F.3d 932, 939] (*R.B. v. Napa Valley*).)

61. Where a procedural violation is found to have significantly impeded the parents' opportunity to participate in the IEP process, the analysis does not include consideration of whether the student ultimately received a FAPE, but instead focuses on the remedy available to the parents. (*Amanda J. ex rel. Annette J. v. Clark County School Dist.*

(9th Cir. 2001) 267 F. 3d 877, 892-895 [school's failure to timely provide parents with assessment results indicating a suspicion of autism significantly impeded parents right to participate in the IEP process, resulting in compensatory education award].)

62. In this case, San Lorenzo committed a procedural violation by interfering with Parents' opportunity to participate in the IEP process by failing to fund the requested independent psychoeducational and academic assessments. However, this Decision finds that Student is not eligible for special education services. In *R.B. v. Napa Valley*, the Ninth Circuit Court of Appeals held that a procedural violation did not result in a denial of a FAPE because the student was no longer eligible for special education. While the court in that case recognized that procedural violations often result in a denial of a FAPE, the court distinguished those cases based on eligibility. "A child ineligible for IDEA opportunities in the first instance cannot lose those opportunities merely because a procedural violation takes place." (*Id.*, at 942.) (See *M.L. v. Fed. Way Sch. Dist.*, (9th Cir. 2005) 394 F.3d 634, 652.) Thus, Student was not denied a FAPE by San Lorenzo's failure to fund the independent psychoeducational and academic assessments.

63. The finding that San Lorenzo did not deny Student a FAPE due to failing to fund the independent educational evaluations has no effect on San Lorenzo's obligation to provide Student with the independent educational evaluations for which it has currently contracted. San Lorenzo was required to either fund the requested independent educational evaluations or file for due processing hearing to prove its assessments were appropriate. San Lorenzo chose to fund the independent psychoeducational and academic assessments and nothing in this Decision shall be construed to relieve them of that obligation.

ORDER

1. All relief sought by Student is denied.
2. Nothing in this Decision shall be construed to relieve San Lorenzo of its obligation to fund independent psychoeducational and academic assessments.

PREVAILING PARTY

Pursuant to California Education Code section 56507, subdivision (d), the hearing decision must indicate the extent to which each party has prevailed on each issue heard and decided. Here, San Lorenzo was the prevailing party on all issues presented.

RIGHT TO APPEAL

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

DATED: January 14, 2016

/s/

B. ANDREA MILES
Administrative Law Judge
Office of Administrative Hearings