BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Consolidated Matters of: Parents, on behalf of STUDENT, v. LOS ANGELES UNIFIED SCHOOL DISTRICT,	OAH CASE NO. 2008010373
LOS ANGELES UNIFIED SCHOOL DISTRICT, v. Parents, on behalf of STUDENT.	OAH CASE NO. 2008050471

DECISION

Administrative Law Judge Eileen M. Cohn, Office of Administrative Hearings (OAH), State of California, heard these consolidated matters in Los Angeles and Van Nuys, California, on June 18 and 20, 2008 and July 9, 21, 22, 23, and 25, 2008.[1]

Mother represented Petitioner (Student). Peter A. Sansom, Attorney at Law, of Lozano Smith represented Los Angeles Unified School District (District). At various times, Susan Glickman, Patricia Leach and Sandi Naba attended the hearing as representatives of the District.

On January 9, 2008, Student filed his Request for Due Process Hearing, OAH Case No. 2008010373 (Student's Complaint). On May 12, 2008, District filed its Request for Due Process Hearing (District's Complaint) in OAH Case 2008050471, and a Motion to Consolidate District's Complaint with Student's Complaint for hearing.

[1] On June 18, July 9, 22 and 23, 2008 the hearing was held at District elementary schools. On June 20, July 21 and July 25, 2008, the hearing was held telephonically.

On May 19, 2008, District's Motion to Consolidate was granted, and the due process hearing on the consolidated matter was continued until June 16, 2008. The ALJ vacated the June 16 hearing date and continued the prehearing conference to that day. At the prehearing conference the parties agreed to continue the consolidated due process hearing matter to June 18, 2008, and during the due process hearing, the parties agreed to continue the hearing to specified dates, times and locations, in order to accommodate witnesses and Mother.

Sworn testimony and documentary evidence were received at the hearing. Closing arguments were presented on July 25, 2008, and the record was closed.

ISSUES

1. Did District deny Student a free and appropriate public education (FAPE) for the 2006-2007 school year, as of February 2007, by failing to find Student eligible for special education and related services under the category of speech and language impaired (SLI) at the initial IEP team meeting in February 2007?

2. Did District fail to offer Student a FAPE in the least restrictive environment (LRE) for the 2007-2008 school year at the June 20, 2007, IEP team meeting by:

A. offering only 30 minutes of speech and language (LAS) services at the District school site using a pull-out model;

B. offering only 120 minutes of occupational therapy (OT) consultation services for the school year at the District school site; and

C. offering placement in a District general education elementary school class.

3. Whether Student was no longer eligible for special education and related services as of the May 6, 2008 IEP team meeting.

REQUESTED REMEDIES

Student requests an order of compensatory education in the amount of two hours a week of LAS and two hours a week of OT delivered by a nonpublic agency (NPA) and placement in a private school.

District requests an order confirming that Student is not eligible for special education and related services as of the June 20, 2008 IEP team meeting.

FACTUAL FINDINGS

1. Student was born November 6, 2001. At all relevant times Student has resided in the District with Mother and his father (Parents), one older sibling and two younger siblings. Parents have never enrolled Student in a District school. Student has attended private nonsecular elementary schools since kindergarten. The District school closest to Student's home (Student's home school) is Carthay Elementary School (Carthay).

2. Before Student's fifth birthday, Mother referred Student for an assessment with the Westside Regional Center (WRC) to rule out an autistic spectrum disorder and to address her concerns about speech and language delays. Mother reported incidences of autism, Down's syndrome and developmental issues in the family. From Mother's observation of Student at home and at the local park, Mother suspected that he might have communication, language, socialization and motor delays symptomatic of autism, or a SLI. In July 2006, Janet Wolf, Ph.D., a WRC psychologist, evaluated Student and did not diagnose him with any disability.

The February 2007 IEP Team Meeting

3. On November 2, 2006, Mother requested that District conduct a psychoeducational and LAS assessment of Student and provide Student with special education. She also indicated that OT and behavior therapy might be needed. Mother filled out a student information questionnaire to assist District in its assessment of Student. She indicated that Student had articulation and pronunciation problems. She expressed concerns with Student's balance and motor coordination. She informed District that Student does not interact well socially; that he cries when he doesn't get his way, throws tantrums and is pushed around by others. To assist with her assessment request, Carthay's special education administrator advised Mother to get input from Student's private school teachers about Student's strengths and abilities, their areas of concern and the impact of the suspected disability on Student's education. Mother obtained letters from the principal of general studies for Student's school and Student's kindergarten teacher recommending that Student receive speech therapy. The principal noted that speech therapy was needed so that Student could articulate clearly to his peers and his teachers, and his teacher observed that Student had difficulty making the "th" sound. Mother also obtained a letter from a medical doctor. Without elaboration, the doctor recommended speech therapy for Student's "speaking abilities" and OT for his "fine motor deficits including spatial discrimination."

4. In response to Mother's request for assessment, District developed an assessment plan and directed five separate District assessors to prepare assessment reports. Between December 2006 and February 2007, Student completed a battery of standardized tests, observations and interviews for the purpose of determining his eligibility for special education. Five reports were prepared: a psychoeducational assessment; a LAS assessment; and OT assessment, an adapted physical education (APE) assessment; and a physical therapy (PT) assessment.

5. On February 1, 2007, an initial IEP team meeting was scheduled to review the assessments and to determine whether Student was eligible for special education. The meeting was recessed as a result of a District-wide breakdown of the computerized IEP document system and reconvened and completed on February 20, 2007. In attendance were: Mother; Carthay's Vice Principal responsible for special education; District speech and language pathologist (SLP) Paula Sinclair; a special education teacher; two District OT therapists, including Felicia Dudley (Ms. Dudley) Student's assessor; District's physical therapist (PT); and District's applied physical education (APE) teacher.[2]

Cognitive and academic abilities

6. District's initial psychoeducational assessment was reviewed. In December 2006, Steven Baker (Mr. Baker), District school psychologist, conducted District's initial psychoeducational assessment of Student to determine his eligibility for special education. Mr. Baker administered a battery of standardized tests and conducted an informal interview. Mr. Baker utilized the following tests and observations to gather information:

Attention Deficit Hyperactivity Disorder (ADHD) Rating Scale-IV: Home Version
ADHD Rating Scale –IV: School Version
Bender Visual Motor Gestalt Test (Bender)
Burks' Behavior Rating Scale (Burks')
Conners' Parent Rating Scale – Revised: Long Version (Conners'-Parent)
Conners' Teacher Rating Scale – Revised: Long Version (Conners'-Teacher)
Developmental Test of Visual-Motor Integration (VMI)
Draw-A-Person Projective Instrument
Elementary Classroom Performance Screening Sheet
Gilliam Autism Rating Scale – Second Edition (GARS-2)
Matrix Analogies Test (MAT)
Motor-Free Visual Perception Test-Third Edution (MFVPT-3)
Test of Auditory-Perceptual Skills – 3 (TAPS-3)
Visual Aural Digit Span Test (VADS)
Wide Range Achievement Test -3 (WRAT3)
Woodcock Language Proficiency Battery – Revised (WLPB-R)

7. Mr.Baker concluded that Student was functioning in the superior range of cognitive ability. Mr. Baker's conclusion was based upon his analysis of the results of the standardized tests, teacher reports and his informal interview of Student. Student's visual and auditory processing skills were an area of strength.[3] Mr. Baker looked to the VADS results to measure Student's potential to learn and achieve at school. His perceptual-motor integration, sequencing and recall, as measured by the VADS, was above age equivalent

[2] Since the IEP team treated the two meeting dates as one IEP team meeting, the February 1 and February 20, 2007, meetings, shall be referred to collectively as the "February 2007 IEP team meeting."

[3] Visual processing is the ability to analyze and synthesize visual stimuli and auditory processing is the ability to analyze and synthesize auditory stimula.

levels. Student's ability to form verbal concepts, as measured on the WLPB-R, indicated appropriate aptitude. Mr. Baker noted that Student had reasonable ability to comprehend and verbally complete logical word relationships. He noted from teachers' reports that Student was able to grasp new concepts ("fast"), transfer previous learning to new learning situations ("always even without being asked"), and retain previous learning from day-to-day ("extensive memory"). Mr. Baker's informal interview of Student revealed "sufficient ability to relate all personal data and a general fund of knowledge."

8. Student's academic achievement was measured by WRAT3. His standard scores were in the superior range in spelling and arithmetic, and in the high average range in reading achievement. Student was able to write his name, decode letters out of context with 100 percent accuracy, solve some oral arithmetic problems and perform several of the basic addition number computations presented.

Speech and Language

9. Mr. Baker's assessment addressed Student's speech and language abilities. Student's oral expressive language and receptive language were in the high average range and an area of strength. Student displayed reasonable ability to correctly name and respond appropriately on the picture vocabulary subtest of the WLPB-R. He displayed reasonable ability to comprehend and verbally complete logical word relationships and to discern the inherent relationships or association among words in the verbal analogies subtest of the WLPB-R. Similarly, as reflected on subtests of the TAPS-3, Student's receptive language strength was demonstrated by his ability to discriminate paired words with phonetically similar consonants, cognates, or vowel differences.

10. Teachers' reports were consistent with the results of Mr. Baker's formal assessments of Student's oral expressive and receptive language. Students' teachers reported that Student was at a "higher level" in his ability to express his ideas verbally, and was "in progress" of learning to express his ideas in writing. Student understood teachers' classroom directions.

11. Ms. Sinclair, District's SLP, conducted an initial assessment of Student's speech and language needs when Student was five years, two months of age. Her test results were discussed at the February IEP team meeting.

12. Student did not display any deficits in receptive language during Ms. Sinclair's assessment. Ms. Sinclair administered the Receptive One Word Picture Vocabulary Test. In that test, the Student's ability to recognize objects, verbs and concepts was assessed. The test measures what a pupil has learned from his home and school environments. Student was presented with four pictures. In response to the assessors' questions about four pictures, Student was asked to point to objects in the pictures. Applying a standard deviation of 1.5, Student's standard score of 145 was three standard deviations above the mean score of 100, and within the 99th percentile of other pupils in the area of receptive language.

13. Student did not display any deficits in expressive language during Ms. Sinclair's assessment. To assess Student's expressive language, Ms. Sinclair administered the Expressive One-Word Picture Vocabulary Test which measures the range of Student's vocabulary. Student's standard score of 138 was two-and-a-half standard deviations above the mean of 100. His expressive abilities, like his receptive abilities, placed him in the 99th percentile of pupils. Student's expressive abilities impressed Ms. Sinclair. In her report, she commented:

> The speed with which [Student] answered each item was astonishing. After each answer he said 'I know this.' He demonstrated that he certainly did.

14. Ms. Sinclair did not find any deficits in Student's articulation which were not age appropriate. Ms. Sinclair administered a standardized assessment to measure Student's phonemic development.[4] Student pronounced all phonemes correctly, excepting "r" and all blends with "r." Ms. Sinclair was not concerned about his inability to correctly reproduce the "r" sound as this sound does not often develop until age eight.

15. From her interview with Student, Ms. Sinclair observed that the pitch of his voice and fluency of his speech were age appropriate. She noted that the intelligibility of his speech was affected by his tendency to speak rapidly and that intelligibility improved when he slowed down. Ms. Sinclair concluded that Student did not have any problems with his voice or the fluency of his speech.

16. Ms. Sinclair assessed Student's pragmatic speech abilities by engaging him in conversation. Pragmatic speech refers to a pupil's ability to engage in and maintain social conversation. Deficits in pragmatic speech directly impact a pupil's social skills. Assessments of pragmatic speech are also used to determine whether a pupil has autism. Pupils with autism have trouble initiating conversation, maintaining eye contact during a conversation, responding appropriately and participating in a conversation. Student had to be coaxed to converse. He was in a rush to attend school. After some coaxing, Student conversed with ease. He spoke happily about a favorite TV show. He maintained eye contact with Ms. Sinclair during their conversation. Ms. Sinclair concluded that Student did not display any deficits in pragmatic speech and did not exhibit autistic-like behaviors.

17. Ms. Sinclair exclusively relied upon formal tests and her observations from her interview with Student. She did not speak with Student's current teachers. She did not interview Mother.

18. Ms. Sinclair testified at the hearing. She has twenty-five years experience as a SLP; of those years, 15 have been spent in the public school system. Ms. Sinclair maintains the required California license for her profession. She has conducted one thousand

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[4] The standardized assessment was referred with the acronym "PAT." At the hearing, Ms. Sinclair did not recall the full name of the assessment.

assessments and participated in as many IEP team meetings. She was proud of her ability to quickly establish rapport with young pupils and to elicit reliable information from them. She believes her interaction with Student was positive and her assessment results reliable. Ms. Sinclair was a credible witness. Ms. Sinclair was present at every IEP team meeting convened for Student. She was familiar with the independent LAS assessments later administered to Student and was able to explain the conflicting eligibility determinations made in the February and June 2007 IEP team meetings. Ms. Sinclair's test results were brief. For the February IEP team meeting, she prepared only a one-page summary of her results. She relied completely upon standardized tests and her personal observation of Student. The conclusions she reached about Student's pragmatic strength differed from independent assessor Kathy Khalehpari's (Ms. Khalehpari's) conclusions a few month later. In all other respects, her assessment was consistent with Ms. Khalehpari's independent assessments. Accordingly, with the exception of her conclusion about Student's pragmatic strength at the February 2007 IEP team meeting, her testimony was given great weight.

Motor skills

19. Mother reported to District her concerns about Student's motor skills. She reported that he could not catch a ball and did not know how to kick his legs on a swing. Mother observed that Student bumped into things and could not walk straight. Teachers did not report concerns in this area. District's APE teacher and physical therapist separately assessed Student's gross motor skills as part of Student's initial evaluation for special education. District's APE teacher assessed Student by observing him balancing, walking, running, jumping, hopping, stair climbing, throwing, catching and kicking. District's APE teacher concluded that Student did not demonstrate gross motor delays. He was able to walk up and down the stairs alternating his feet, and he was able to throw, catch and kick a ball using the appropriate skills. As a result of her direct observations of Student, and interview with Mother, District's physical therapist concluded that Student was well balanced, demonstrated a good variety of gross motor and ball handling skills. His muscle tone was within functional limits, he did not have any postural or structural abnormalities, and his range of motion in his trunk and lower extremities were within functional limits.

20. Mother feared that Student's motor delays were indicative of an autism spectrum disorder. She reported concerns with Student's fine motor skills. According to Mother, Student could not use scissors, or hold pencils or utensils properly. He could not button his shirt, zip his pants, or tie his shoe laces. She reported that he had heightened sensitivity to touch and sound. He did not like to be hugged and he covered his ears to avoid noise. Teachers did not report these concerns.

21. On February 9, 2007, when Student was five years, three months old, District OT Ms. Dudley conducted an initial OT assessment. An OT assessment measures whether pupils' neurological, visual-motor and motor systems are performing within normal limits for their age. The OT assessment may reveal deficits that indicate a disability (e.g., autism, orthopedic) that interferes with pupils' access to education. Ms. Dudley observed Student, interviewed Mother, reviewed teacher reports and administered the standardized assessment,

the Beery Buktenica Developmental Test of Visual-Motor Integration, Fifth Edition (Beery-VMI); specifically, the short form (ages 2-7) and the visual perception subtest.

22. Ms. Dudley assessed Student's neuromuscular range of motion. She determined that his muscle tone, strength and range of motion were within normal limits. He could reach and carry items without difficulty in the classroom setting. He demonstrated normal postural stability and adequate endurance to maintain posture. He was able to sit, stand, and walk without complaining of pain. He walked around the classroom without tripping or falling. He demonstrated adequate balance and equilibrium when jumping, hopping and skipping.

23. Student demonstrated functional visual perceptual skills during Ms. Dudley's assessment. He was able to point to pictures of familiar objects, discriminate shapes and sizes, and visually track objects in all directions. He was able to put the pieces of a simple interlocking puzzle together without cues or assistance. He positioned paper correctly when coloring and did not need to tilt his head too close to the paper when coloring or writing. He demonstrated adequate depth perception by reaching for items without overshooting. On the visual perception subtest of the Beery-VMI Student performed in the very high range.

24. Student's fine motor skills were normal for his age. He grasped small objects in play dough and utilized a sufficient grasp with his writing utensils. He picked up small items and placed them in the palm of his hand, twiddled his thumbs, and isolated his thumbs by lacing his hands together while rotating them to and away from his body.

25. Student's visual motor skills were normal. A visual motor assessment, such as the Beery-VMI short form, measures whether Student has appropriate coordination between their eye and hand. Student used adequate pencil pressure when coloring or writing, colored within the border 90 percent of the time, and printed his name with proper letter formation and sizing of letters. Student held his scissors correctly and exerted proper bilateral integration of his left hand to hold the paper with his right cutting hand. Student performed in the high range on the Beery-VMI short form.

26. Ms. Dudley measured Student's sensory integration or processing skills. Sensory integration is the neurological process by which sensations (from the skin, eyes, joints, gravity and movement receptors) are organized for use. Sensory processing may impact a pupil's activity level, his ability to handle transitions, and his attention. Weaknesses in sensory integration or processing may be indicative of autism or ADHD. The OT assessment measures three different processes in the body: the tactile system, the proprioceptive sense, and the vestibular sense. The tactile system provides feedback to the body about the shape temperature, size and texture of an object. Student could discriminate between objects by using touch, and unlike pupils with autistic behaviors, tolerated touching various textures and did not avoid or seek out particular objects.

27. Student demonstrated adequate proprioceptive discrimination for various tasks. The sense of proprioception provides information to the muscles and joints and

signals to the body where it is in space. It controls how much pressure the muscles must use to accomplish a task, e.g, how hard to press a writing utensil, how hard to push a door, or throw a ball. Student did not display proprioceptive deficts as manifested by bumping or crashing into objects, or seeking deep pressure such as excessive hugging. He used adequate pressure for writing and coloring.

28. Student also demonstrated that he possessed an appropriate vestibular sense. The vestibular sense provides information related to head position and movement. The receptors of this system respond to gravity and motion, especially where there is a change of direction. Excessive jumping, rocking, or spinning or a fear of heights would indicate possible vestibular sense inadequacies. Student demonstrated good vestibular discrimination by crossing his body midline and incorporating bilateral coordination of activities such as using both sides of his body for cutting and writing.

29. Ms. Dudley administered the Structured Observations of Sensory Processing Measurements. In this assessment, Student imitated various body movements and positions. Student adequately completed all the movements and positions he was requested to perform, demonstrating that he had adequate sensory processing skills.

30. The OT assessment also measured Student's motor planning abilities, referred to as praxis, by requesting Student to complete several tasks. Student was able to complete a three step obstacle course, which included finding objects in play dough, hopping over a puzzle, and putting the puzzle together. He was able to complete a three-step fine motor activity which included folding, pushing, pressing and then cutting out dough using dough cutters. Student was able to imitate body positions involving opposite sides of the body. He demonstrated good hand-eye coordination when he negotiated obstacles such as desks and chairs.

31. Ms. Dudley determined that Student's self-help skills were age appropriate for school. She concluded that Student was independent at school because he could independently hold writing utensils, dough cutters and scissors, and his gross, fine, and visual motor and motor planning skills were functional. In addition, Student was independent with feeding and toileting at school. Ms. Dudley responded to Mother's complaints. Ms. Dudley noted that Student's delay in tying shoelaces did not indicate a deficiency because pupils only start to tie their shoes at aged five and Student was only five years, three months of age at the time of the hearing. Although Mother indicated that Student had trouble holding a spoon and feeding himself, from his use of writing utensils and other school-day tools, Ms. Dudley concluded that he had the ability to hold a spoon to his mouth.

32. Overall, Ms. Dudley concluded that Student demonstrated adequate sensory processing by maintaining his attention and focus, and transitioning from one activity to another during the assessment, followed directions and was excited about performing some of the games and activities in the assessment. Student had no problem transitioning between activities.

33. Ms. Dudley was well qualified to assess Student and to provide expert testimony about OT and OT assessments. She graduated from University of Southern California (USC) with a degree in OT and maintains the required California license. Ms. Dudley assesses pupils, provides OT services to District pupils, and attends IEP team meetings. Ms. Dudley testified credibly about the scope of her assessment and her conclusions. Ms. Dudley and Mother engaged in a sharp exchange about Student's needs. Ms. Dudley was admittedly upset that she had to appear at a hearing during the summer even though she was being compensated for her attendance. She was frustrated with Mother's position that Student required OT services and that Ms. Dudley failed him by not recommending him for OT services in her assessment. Ms. Dudley testified that the source of her frustration was Mother's failure to understand that Student could not receive OT unless he was eligible for special education due to legally cognizable category like SLI or autism. Despite Ms. Dudley's emotional response to Mother, she clearly established the validity of her assessment and communicated her thorough understanding of Student's capabilities and needs. [5]

34. The results of Ms. Dudley's formal assessments and her observations of Student were unequivocal. Ms. Dudley did not personally interview Student's teachers, but she had access to teachers' reports from other assessments and these reports did not contradict her observations. Ms. Dudley reviewed medical information supplied by Mother. Her testimony and her report were given great weight in determining whether District's offer in 2007 was appropriate and whether District appropriately concluded that Student no longer qualified for special education as of May 2008.

35. Mr. Baker's assessment results corroborated Ms. Dudley's conclusions. Mr. Baker administered standardized tests to measure Student's gross and fine motor skills. Student scored in the superior standard score range in the Bender Gestalt Test of Visual-Motor Perception. Student reproduced a small version of the gestalt figure presented using fine lines. His method of reproduction was similar to children who are timid, shy, or insecure, but his gross and fine motor skills were intact. Mr. Baker also administered the Berry-VMI. Student score indicated that his ability to integrate or coordinate his visual perceptual and motor abilities was in the superior range. Overall, Mr. Baker concluded that Student tested in the high average range for sensory-perceptual integration.

Social emotional status

36. Mr. Baker assessed Student's social-emotional status. In doing so he performed assessments and reviewed teacher reports which measured whether Student had ADHD or possessed autistic like characteristics. Teachers reported that Student's adjustment to school, his teachers and peers was normal to advanced. His teachers did not observe him to be hyperactive, restless, erratic, flighty, scattered or distracted. Their responses to the

[5] Ms. Dudley also clearly and capably compared her assessment with other OT assessments in 2007 and 2008, including the independent assessment of Jean Pacifico-Banta an independent assessor, who conducted a subsequent independent OT assessment of Student at Mother's request. (*Infra* at paragraphs 68-77.)

Elementary Classroom Performance Screening Sheet indicated that Student could successfully and appropriately conduct himself in the following manner:

relate to peers and adults
work in a noisy environment
play in the school yard
participate in either small or large groups
make decisions independently
work independently
assume responsibility for his actions
cope with frustration
maintain an appropriate attention span
start an assignment on time
stay on task until an assignment is completed

37. Teachers completed several behavioral ratings scales as part of Dr. Baker's assessment. The teachers' GARS-2 rating scale measured signs of autistic-like behavior in the school environment. GARS-2 describes autism as a pervasive developmental disorder that appears in three key areas (referred to as subscales): social interaction, communication, and stereotyped patterns of behavior, interests, and activities. GARS-2 rates items in all three areas according to the following observations: (0) never observed; (1) seldom observed; (2) sometimes observed and (3) frequently observed. Subscale standard scores below three indicate an unlikely probability of autism; subscale standard scores between four and six suggest a possible probability of autism; and a subscale standard score of seven or higher indicates that autism is very likely. On each subscale Student received a total standard score of two indicating that Student was unlikely to have autism. Consistent with teachers' ratings, Mr. Baker concluded from his interview with Student and Student's projective drawing that he displayed age and socially appropriate communication.

38. As part of Mr. Baker's psychoeducational assessment, Mother completed the GARS-2 rating scales to measure signs of autistic-like behavior in the home environment. Mother's rating of "three" (frequently observed) fell in such areas as: avoiding eye contact; eating specific foods; turning in circles; slapping, hitting, or biting self, or attempting to injure self; not ask for things; inappropriate use of pronouns resisting physical contact. Mother's responses were markedly different than the teachers' ratings. Mother's responses to GARS-2 indicated that Student was in the "likely range of probability" for autism.

39. Teachers also completed other rating scales to measure whether Student displayed behavior symptomatic of ADHD, either the hyperactive or inattentive type. Teachers did not report clinically significant areas of concern in any of the three rating scales administered, Burks, Conners-Teacher, or the ADHD rating scales.

40. Mother's responses to the Conners'-Parents indicated that Student was "at risk" for ADHD, the combined type which includes inattentiveness, hyperactivity and impulsivity. Mother indicated on the Conners'-Parents that Student displayed inattentive

behavior, organizational problems, difficulty completing tasks, and concentration problems. Mother also indicated that Student had atypical emotional responses and behaviors, was sensitive to criticism, anxious in unfamiliar situations, had few friends, was shy and withdrawn, and had low self-esteem. Mother also indicated in their responses to the ADHD Rating Scale-IV: Home Version, that Student was hyperactive. Mother's answers corresponded to the Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition (DSM-IV) criteria for combined inattentive and hyperactive-impulsive type ADHD.

Eligibility, services and placement for the 2006-2007 school year

41. Mr. Baker concluded that special education services did not "appear to be needed at this time." He determined that Student's cognitive abilities were consistent with his academic achievement and that there was no evidence of a specific learning disability (SLD). He noted that Mother's concerns with Student's behavior in the home environment were not evident in the school environment. "On the contrary," Mr. Baker explained, "[Student] displays exemplary academic progress and positive social skills growth."

42. Based upon the results of the assessments, the IEP team determined that Student did not meet the eligibility requirements for special education and related services. Student was performing at or above grade level. The IEP team concluded from the assessments that "if [Student] had any disabilities, they were not keeping him from accessing his general education curriculum." Based upon the assessment of Student's cognitive ability and academic achievement, the school psychologist recommended that Student be tested for the District's gifted program when it becomes available the second semester of second grade.

43. District representatives confirmed that Student was appropriately placed in a general education class. They invited Parents to enroll Student in Carthay, his home school, for the duration of the 2006-2007 school year, and to continue his studies at Carthay for the 2007-2008 school year. Carthay is an elementary school for pre-kindergarten through fifth grade pupils. Fully credentialed general education teachers are assigned to the general education classes. The pupil-teacher ratio is 20 pupils to one teacher for kindergarten and first grade.

44. Mother did not consent to the IEP. She disagreed with the findings in District's assessments and requested that the District fund independent assessments. She requested independent assessments in LAS, OT, PT, APE and self-help. She identified Student's areas of need as "autism, speech, orientation, motor planning, gross motor and fine motor." She provided the following examples of Student's deficiencies to support her request.

Bumping into walls
Fear of heights
Fear of new change
Bothered by noise
Not alternating feet at the time of walking

Failure to zip up jacket
Failure to tie up shoe laces
And more

District agreed to fund the requested independent assessments.

June 20, 2007 IEP team meeting

45. A second IEP Team meeting was held on June 20, 2007 (the "June 2007 IEP team meeting") to discuss the independent assessments and to re-evaluate the IEP Team's four month old determination that Student was not eligible for special education. The IEP teams' decisions would govern Student's services and placement for the 2007-2008 school year. Mother, Carthay's Assistant Principal, a special education teacher, a general education teacher, District school psychologist Wynne Wong-Cheng, District OT Ms. Dudley, District SLP Ms. Sinclair, District's PT, District's APE, and its program specialist attended. The IEP team considered independent assessments in the following areas:

Psychoeducational
Speech and language
Occupational Therapy
Physical Therapy

The IEP team also considered an outside psychoeducational assessment Mother obtained from the WRC.

46. Sandi J. Fischer, Ph.D. (Dr. Fischer) conducted the independent psychoeducational assessment when Student was five years, four months, on April 5, 8 and 9, 2007. Ms. Fischer's assessment included standardized tests, parent interview and record review. She administered the following assessments:

Child Behavior Checklist
Standford-Binet Intelligence Scales – Fifth Edition
Norris Educational Achievement Test- Readiness and Achievement
NEPSY – Developmental Neuropsychological Assessment (selected subtest)

She did not observe Student at his private school or interview Student's private school teachers or other school personnel.[6]

47. Dr. Fischer testified at the hearing. She was well-qualified to administer the assessments. She received her masters and doctorate degrees in psychology in 1982 and has

[6] Mother disputed Ms. Fischer's claim that Mother refused Ms. Fischer's request to execute a release authorizing Ms. Fischer to interview Student's teachers or observe him at his private school. Of relevance to this decision is the absence of Ms. Fischer's personal interviews and school observation from her report. Ms. Fischer did observe Student and interview teachers for her 2008 reassessment.

been conducting developmental, psychological and psychoeducational assessments for children, adolescents and adults in private practice for eighteen years. She has substantial clinical experience conducting individual and group psychotherapy. She was qualified to render an opinion as to whether Student exhibited autistic like behaviors. In 1996, she conducted developmental assessments for the WRC to determine whether children qualified as autistic so that they could continue to receive regional center services. She was qualified to determine if Student suffered from a serious emotional disturbance. She had provided group and family psychotherapy for pupils with learning disabilities and emotional disturbance. As an experienced assessor, she was qualified to comment on and interpret Mr. Baker's psychoeducational assessment. Dr. Fischer assessed Student in 2007 and updated her assessment in 2008. She testified candidly and credibly. Her testimony was given great weight.

48. Dr. Fischer interviewed Mother. Mother reported to Dr. Fischer her concerns about Student. As with previous assessments, Mother's impressions of Student were contradicted by the impressions of Dr. Fischer and the results of the standardized tests. Mother stated that she spent an extensive amount of time at home working with Student on his academic skills. She remained concerned that he displayed autistic behaviors such as "tapping on his head," "go[ing] into circles, "flicker(ing) his eyes." She reported that he was sensitve to light and avoided eating certain fruits with seeds. Mother insisted that Student had "speech problems," a "motor delay and low muscle tone" and poor fine and gross motor coordination. She considered his social skills to be seriously deficient. She maintained that Student "never" had friends. She was concerned about his shyness. She viewed Student as too passive; she wanted him to be "more aggressive" and the type of child "who gets what he wants."

49. Mother also completed the Child Behavior Checklist where she was required to rate Student's specific behaviors. Her ratings were compared with the norms of boys of his age. Mother's ratings placed Student in the clinical range in the areas of withdrawn/depressed behavior, social problems and attention problems and in the borderline clinical range in the areas of anxious/depressed, thought problems, and aggressive behaviors.

Cognitive ability and achievement

50. Like Mr. Baker, Dr. Fischer concluded from assessments of Student's cognitive ability that he was very bright. The results from the Stanford-Binet indicated that Student's verbal ability was in the superior range and his nonverbal ability tested in the high average range. He demonstrated a particular strength in verbal visual spatial processing skills. Overall, Student did not exhibit any area of weakness. The Stanford-Binet included five index scores in fluid reasoning, knowledge, quantitative reasoning, visual spatial processing, and working memory. Student achieved high average and superior range scores in three of the five indices. His scores in the area of quantitative reasoning and verbal memory were in the average range.

51. Dr. Fischer decided to further examine Student's average scores in the area of verbal working memory. She administered the narrative memory subtest of the NEPSY in order to determine whether Student was able to listen and process meaningful information. In this assessment, Student was required to re-tell a brief story Dr. Fischer read to him. Student was able to re-tell a coherent story that included many of the details he was told. He also was able to provide additional information when cued by Dr. Fischer as part of the assessment. His standard score of 15 was well above the average range. The mean score is 10 with one standard deviation equivalent to three points.

52. The Norris Educational Achievement Test was administered to assess academic readiness and achievement. This test compares the performance of first graders, not kindergartners, like Student. Dr. Fischer administered the test to him because the results of his cognitive assessments indicated that he could handle the problems presented. She noted that the scores underestimated Student's ability because he was being compared to first graders. Student's ability to understand math concepts was assessed. He missed only one item presented to him. His standard score of 116 was in the high average range. The mean score is 100 and one standard deviation is equivalent to 15 points. His arithmetic skills were also in the average range. His ability to match letters, name them and indicate the sound they make was in the superior range. He remarked that the letter matching task was "so easy." He made only one error. His word recognition skills fell solidly in the average range. He was able to accurately read words. His errors were not unusual for children his age and included errors relating to difficult central vowel sounds, such as "hip" for help, or reversals, such as "strat" for star and "flea" for fell. His spelling skills were in the average range and Dr. Fischer expected him to improve because he was completing tasks typically expected of older children.

53. Dr. Fischer concurred with the assessment of Mr. Baker. She considered Student to be a very bright child with superior verbal ability and high average nonverbal ability. Student was functioning at or above the expected levels in academic readiness and academic achievement. She did not see evidence of a learning disability at the time of her report.

54. Mother obtained an outside psychological assessment which also reviewed Student's verbal and nonverbal skills. On March 23 and March 25, 2007, the WRC performed its second psychological assessment of Student to determine his eligibility for regional center services as a child diagnosed with autism spectrum disorder. Thompson Kelly, Ph.D., administered the assessment for the WRC. Dr. Kelly considered whether Student suffered from a communication and language disorder. Commenting on the results of Student's previous cognitive tests with Dr. Wolf in July 2006, Dr. Kelly noted that her assessment suggested the possibility of some delays in Student's language skills.

55. Dr. Kelly noted that his assessments revealed a significant discrepancy between Student's verbal and non-verbal skills. He observed that "this type of a profile is common in individuals with a language and/or verbal learning disability." Dr. Kelly's conclusions were drawn from a standardized assessment of behavior entitled the Vineland

Adaptive Behavior Scales-Second Edition (VABS-II) completed by Student's parents. Adaptive behavior is assessed by examining functioning in the areas of communication, daily living skills, socialization and motor skills when contrasted with peers of a similar age. Dr. Kelly questioned the validity of the VABS-II as Student's scores were significantly lower than reported on the same assessment administered a year earlier by Dr. Wolf. In Dr. Kelly's assessment, Parents reported Student's receptive and expressive language skills to be the age equivalent of two years two months, three years younger than his current age. Parents found Student to have mildly delayed socialization skills. They also reported a borderline range of abilities in the motor skills domain of the assessment, about two or two-and-a-half years delayed. As a result of Parents' report, VABS-II scores revealed borderline abilities in the communication and motor skills domains and mild delays in the daily living skills and socialization domains.

56. After considering Dr. Wolf's assessment results and Parents' current, but discrepant, responses to the VABS-II, Dr. Kelly, recommended that appropriate professionals at the District rule out a diagnosis of a mixed receptive-expressive language disorder and developmental coordination disorder. Dr. Kelly's concerns were conclusively resolved in the assessments administered by Dr. Fischer and District, and independent LAS, OT, APE and PT assessments.

Speech and language

57. Ms. Khalehpari, a SLP, administered the independent LAS assessment Mother requested. She assessed Student at his home on two different days. Each session was two hours and Student worked for 45 minutes before taking a break. Ms. Khalehpari used the following standardized assessments and assessment tools to determine whether Student qualified for special education.

Parent Interview
Oral-Facial Examination
Goldman Fristoe Test of Articulation – 2 (Goldman-Fristoe)
Receptive One Word Picture Vocabulary Test
Expressive One-Word Picture Vocabulary Test
Test of Language Development- Primary 3rd Edition (TOLD P:3)
Functional Communication Profile-Revised
Informal Language Sample
Clinical Observations

58. Ms. Khalehpari's assessment was more detailed than Ms. Sinclair's assessment, but despite the additional tests and observations, in most respects Ms. Khalehpari's findings were consistent with Ms. Sinclair's. Ms. Khalehpari did not find any physical impediments to speech in her oral-facial examination of Student. The Goldman-Fristoe test did not reveal any significant problems with Student's articulation. All sounds were produced with precision with the exception of the "s" and "s" blends, and the substitution of a "d" sound for a "th" sound in one instance. During spontaneous speech

Student also distorted the "r" sound. Student also transposed two phonemes, e.g., remember was produced as "ermember." Such transpositions are considered part of normal speech acquisition that is expected to disappear when a pupil reaches eight years of age. Voice and fluency of speech was normal; Student used varied voice tones for statements, questions and answers.

59. Like Ms. Sinclair, Ms. Khalehpari did not find Student's expressive and receptive language skills deficient. She utilized the same standardized tests as Ms. Sinclair to test Student's receptive and expressive language skills. Ms. Khalehpari reported that deficiencies would have been indicated if Student's standard score was below 80 placing Student in the seventh percentile. Student scored in the 90th and 91st percentile, respectively, on expressive and receptive language measures. To corroborate Student's scores on the standardized expressive and receptive assessments, Ms. Khalehpari administered a second assessment, the TOLD test. Student performed in the high average or superior range in all subtests addressing expressive and receptive language skills, including grammatical use and structure, syntax, semantics and phonemic awareness, word discrimination abilities and organization of language.

60. Unlike Ms. Sinclair, Ms. Khalehpari relied upon Mother's observations in her assessment of Student's speech and language skills. Ms. Khalehpari administered the Functional Communication Profile-Revised, a checklist-type assessment that includes data obtained through a parent report and observation on a range of areas impacting speech and language. The checklist incorporates data on the following issues: sensory; motor; behavior; attentiveness; expressive and receptive language; pragmatic and social skills; speech; voice; oral; and fluency.

61. Ms. Khalehpari paid particular attention to Mother's responses in the pragmatic/social skills portion of the checklist. Mother repeated her concerns about student's weak pragmatic communication skills. She questioned his ability to develop friendships and noted that he had difficulty with same-aged peers. Mother reported that Student was very shy; did not play with others; asked only simple questions; did not respond consistently to questions or to "who, what, when, where" questions; was self-centered in conversation and did not consider the listener's perspective; could not initiate topics without moderate assistance; and could not be stimulated to elaborate on a topic.

62. Ms. Khalehpari did not personally interview Student's teachers or the administrators at Student's private school. She relied upon letters prepared by the teachers in fall 2006 in response to Mother's request. Student's teacher observed articulation errors with the "th" sound; and Student's principal reported concerns with Student's ability to clearly articulate to his peers and teachers. Ms. Khalehpari was not concerned about the reports from Mother and Student's teachers. Like Ms. Sinclair, she concluded that his articulation deficits would resolve with age.

63. Ms. Khalehpari's conclusion about Student's articulation needs was consistent with the two psychoeducational assessments conducted during the same period of time. Dr.

Fischer reported that she had difficulty understanding some words Student used during her initial session with him, but had no difficulty understanding him during the final two sessions. She maintained that any problems he may have had with articulation did not necessitate speech and language intervention.[7] Dr. Kelly observed that Student's descriptions of events were somewhat simplistic. He also noted occasional articulation errors. Aside from occasional articulation errors and simplistic description of events, Dr. Kelly reported that Student was easily understood and his conversation was appropriate.

64. Ms. Khalehpari, recommended speech and language services. Unlike Ms. Sinclair, Ms. Khalehpari was concerned that Student's shyness impacted his communication skills. During her observation she attempted to engage Student in spontaneous conversation. In contrast to Ms. Sinclair's impressions, she noted that Student had difficulty making eye contact and sharing personal information without "maximum cueing." Relying upon Mother's and her own observations of Student, Ms. Khalehpari concluded that Student did have social pragmatic speech deficits. She recommended speech and language services to assist him in developing his social pragmatic skills. In particular, she recommended increased social interaction with age level peers, such as play dates with classmates, group sports, and assistance with developing conversation skills with peers. Ms. Sinclair was suspicious of the conclusion Ms. Khalehpari reached from one conversation with him, but agreed to the services Ms. Khalehpari recommended.

Motor skills

65. Dr. Fischer concluded that Student did not have gross motor deficits or require the assistance of a physical therapist to access his education. During three days of testing at Student's home, Student moved without significant difficulty from room to room and walked backwards down a stair holding a handrail. During her time at Student's home, Student moved slowly, but he did not fall or bump into objects as his Mother reported.

66. Dr. Fischer also concluded that Student did not have fine motor deficits, or require the assistance of an occupational therapist. She observed that he was able to hold his pencil adequately and to draw and write legibly. The Norris Educational Achievement Test administered by Dr. Fischer also measured Student's readiness in the area of fine motor coordination. Student's score in the fine motor coordination fell in the average range, or 107 (applying a mean of 100 and a standard deviation equivalent to 15). He was able to draw increasingly difficult geometric shapes, but he lost points because he did not place his shape within the confines of the small box. Student's score on a similar test administered by Dr. Baker, the VMI test, was significantly higher, 136. Dr. Fischer explained that the difference was because the area in which the student draws in the VMI is much larger than the Norris box.

[7] At the hearing, Dr. Fischer conceded that she deferred to the speech and language pathologist to make a determination of whether Student is eligible for special education as speech and language impaired.

67. The independent PT assessment conducted on May 25, 2007, was consistent with previous reports and Dr. Fischer's assessment. Student was assessed at Carthay in all areas related to educational-based physical therapy, including gross motor skills, functional mobility and campus and classroom access and safety. Overall, Student demonstrated good functional and development skills. He was able to sit independently using a variety of sitting positions. He was able to stand on one foot with his hands on his hips for 20 seconds. He walked on level and uneven surfaces. He demonstrated independence in making transitions. He kicked and caught a ball, jumped, hopped, accessed the climbing structure at Carthay, and walked up and down stairs with an alternating step pattern and no upper extremity support. Student did not present with significant deficits in the neurological assessment and clinical observation with regard to muscle tone, posture, reflexes, motor control, or range of motion or strength. Student's performance was appropriate for his age when measured by the gross motor subtests of the Peabody Development Scales. The independent PT assessor concluded that Student was able to independently and functionally access his educational setting and did not need physical therapy to do so.

68. On June 11, 2007, Jean Pacifico-Banta (Ms. Pacifico-Banta), a licensed OT, of PlayWorks Inc., conducted an extensive independent OT assessment of Student. Ms Pacifico-Banta conducted the assessment at Student's school over a six hour period. She used two standardized assessments. She administered the Sensory Processing Measure (SPM) for home (SPM-home) and main classroom environment (SPM-classroom). SPM is comprised of integrated rating scales which measure a pupil's visual, auditory, tactile, proprioceptive, vestibular, body awareness, balance and motion, praxis, and social participation at his home and school. She also administered the Miller Function and Participation Scales (M-FUN). The assessment included one-to-one testing, observations in a variety of school settings, interview with Mother and interviews with Student's two teachers, and review of Student's work samples and records.

69. Overall, Ms. Pacifico-Banta's independent assessment was consistent with the results reached by District OT Ms. Dudley five months earlier. Student did not evidence any weaknesses in his neuromusculoskeletal system. He did not have any limitations in movement, physical weaknesses, or problems in physical endurance that would impede his ability to engage in school activities. His fine motor coordination of the small muscles of the hands, as measured by the applicable M-Fun subtest, was within average range. His visual motor and visual perception skills as measured by the applicable M-Fun subtest were typical for his age. Age appropriate visual motor skills supported Student's independent participation in school-related activities such as writing, completing classroom worksheets, cutting and coloring. Student did not present with any deficiencies that interfered with his ability to access his education.

70. Student also did not present with significant difficulties in the area of sensory processing in the school environment, particularly as it relates to modulation, perception and interpretation of sensory information. Student maintained his attention during all activities except writing. However, although he admitted he did not like writing and his attention

initially diminished during writing tasks, he was easily persuaded to stay on task with positive reinforcement at which time his attention increased.

71. Teachers completed the SPM-classroom. Teachers agreed that Student's response to visual stimuli was typical. He did not seek out or avoid visual input. He tolerated classroom lighting and sunlight and was not observed to be distressed or visually distracted by different lighting. His responses to auditory stimulation were also typical. He did not demonstrate sensitivity to noises or sounds in school or in the community during a field trip to the park.

72. Student did not demonstrate atypical proprioceptive abilities, or intolerance to sensory input to the muscles, joints and tendons. Student's SPM-classroom scores indicated that he could appropriately perceive and interpret proprioceptive input and did not demonstrate proprioceptive-seeking behaviors such as jumping, running, stomping or slapping his feet on the ground, to better understand the direction of his movements. He could use appropriate pressure on a marker or crayon. He could effectively process proprioceptive information by making automatic adjustments to his posture without visually monitoring his body and could negotiate his physical classroom environment without bumping into obstacles. To further corroborate teachers' reports on the SPM-classroom, Ms. Pacifico-Banta had Student perform a finger-to-nose test with his eyes closed, the Schilder's Arm Extension Test (Schilder's Test), and sequential finger movements. She concluded that Student did not have difficulty with proprioceptive processing.

73. On the SPM-classroom, teachers' differed in their assessment of Student's tactile functioning. Student's academic teacher indicated that Student was typical in his ability to tolerate different textures in the classroom such as messy activities that required getting his hands wet or dirty. Student's religious teacher suggested that Student had some difficulties with tactile stimuli. Ms. Pacifico-Banta reconciled the two teachers' views with her own observations and her administration of a standardized test, Schilder's Test. Based upon her observations and assessments, she concluded that Student did not present with tactile modulation difficulties at school. Student was able to sit close to peers, tolerate light stickers on his arm, manipulate clay material with both hands and use classroom tools such as crayons and scissors, without negative reactions. Student tolerated having his head and other parts of his extremities repositioned by the assessor without complaint.

74. As reflected in teachers' responses on the SPM-classroom, Student's vestibular system was typical. Student appropriately regulated or modulated his responses to movement. He did not demonstrate fear of movement when climbing a large playground structure in the park or going down the slide. He did not avoid balance activities and could stand on one leg during hop scotch with his peers. Teachers did not observe Student to seek out vestibular input. He remained seated in his classroom chair without falling or using his hands for additional support. Ms. Pacifico-Banto corroborated teachers' responses on the SPM-classroom with her own observations and other assessments of Student's vestibular system. She observed some weakness in Student's ability to raise his legs off the floor while

on his stomach during the prone test, but he did not lose his balance during the Schilder's Test.

75. Teachers also reported typical scores for Student on measures of praxis, or motor planning abilities. Teachers reported that Student could generate ideas for play and games with peers, was very good with construction activities such as Legos, had good problem solving abilities and could follow multiple-step directions. Ms. Pacifico-Banto verified teachers' scores by observing Student sequence multiple step fine motor and gross motor activities. He evidenced good play skills during unstructured free play, and was able to automatically adjust his posture and to anticipate motor actions in order to kick a ball in motion.

76. As in other assessments that utilized both teacher and parent rating scales, Ms. Pacifico-Banto found a great disparity between teachers' responses to SPM measures of functioning in the school environment, and Mother's responses to SPM measures of functioning in the home environment. Mother repeated her previous reports of Student's dysfunction in all areas involved in the sensory system, visual, auditory, tactile, proprioceptive, and vestibular. In the area of the visual system, Mother maintained that Student was adverse to bright light, enjoyed watching objects spin and liked to repeatedly switch the light switch on and off. To demonstrate Student's dysfunctional auditory system, Mother reported that Student was adverse to ordinary household sounds and was easily distracted by noises and distressed by sounds. According to Mother, Student's tactile system was compromised by his difficulty in perceiving tactile input, high tolerance for pain, lack of awareness of being touched, avoidance of messy things, distress when nails are cut. In the area of proprioception, Mother reported problems with body awareness and movement. Mother also indicated that Student's poor balance and posture control, leaning on walls and furniture, demonstrated a vestibular system problem.

77. Ms. Pacifico-Banto measured Student's social skills as part of her assessment. Of all the assessors that evaluated Student up to that time, Ms. Pacifico-Banto was the only assessor to observe Student at his private school during his class and play time, and during a field trip to a local park. She observed that Student interacted well with his peers, cooperated well and demonstrated good attention skills during social play activities. During unstructured play, Student joined other pupils in games. He was able to take turns and follow group games with simple rules. Teachers also rated Student's social skills as typical in their responses to the SPM. Student was described as having "great social skills." He maintained appropriate personal space and worked cooperatively with others. Ms. Pacifico-Banto concluded that Student did not exhibit any physical, sensory or interpersonal difficulties that impeded social participation in the school setting.

Social Emotional Status

78. As part of Dr. Fischer's psychoeducational test, she measured Student's social emotional status. However, Dr. Fischer did not supplement Mr. Baker's standardized assessments related to autism. Dr. Fischer did not have the opportunity to interview

Student's teachers about Student's behavior in class. At the time of Dr. Fischer's independent assessment, the only available information about Student's behavior was collected from Mother, who continued to have clinically significant concerns about Student's behaviors. Teachers' previous responses to GARS-2 indicated an unlikely probability range of autism.

79. Dr. Kelly's outside assessment for the WRC did conclusively rule out an autism diagnosis. Dr. Kelly assessed Student using the Autistic Diagnostic Observation Schedule-Module (ADOS-2), a standardized behavioral assessment used to elicit examples of socialization, communication and play skills for determining the presence of an autistic spectrum diagnosis. Student's scores in the communication and reciprocal social interaction domains were below the cut off for determining the presence of an autistic spectrum disorder. In contrast to pupils diagnosed with autism spectrum disorders, Student engaged in appropriate eye contact, displayed a range of facial expressions, and used various nonverbal gestures in his conversation with Dr. Kelly. He responded appropriately to Dr. Kelly's questions by visually referencing different items shown to him and exhibiting good joint attention. He also participated in conversations on a variety of topics, discussed his feelings, and commented appropriately on various social situations depicted in a story conveyed to him. Student did not exhibit any unusual or stereotyped verbal or physical mannerisms or fixed preoccupations.

80. In addition to administering the ADOS, Dr. Kelly observed Student in a social setting at a park. Based upon the results of the ADOS and Dr. Kelly's supplemental observation, Dr.Kelly determined that Student did not have autism.

81. Dr. Fischer assessed Student's attention to ascertain whether he had ADHD. Mother's ratings in the Child Behavior Checklist and Conners'-Parent indicated that Student had clinically significant deficits in the areas of attention problems. However, previous teachers' reports disputed Mother's observations.

82. Student appeared to attend well during the three days of Dr. Fischer's lengthy testing. Student listened attentively to her instructions and seemed to enjoy the testing activities, especially on the first day. He was able to sit on the floor for 60-90 minutes for the three separate sessions of testing without requiring breaks.

83. Dr. Fischer noted some possible attention problems from Student's responses to the visual attention subtests of the NEPSY. In the visual attention subtest Student had to perform two separate tasks. He first was shown a picture and asked to find the pictures within a group of different pictures. Student performed this task rapidly and accurately. The second task required Student to find two pictures of faces from a group of similar faces. He found this task to be difficult and worked slowly, but accurately. As a result of his speed, his score on this last subtest was well below average.

84. Dr. Fischer observed possible problems with sustaining attention during the visuomotor subtest of the NEPSY. On this task, Student was required to draw a line in a

track as quickly and as accurately as possible. He worked rapidly and accurately on the first task but his performance deteriorated when he was presented with a second narrower track with many switchbacks. He might have been fatigued, but he found the task difficult and stopped trying to draw the line carefully. As a result his score on this subtest was significantly below average.

85. To conclusively rule out ADHD, Dr. Fischer needed to observe Student in his school environment with distractions and other children present. Based upon teachers' previous reports and her own observations during three days of testing, Student did not meet the criteria for ADHD. However, due to Student's performance on the NEPSY visuomotor subtest, Mother's responses to the Conners'-Parent and Child Behavior Checklist, and her inability to personally observe Student, or speak with Student's teachers, Dr. Fischer could not rule out a diagnosis of ADHD, inattentive type. She asked the IEP team to consider modifications in the classroom to assist Student, e.g., preferential seating, teachers' reminders.

86. Dr. Fischer also considered whether Student was depressed or emotionally disturbed. Mother's responses on the Child Behavior Checklist and Conners'-Parent indicated that Student was clinically borderline in the areas of anxious, depressed, and aggressive behaviors. Mother's ratings on the Child Behavior Checklist also raised the possibility that he was experiencing depression because of irregular sleeping patterns, lack of energy, lack of enjoyment of activities and his shyness. Dr. Fischer observed that with the exception of his excitement during the first day of the assessment, Student remained shy and withdrawn with little energy during the assessment. However, she felt that his reaction might have been due to being assessed during his vacation after recently completing a series of assessments. Dr. Fischer could not determine whether he was in fact depressed without interviewing his teachers. She cautioned that even if he were depressed, his symptoms might not meet the eligibility criteria for special education under the category of emotional disturbance.

87. In view of Mother's widely divergent and negative opinion of Student's emotional status and behavior, and her observations in Student's home, Dr. Fischer made recommendations for Parents to follow which she admitted "were outside the purview of the school district." Dr. Fischer recommended that Parents obtain parenting skills. She recommended that Parents provide Student individual attention multiple times a week by playing a game with him, taking a walk in the park, talking about a topic of interest to him. She also recommended that they seek the advice of a mental health professional to determine whether Student could benefit from counseling. Dr. Fischer further addressed Mother's concern about Student's shyness during her testimony. Dr. Fischer commented that his shyness was a personality trait and did not indicate a deficiency requiring specialized services.

Eligibility, services and placement for the 2007-2008 school year

88. On June 20, 2007, the IEP team reviewed the results of each independent assessment as well as the outside assessment of Dr. Kelly. The IEP team discussed the divergent opinions of Mother and Student's teachers on various assessments. The IEP team addressed several possible areas of special education eligibility, including SLD, other health impairment (OHI), autism and SLI.

89. Based upon the assessment data, the IEP team determined that Student did not meet the eligibility criteria for special education under the category of SLD or OHI due to ADHD. Although Dr. Fischer could not conclusively rule out ADHD because her assessment was incomplete, at the time of the IEP team the assessment data available to the IEP team did not reveal that Student had a processing deficit, including an attention deficit such as ADHD.[8] The IEP team agreed with the assessment data that demonstrated that Student cognitive ability was in the high average to superior range. The IEP team agreed with assessment data that demonstrated that Student was performing at or above the expected levels of academic readiness and achievement. The assessments did not demonstrate a severe discrepancy between Student's cognitive ability and achievement.

90. The IEP team also determined that Student was not eligible for special education as OHI due to any physical disability. The IEP team considered Mother's concern that Student was physically impaired and after reviewing the applicable assessment reports determined that Student did not require PT to access his education.

91. The IEP team also concluded that Student did not meet the eligibility criteria for special education under the category of autism. The IEP team principally relied upon various teachers' rating scales in Mr. Baker's report, and Dr. Fischer's observations of Student during the assessment. Dr. Kelly's assessment corroborated the IEP team's determination.

92. The IEP team considered Mother's claim that Student was depressed to determine whether Student was eligible for special education. Mother insisted that Student was depressed. Her ratings placed him in the clinical range for withdrawn/depressed behavior. Based upon the absence of data from Student's school, District did not have sufficient information to determine whether Student suffered from depression, as Mother claimed, and whether his depression met the eligibility criteria for severe emotional disturbance.

93. The IEP team determined that Student did qualify for special education under the category of speech and language impairment (SLI). The IEP team acknowledged that Student's assessment results indicated that he was performing at or above his age level in

[8] There is no evidence that Dr. Fischer was aware of or reviewed Ms. Pacifico-Banto's observation of Student at his private school and whether the information obtained from her observation would have assisted Dr. Fischer.

articulation and speech and language. Ms. Sinclair, District's speech pathologist deferred to the recommendation of Student's independent assessor, Ms. Khalepheri, who recommended that Student receive LAS services to address his pragmatic language needs.

94. District offered thirty minutes per week of school based LAS. Based upon Ms Khalepheri's recommendation, the IEP team developed a specific goal for Student to assist him in forming peer relationships and increasing his social interactions. The goal provided Student to complete, with minimum cues, a circle of communication (initiate, take turns, and expand on the conversation and terminate appropriately) with 75 percent accuracy, for three-quarters of the trials.

95. The goal would be implemented by both the speech pathologist and the general education teacher. Services would initially be provided in a pull-out model, meaning Student would be removed from his class to work on his goal with the speech pathologist, Ms. Sinclair, and upwards of two other pupils. As Student made progress in his LAS services, Ms. Sinclair would also consider a push-in model as the IEP indicated. Ms. Sinclair would use games to assist him with his social skills and pragmatic communication. The speech pathologist would also collaborate with Student's general education teacher to transfer the goal to the general education setting. It was Ms. Sinclair's practice to work with the general education teacher to schedule the speech and language sessions at a time that did not interfere with Student's key academic lessons, such as language arts and math.

96. Once the IEP team determined that Student was eligible for special education as SLI, it followed the recommendations of Ms. Pacific-Banto and offered Student OT services. Ms. Pacifico-Banto recommended that Student be provided with very limited OT services on a consultative model if the IEP team determined that he is eligible for special education. Student's two OT assessments did not establish that Student had any sensory processing or motor difficulties in the school setting. However, based upon Mother's disparate report of Student's functioning in the home setting, Ms. Pacifico-Banto was concerned that his functioning at home could impact his organizational skills and attention required for successful completion of homework and school projects. OT consultation would focus on providing teachers with organizational strategies for Student and families to use to complete homework and school projects.

97. Based upon Ms. Pacifico-Banto's recommendations, the IEP team offered 120 minutes of consultative OT services for the 2007-2008 school year. The IEP team developed a goal. The goal provided that Student would work in collaboration with the classroom teacher to demonstrate improved organization of behavior skills for successful completion of school-related assignments with moderate prompts in two of five trials, with or without sensory strategies. The goal would be implemented by the classroom teacher under the guidance of the OT. Ms. Dudley was present at the IEP team meeting. She agreed that 120 minutes of consultation was sufficient because the two OT assessments did not indicate that Student had any problems at school. It was provided because Mother's sensory ratings of Student indicated a dysfunction. As a consultant to the teacher, the OT would monitor Student by talking with the teacher to make sure that the dysfunction that Mother spoke of

did not manifest at school. According to Ms. Dudley, the services were provided to make sure Student didn't "slip through the cracks."

98. In addition to the goals, the IEP team provided Student with classroom accommodations including short breaks, preferential seating, verbal praise for completion of work, and reminders to Student to stay on task and to ask for help.

99. As in the February 2007 IEP team meeting, District offered Student placement in a general education class at Carthay. The general education class would be taught by a credentialed general education teacher and would have upwards of twenty pupils.

100. District's offer of LAS and OT was contingent upon Student's enrollment in Carthay. District maintained that it did not have an obligation to provide LAS services or OT as long was Student was enrolled in private school. Carthay's Assistant Principal, Kathleen McGrath (Ms. McGrath), testified at the hearing on two separate days. Ms. McGrath began her employment at Carthay in August 2007 and was not involved in the previous IEPs. McGrath is responsible for oversight of the special education program at Carthay and is familiar with the policies and practices of the District with regard to special education services and private school. She responded to questions in a straightforward and maintained an even temperament even after she waited for hours the first day before she was called to testify. Ms. McGrath was a credible witness and her testimony about District's policies and procedures was given great weight. Under District's policies and guidelines Student's who are eligible for special education under the category of SLI, but are voluntarily placed by their parents in private schools, including private nonsecular schools, are not entitled to special education services. In addition to the IEP, as a private school Student, he was provided a services plan. As indicated in the service plan, District only provides limited consultative services (e.g., classroom instructional strategies) for parentally placed private school pupils who are eligible for special education under the categories of SLD, ED, and autism. Student was eligible as SLI so he did not qualify for these services.

101. Mother did not consent to District's offer of services or placement. Mother testified at length during the hearing. Mother wanted Student to receive two hours of speech and language services weekly from a nonpublic agency outside of school for several reasons. She maintained that the amount of time offered was not sufficient to address Student's LAS deficits. She insisted that Students' deficits were significant and remained in all areas she reported despite assessments and teacher reports to the contrary. She considered his shyness to be indicative of his expressive language deficiencies. She objected to pull-out services because they reduced the time Student participated in his classroom academic program. Mother also considered pull-out services an embarrassment to Student, especially given his shyness. Mother believed Student would be singled out and ridiculed by his classmates for receiving LAS services. Ms. Goldberg disagreed that Student would be ridiculed. During her years of providing LAS services in school, she observed that pupils often welcomed their pull-out time. They enjoyed the exercises which were fun and they also enjoyed working with a group of pupils.

102. Mother also maintained that District's speech therapists were incompetent. She maintained that one SLP she observed did not have sufficient mastery of the English language. She also criticized her because she left her classroom unattended for fifteen minutes when Mother arrived to speak with her. Other than her observations, Mother did not provide competent evidence to support her objections to District's offer of LAS services and her insistence that Student required two hours of LAS services.

103. Mother objected to District's OT offer. She requested two hours a week of nonpublic agency OT. Despite several assessments to the contrary, Mother insisted that Student required OT services to address his motor skill and motor planning deficiencies. She disagreed that 120 minutes of OT consultation was sufficient. Mother insisted that District's identification of this service in June 2007, confirmed her contention that more than consultation was needed to address his deficits. Ms. Dudley, in a heated exchange with Mother, tried to explain that OT can only be provided after pupils are found eligible for special education services. She explained that even if Student needed OT, he could not receive OT from the District unless he was found eligible for special education. Once Student was found eligible for special education as SLI in June 2007, Ms. Dudley was authorized to provide services. Mother could not effectively challenge the OT assessments with her own observations. Her observations were repeatedly shown to be significantly at variance with standardized assessments, and assessor and teacher observations. Ms. Pacifico-Banto's assessment was particularly enlightening as she was the only assessor during the 2006-2007 school year that personally observed Student at his private school. Mother's observations at home were not seen in the classroom. Student did not evidence any motor deficiencies that required OT services, especially two hours of OT services.

104. Mother objected to District's offer of placement in a general education first grade classroom at Carthay. On the second day of hearing she testified that she observed Carthay's classroom when Student was being assessed by Dr. Baker in December 2006.[9] She thought the class was too large and too noisy for Student. Several weeks later she testified for the first time that Carthay was not appropriate because it was not safe. Student has never been enrolled in a District school or a public school. Mother enrolled Student in a private school that provided both secular and nonsecular studies. During the 2006-2007 school year she was dissatisfied with his private school where he attended kindergarten. At one point he was only one of two pupils in his kindergarten class. She considered the class size too small to develop Student's communication and social skills. For the 2007-2008 school Mother enrolled Student in a different private school that also had a secular and nonsecular program. His classroom size was the same or larger than the class at Carthay. Mother's credibility was undermined by her later unsupported claim that Carthay was not safe because it demonstrated that she was straining to find suitable objections to Student's

[9] District disputed that Mother observed the class and attempted to attack her credibility by showing that the sign-in logs at the school did not indicate that she was present during a time class was in session. However, Mother claimed she walked in many times without signing in because District personnel knew her and she was often managing a stroller. District's witness, Ms. McGrath, was not working at Carthay during the 2006-2007 school year so could she was not qualified to testify about its practices at that time.

home school. Mother failed to provide any probative evidence that Carthay was inappropriate.

105. Mother failed to articulate why her unilateral placement of Student in a nonsecular private school was necessary to provide Student a FAPE. Mother did not share the curriculum, or identify the qualifications of its teachers. For the 2007-2008 school year, Mother selected a private school that provided Student with secular and nonsecular instruction. As part of the nonsecular curriculum, Student received lessons in a foreign language, and learned and practiced religious rituals and prayers. From the various reports from Student's teachers, it appeared that he was content and thrived at his school. However, without more, Student's contentment is insufficient an indicia of whether he required this placement to obtain a FAPE.

106. Mother's claim that her unilateral placement was necessary was undermined by her stated discontent with his private school. She was not completely satisfied with his progress at his private school during the 2007-2008 school year. She repeated her concerns about Student's deficiencies to the school. The private school administrator and teachers convened a student study team (SST) meeting to discuss with Mother her concerns about Student. They did not find any cause for concern. Mother didn't agree with their conclusions. She didn't think that they were qualified as general educators to identify Student's challenges.

May 6, 2008 IEP team meeting

107. In fall 2007 Mother again requested that the District conduct assessments. On October 23, 2007, she wrote to Ms. McGrath and requested an assessment. Ms. McGrath investigated Mother's request. She denied Mother's request after ascertaining that Student had been assessed extensively in a wide range of areas during the previous school year. On February 27, 2008, District and Mother entered into an agreement to update Student's assessments in the following areas: health and development, including vision and hearing, general ability, academic performance, language functioning; social-emotional status and self-help, including orientation and mobility. The following assessments were performed:

Academic performance reassessment by District special education teacher
Psychoeducational re-evaluation by LAUSD psychologist
Psychoeducational re-evaluation by independent assessor Dr. Fischer
Speech and language assessment by independent speech SLP Tova Goldberg
Motor abilities assessment by LAUSD occupational therapist
Motor abilities assessment by LAUSD physical therapist
Health and development assessment by LAUSD nurse

With the exception of Dr. Fischer's re-evaluation, by agreement all District assessments were to be conducted by individuals who had never assessed Student. Further, all assessors were required to observe, interview and assess Student independently before reading previous

reports. Dr. Fischer updated her previous assessment report with school observations and interviews.

108. On May 6, 2008, an annual IEP team meeting was held to discuss the reassessments and to determine Student's services and placement for the 2008-2009 school year. All necessary members of the IEP team were present as well as many of the assessors. In attendance were: Mother; Ms. McGrath; Ms. Sinclair; District school psychologist Miriam Chow (Ms. Chow); District OT Lisa Serra; District PT Grace Manning; and Districts psychological service specialist Monique Arbuckle. Private school representatives were invited to participated, but declined. Mother had also indicated that she did not want Student's private school representatives involved in the process. The IEP team meeting was held for five hours. The assessments were discussed in detail. Mother questioned the assessment results and did not consent to the IEP.

109. Overall, the assessments conducted in 2008 were consistent in all areas with previous District assessments, independent assessments, and outside assessments administered in 2006 and 2007. Also unchanged was the depth of the disparity between Mother's negative views of Student's deficiencies, and the positive views shared by his assessors and teachers. Mother did report that Student was a bright child. Otherwise, Mother's observations of Student as reported to assessors in 2008 remained unchanged from her previous reports.

Cognitive ability and academic achievement

110. Dr. Fischer updated her 2007 assessment one year later, on April 10, 2008, by observing Student at his private school and interviewing his teachers. Student's teachers had no concerns about Student's academic capabilities. His general education teacher rated his academic skills in the "middle to upper part of his class." He read fluently and followed a story. Dr. Fischer also reviewed Student's work samples in writing from the beginning of the year through the assessment and confirmed that he made significant progress. His writing was a bit messy, but understandable. From her school observation, teacher interviews and ratings from his two teachers, Dr. Fischer concluded that there were no indications that Student had academic problems or a learning disability.

111. Vicki Brown, District's special education resource specialist, administered the Woodcock-Johnson III (WJ-III) a standardized test measuring academic achievement. The assessment results indicated that Student performed above grade level in letter/word identification and at grade level in reading comprehension. The written language assessment demonstrated that Student was working above grade level in spelling and writing fluency. He is working on and above grade level in math. The assessor noted that Student worked best with positive reinforcement and encouragement, and when the material was of high interest. Ms. Brown's tests were referenced in District's psychoeducational reassessment of Student. Ms. Chow conducted the psychoeducational reassessment. She supplemented Ms. Brown's testing with oral interviews with Student's teachers, classroom observations, and standardized rating scales completed by Student's Mother and teachers. Ms. Chow

administered the Behavior Assessment System for Children (BASC-2) which measures, among other things, hyperactivity, conduct problems, attention problems and social skills. Teachers considered Student bright and capable, a typical, "normal" child, working at grade level in all areas. He was hard working and motivated. Ms. Chow's observations were consistent with teachers' impressions. Ms. Chow observed Student at his school on two separate occasions. She spoke with his teachers directly. Based on the results of standardized tests, teacher interviews and rating scales, work samples and observations, Ms. Chow concluded that Student was not eligible for special education under the category of SLD. He was performing at or above grade level, processing disorders were not evident, and he was able to access his general education curriculum.

Speech and language

112. Tova R. Goldberg (Ms. Goldberg), an independent SLP, assessed Student over a five day period between April 7, 2008 and May 2, 2008. Ms. Goldberg administered two standardized assessments. She administered the Clinical Evaluation of Language Funamentals – Third Edition (CELF-3), which is a recognized clinical tool for the identification and diagnosis of communication and language disorders for pupils five to 21 years of age. CELF-3 provided measurements of Student's core, receptive, expressive, language content, language structure and working memory. Student's standard scores were above average. With a standard score of 100 as the mean, and a standard deviation of 1.5 percent, or 15 points, his standard scores on all subtests except working memory were over one and a half standard deviations above the mean, or in the high average range. His working memory score of 115 was his lowest, but it too was one standard deviation above the mean. Ms. Goldberg also administered the Test of Early Language Development – Second Edition (TELD-2) which is utilized to assess children's language skills through the age of 11. Student achieved a standard score of 123, one and a half standard deviations above the mean. His language skills were equivalent to a pupil of eight and a half years old, two years older than his age.

113. Ms. Goldberg's testified at the hearing and her testimony was given great weight. Ms. Goldberg has extensive credentials. She has both a bachelor and Master of Arts degree in communication disorders. She has a certificate in clinical competence and a clinical rehabilitative service credential. Since 1990 she has been conducting assessments and treating children and pupils with various communications disorders in several school districts. She was qualified to administer assessments and to provide her opinion about whether Student was eligible for special education as SLI. Mother selected Ms. Goldberg to perform the independent assessment because she was aware of her reputation. Ms. Goldberg answered each question directly and thoughtfully.

114. Ms. Goldberg observed Student's oral motor mechanism and concluded that he did not exhibit any physical impediments to speech. She observed his articulation and found him to be intelligible. She found no deficiencies in the quality or pitch of his voice, the speed of his speech or the fluency of his speech.

115. Ms. Goldberg administered a language sample to Student. Student responses were typical for a pupil his age. He was able to respond in complete grammatically correct sentences, and he was able to combine sentences to describe pictures, actions and events. His utterances were intelligible. He was more successful sequencing sentences to retell information at school than at home. When Ms. Goldberg interviewed Student at home he was watching "The Simpsons," a complicated cartoon with adult content. When she asked him to describe the episode, he hesitated and his sentences were truncated and disjointed. In contrast, when he described school, homework, or pictures, he demonstrated appropriate skills.

116. Ms. Goldberg also assessed Student by observing him during a play-based clinical observation, observing him at home and at school, and interviewing Mother and his teachers. During Ms. Goldberg's assessment at his home, Student was cooperative and attentive. He wasn't distracted by his family and was able to return to his assessment tasks after an interruption by a younger sibling. He offered information about his friends at school and about his favorite activities. At school, Ms. Goldberg observed him in the play yard during recess and in his religious education class. He was happy during recess and acknowledged his peers. He easily transitioned from the play yard to the class. He followed the class instruction and when instructed "readily and loudly" recited the religious text. He raised his hand and volunteered to answer a question posed by the teacher; when he was called upon to respond he did so appropriately.

117. Ms. Goldberg's assessments and impressions were corroborated by Student's teachers. She interviewed Student's general education teacher and his nonsecular teacher for her assessment. Both teachers stated that Student liked school, had friends, was playful, social, and academically on target with his class. His general education teacher reported that Student read loudly, with clarity and expression. She stated that Student volunteers to read, reads fluently, and has a sophisticated vocabulary. Socially she observed that he was not aggressive and characterized Student as "a little shy." His religious teacher stated that he completes his homework and is "no trouble." She stressed that he did not write his foreign language letters backwards like his peers.

118. Mother questioned the accuracy of Ms. Goldberg's interpretation of the CELF-4 observational rating scales scored by Student's teachers, particularly the pragmatics profile. Ms. Goldberg did not compute the total score on the CELF-4 because of the number of "not observed" or "not appropriate" ratings on the pragmatic profile. However, she referred to the information as a comprehensive list of behaviors and used it to corroborate her other assessments and observations. Ms. Goldberg noted that in the pragmatics profile, teachers found no difficulties in the area of rituals, conversational skills, asking for, giving and responding to information and nonverbal communication. On the pragmatics rating scale, teachers were required to rate how often they observed Student using a skill according to a scale that included the categories: never; sometimes; always, not observed; and not appropriate. Ms. Goldberg did not explain the rating system to the teachers; teachers read the instructions and filled out the forms. "Not appropriate" was defined in the rating sheet as a skill not appropriate for that pupil, either culturally, or for any other reason. The

pragmatics profile contained 52 skills. Teachers indicated they had not observed 13 skills. Teachers noted that they had not observed certain skills such as: Student accepting or rejecting invitations appropriately; starting or responding to verbal and nonverbal negotiations appropriately; modifying his language based upon the communication situation (communication partners, topic, place). Mother insisted that teachers' failure to observe him using these (and other) skills in nine months indicated that Student was not capable of using these skills. According to Mother, at the time teachers completed the rating scales they had been observing Student for at least seven months. If they did not observe him using these skills, Student was deficient in these skills. Ms. Goldberg disputed Mother's reading of the term "not observed" as speculative and deferred to its plain meaning.

119. Ms. Goldberg responded to Mother's particular concerns about Student's "shyness" at the due process hearing. Ms. Goldberg and Student's teachers' noted that Student looked away at times during conversation. Ms. Goldberg considered Student to be a polite child who is capable of responding appropriately to greetings and maintaining eye contact. Although he looks away at times, Ms. Goldberg concluded that this was due to his "shy" personality and not a pragmatic language deficit as Mother suspected. Student participated in cooperative play and in verbal turn-taking with peers. His attention span and ability to initiate and maintain a topic in conversation was age appropriate. Ms. Goldberg was confident that Student's shyness was a personality trait because her comprehensive assessment did not reveal that Student had a speech and language delay.

120. Mother also questioned Ms. Goldberg's interpretation of teachers' responses to the CELF-4 observational rating scale. This portion of the rating scale contains a total of 40 communications problems in listening, speaking, reading and writing. The directions instruct teachers to check the box beneath the appropriate heading that best describes how often the behavior occurs: never, sometimes, often or always. Most of Student's scores were "never." No behavior occurred more than "sometimes." Under the listening section, only three of nine of the behaviors were rated "never:" trouble paying attention; trouble understanding what people are saying; and trouble understanding facial expressions, gestures, or body language. The remaining six of the nine behaviors were rated "sometimes." Mother contended that the number of "sometimes" scores under the listening scale indicated that Student had a receptive language problem. Student "sometimes" had to ask people to repeat what they are saying, sometimes had trouble following spoken directions, remembering things people said, understanding the meaning of words and new ideas. In addition, teachers thought that Student "sometimes" has trouble looking at people when talking or listening. Ms. Goldberg dismissed the negative implications of the "sometimes" ratings. She concluded that Student had no difficulties in the areas of listening, speaking, reading or writing.

121. Ms. Goldberg concluded that Student was not eligible for special education as SLI impaired. From her observations and teachers' reports, she did not find that Student had any problem with pragmatic speech. She maintained that the standardized assessments administered the year before did not show that Student had any problem with pragmatic speech at that time. Given the assessment results available to Ms. Khalephari, she was

wrong to conclude that Student had a pragmatic speech problem the previous year without observing Student at school. Ms. Goldberg acknowledged that testing revealed that Student had a relatively mild delay in sequencing sentences to retell stories and past events, and in recalling and reciting numbers backwards. However, given Student's cognitive ability and academic achievement, these mild delays did not impede his access to education. The general education elementary school curriculum is language-based. Stories are read, and pupils are regularly asked to recall and describe events. Student's skills in these areas would improve through participation in the general education curriculum. He did not require more intensive specialized instruction to address these mildly delayed skills.

Motor Skills

122. In 2008, as in 2007, Student's physical abilities were typical of pupils his age. District PT Grace Manning, conducted her assessment on March 21, 2008, at Student's home in the presence of Parents and his siblings. She prepared a detailed report addressing Student's muscular and orthopedic condition. Student demonstrated functional proficiency in every area. He possessed a full range of motion, strength and balance for walking, running, stair climbing, and ball skills. He did not exhibit structural or postural abnormalities. He walked up and down a steep ramp and ran across uneven surfaces. Ms. Manning concluded that Student did not require physical therapy to access his education.

123. In 2008, as in 2007, Student's OT assessment did not reveal deficiencies in any areas assessed, including, neuromuscular, visual perception, fine motor and visual motor skills, sensory modulation, sensory processing, and praxis. District assessor Lisa Cerra conducted the assessment on March 21, 2008. She concluded that Student has many areas of strengths and no deficits which would impede his participation in classroom activities. Student demonstrated good motor planning for classroom activities and functional self-help skills.

Social Emotional

124. In her reassessment, Dr. Fischer observed Student playing with two other pupils throughout recess, and briefly leaving his playmates to speak to a small group of girls. He had no difficulty transitioning back into the classroom and when seated remained attentive to class instruction. Student's teachers described him as a "wonderful boy." They confirmed that he was making and keeping friends and that he was happy in class. One teacher noted that he was "too quiet" but added that there was "nothing wrong" with him. Responding to the Child Behavior Checklist, teachers confirmed that Student was well adjusted and was developing social relationships with his peers. He demonstrated typical behavior for boys ages six through eleven in all areas. Teachers agreed that he was well behaved. He did not seem depressed and he did not have social or attention problems. Both teachers reported a slight tendency to worry, perfectionism and a desire to please adults. Dr. Fischer concluded that Student was not eligible for special education because there was no evidence that he had a SLD, OHI such as ADHD, autism or ED.

125. District school psychologist Ms. Chow reached the same conclusions as Dr. Fischer in her psychoeducational reassessment of Student. She concluded that Student is not eligible for special education as OHI due to ADHD. Ms. Chow conducted extensive observations and interviews with Student's teachers. She observed Student at his school on two separate days. Student remained attentive throughout his classroom lessons, participated appropriately and completed his assignments independently. On the playground he demonstrated good peer relations when he ran, jumped, laughed and slid down slides with another peer, and rode a bicycle alongside other peers for 25 minutes. In her oral interviews teachers did not consider Student to be deficient in any way. They considered him to be bright, respectful and cooperative. They noted that he was quiet, but he got along with other pupils, helped them do their work, and played with them on the playground. They considered him to be focused with excellent attention span. He transitioned from one activity to another without problems. They observed that his homework was always turned in and completed. Teachers also completed the structured behavior rating scales of the standardized assessment, Behavior Assessment System for Children – Second Edition (BASC-2). On one scale they rated him average in all areas, including hyperactivity, aggression, conduct problems, anxiety, depression, attention, adaptability social skills, study skills and functional communication. On another scale, the disruptive behavior scale, they did not indicate any clinically significant results for inattentive or hyperactive impulsive behaviors. Student never had difficulty sustaining attention or engaging in leisure activities or doing fun things quietly. Ms. Chow concluded that Student did not have ADHD.

126. As in other assessments, Mother's ratings were contrary to the ratings by Student's teachers. She indicated in her responses to BASC-2 clinically significant problems in many areas including aggression, anxiety, depression, withdrawal and adaptability and rated him at-risk for hyperactivity, attention problems and social skills. She also found that he had problems with compliance, commands or rules. Ms. Chow concluded that Mother's attentional concerns at home do not appear in the school environment or affect his educational performance. Student was working at grade level.

Eligibility, services and placement

127. The IEP team concluded that Student was not eligible for special education services. Student's verbal and nonverbal ability was in the high average or superior range. Student was functioning at or above his expected levels of academic achievement. Student was not eligible as a pupil with a SLD. There wasn't a severe discrepancy between his cognitive ability and achievement. He did not have a processing deficit. He did not have a SLI. He did not have a pragmatic speech deficit. His LAS assessment indicated a relatively minor delay in retelling stories and recalling numbers backwards, but these delays alone did not make him eligible for special education. Student did not meet the eligibility criteria for autism. Student did not present with ADHD. Student did not qualify for PT or OT because he did not have a disability that impeded his access to education. As a general education pupil, Student was entitled to placement at his home school, Carthay. Mother did not consent to the IEP.

LEGAL CONCLUSIONS

Burden of Proof

1. Student has the burden of proof that District denied him a FAPE during the 2006-2007 school year, as of the February 2007 IEP team meeting, and for the 2007-2008 school year based upon District's offer at the June 20, 2007 IEP team meeting. The District has the burden of proof that Student was not eligible for special education as of the May 6, 2008 IEP team meeting. (*Schaffer v. Weast* (2005) 546 U.S. 49, 56-62 [126 S.Ct. 528, 163 L.Ed.2d 387].)

Issue One

2. Mother contends that District denied Student FAPE in February 2007 when it failed to find Student eligible for special education under the category of SLI, as it did a few months later, at the June 2007 IEP team meeting. Based upon the following legal principles and factual analysis, Mother has met her burden of proof on this issue.

3. The IDEA was enacted to ensure that disabled pupils receive an appropriate education. Under the IDEA, pupils with disabilities have the right to a free appropriate public education ("FAPE"). (20 U.S.C. § 1412(a)(1)(A); Ed. Code, § 56000 et seq.) FAPE is defined as special education and related services that are provided at public expense. (20 U.S.C. § 1401(9); Cal. Code Regs., tit. 5, § 3001 subd. (o).)

4. A pupil must meet the statutory criteria for "child with a disability" to receive IDEA protection. (20 U.S.C. § 1401(3).) California law defines special education as instruction designed to meet the unique needs of individuals with exceptional needs coupled with related services as needed to enable the student to benefit fully from instruction. (Ed. Code, § 56031.) Under both California law and the IDEA, a child is eligible for special education if the child needs special education and related services by reasons of mental retardation, hearing impairments, SLI, visual impairments, ED, orthopedic impairments, autism (or autistic-like behaviors), traumatic brain injury, OHI, or SLD. (20 U.S.C. §1401 (3)(A)(i) and (ii); Cal. Code Regs., tit. 5, §3030.)

5. The term "related services" includes transportation and such developmental, corrective, and other supportive services, as may be required to assist a child with exceptional needs to benefit from special education. (20 U.S.C. § 1402(26).) In California, related services may be referred to as designated instruction and services (DIS). (Ed. Code, § 56363, subd. (a).) LAS and OT services are considered related services. (Ed. Code § 56363, subd. (b)(1).)

6. Generally, "to qualify under IDEA, a child must satisfy three criteria: (i) he must suffer from one or more of the categories of impairments, delineated in IDEA, (ii) his impairment must adversely affect his educational performance, and (iii) his qualified

impairment must require special education and related services." (Ed. Code, § 56076, subd. (b); *Capistrano Unified School Dist. v. Wartenberg* (9th Cir. 1995) 59 F.3d 884, 899.)

7. To determine whether a child is eligible for special education, District must conduct an initial assessment in all areas related to his or her suspected disability, and no single procedure may be used as the sole criterion for determining whether the student has a disability or whether the student's educational program is appropriate. (20 U.S.C. § 1414(b)(2) & (3); Ed. Code, § 56320, subds. (e) & (f).) The initial assessment must be sufficiently comprehensive to identify all of the child's special education and related services needs, regardless of whether they are commonly linked to the child's disability category. (34 C.F.R. § 300.306 (2006).) 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 also 20 U.S.C. § 1414(b)(3).) In conducting the assessment, the school district must use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the student, including information provided by the parent, that may assist in determining whether the student is a child with a disability, and if so, the content of the IEP. (20 U.S.C. § 1414(b)(2)(A)(i); 34 C.F.R. § 300.304 (c) (2006).)

8. Eligibility under the category speech and language impairment means a disorder of one of the following: (a) articulation disorder such that the pupil's production of speech significantly interferes with communication and attracts adverse attention; is a result of reduced intelligibility or an inability to use the speech mechanism, and which significantly interferes with communication; (b) abnormal voice characterized by persistent, defective voice quality, pitch or loudness;(c) fluency difficulties which result in an abnormal flow of verbal expression to such a degree that these difficulties adversely affect communication between the pupil and listener; (d) receptive or expressive delays that result in the pupil's language performance being significantly below the language performance of his peers; or (e) hearing loss. (Ed. Code, § 3030, subd. (c).)

9. A parent is entitled to obtain an IEE of a child. (20 U.S.C. §1415(b)(1).) An IEE is an evaluation conducted by a qualified examiner not employed by the school district. (34 C.F.R. § 300.502(a)(3)(i) (2006).) A parent has the right to an IEE at public expense if the parent disagrees with an evaluation obtained by the school district. (34 C.F.R. § 300.502(b)(1); Ed. Code, § 56329, subd. (b).)

10. The Ninth Circuit has endorsed the "snapshot" rule, explaining that the actions of the school cannot "be judged exclusively in hindsight. . . an IEP must take into account what was, and what was not, objectively reasonable when the snapshot was taken, that is, at the time the IEP was drafted." (*Adams v. State of Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149 (citing *Fuhrman v. East Hanover Bd. of Educ*. (3d Cir. 1993) 993 F.2d 1031, 1041).)

11. In most respects District provided a comprehensive initial assessment of Student in all areas of disability suspected by Mother. District used a variety of standardized

assessments instruments, and the District relied on more than one assessment instrument. While Mother may disagree with the conclusions reached by the assessors from the data obtained from these standardized measures, she never effectively challenged the validity of these standardized instruments. At the time of the February 2007 IEP team meeting, Student had been assessed by the WRC psychologist Janet Wolf, District school psychologist Mr. Baker, District SLP Ms. Sinclair, District OT Ms. Dudley, District's APE teacher and District's PT. Student's cognitive ability and achievement were in the high average range on most measures. Mother's suspicions regarding possible autistic behaviors, or cognitive and physical challenges were not supported by a wide variety of measures including teacher reports, observations and standardized tests.

12. Mother's opinion of Student's speech and language deficiencies were largely dispelled by teacher reports, assessor observations and the standardized assessments administered by Mr. Baker and Ms. Sinclair. Although Student's teacher reported articulation errors, Ms. Sinclair credibly dispelled the minor articulation errors as age appropriate. Student did not demonstrate any deficiencies in his voice or speech fluency. In a wide range of standardized assessments Student demonstrated strong oral and receptive language abilities. His teacher's report confirmed his "higher level" abilities. Ms. Sinclair commented that Student's speed in answering questions was "astonishing."

13. By her own admission, Ms. Sinclair's assessment was limited to her administration of standardized tests and personal observation of Student during her assessment. Ms. Sinclair did not notice anything amiss in Student's conversation with her. She maintained that he easily interacted with her and did not evidence any difficulties with social speech. Ms. Sinclair did not account for Mother's observations by accepting them or contradicting them with independent information from interviews with teachers, or observations of Student in his classroom or home environment. Although Ms. Sinclair insisted that her conclusions were correct, a few months later during the June 2007 IEP team meeting, she deferred to independent assessor Ms. Khalephari who had a different impression of Student and did account for Mother's observations of Student in his home environment. In contrast to Ms. Sinclair, Ms. Khalephari did observe Student to hesitate during her attempt to engage him in spontaneous conversation. Mother's observations in June 2007 were no different than her observations in February 2007, and were corroborative of Ms. Khalephari's observation. The IEP team's conclusion in June 2007 that Student was eligible for special education under the category of SLI as a result of pragmatic speech challenges was based upon the same information available to District, but ignored, in February 2007. Ms. Goldberg in her 2008 LAS assessment validated Ms. Sinclair's opinion a year earlier that Student did not have a SLI. Nevertheless, within a narrow snapshot of time during the 2006-2007 school year, Ms. Sinclair endorsed the contrary conclusion and as part of the June 2007 IEP team made Student eligible for special education under the category of SLI. For these reasons, Mother met her burden of proof that District failed to make Student eligible for special education and related services in February 2007 under the category of SLI. However, Student is not entitled to compensatory education for District's failure to make Student eligible four months earlier. (See *infra*, pp. 40-41, *Compensatory*

Education.) (Legal Conclusions 1 through 10, and Factual Findings 1 through 18, 57 through 64, 93 through 95, 112 through 123.)

Issue Two (A):

14. Mother contends that District's offer of 30 minutes of LAS services in a pull-out model for the 2007-2008 school year was insufficient. Based upon the following legal principles and factual analysis, Mother has not met her burden of proof on this issue.

15. In *Board of Education of the Hendrick Hudson Central School District, et al.* 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. (*Rowley*, 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 "sufficient to confer some educational benefit" upon the child. (*Rowley*, at pp. 200, 203-204.) In resolving the question of whether a school district has offered a FAPE, the focus is on the adequacy of the school district's proposed program, not the preferred program of Student's parents. (*Gregory K.* v. *Longview Sch. Dist.* (9th Cir. 1987) 811 F.2d 1307, 1314.) For a school district's offer of special education services to substantively and procedurally provided a FAPE: (1) the services must be designed to meet the student's unique needs; (2) the services must be reasonably designed to provide some educational benefit; (3) the services must conform to the IEP as written; and, (4) the program offered must be designed to provide the student with the foregoing in the least restrictive environment. (*Ibid.*)

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

17. Mother objected to the LAS pull-out program offered by District. She maintained that it would interfere with Student's academic instruction and cause him embarrassment. Federal and state law requires school districts to provide a program in the least restrictive environment to each special education student. (See 34 C.F.R. §§ 300.114, et. seq.) A special education pupil must be educated with nondisabled peers "[t]o the maximum extent appropriate," and may be removed from the regular education environment only when the nature and severity of the student's disabilities is such that education in regular classes with the use of supplementary aids and services "cannot be achieved satisfactorily." (20 U.S.C. § 1412(a)(5)(A); 34 C.F.R. § 300.114(a)(2)(i), (ii).) A placement must foster maximum interaction between disabled students and their nondisabled peers "in a manner that is appropriate to the needs of both." (Ed. Code, § 56031.) Ms. Sinclair testified that pull-out services would be offered initially so that Student could have the opportunity to

work on his peer interaction outside of class with the goal of generalizing his newly acquired skills to the classroom. She stated that pull-out services are coordinated to the extent practicable to avoid Student missing academic subjects. Ms. Goldberg disputed Mother's suggestion that Student would be embarrassed by the services since the services are fun and Student's have been known to look forward to them. Thirty minutes of pull-out services a week constituted a de minimis amount of time for Student to be away from his general education peers.

18. The results of standardized assessments indicated that Student's speech and language skills remained in the average to high average range in all respects, including articulation, voice, fluency, and expressive and receptive language. As stated in paragraph 13 above, Ms. Khalephari's independent LAS assessment departed from Ms. Sinclair's LAS assessment in that Ms. Khalephari considered Mother's observation of Student at home. Her experience during a spontaneous conversation with Student differed from Ms. Sinclair, but corroborated Mother's views. Given the relatively minor deficiencies in Student's pragmatic skills, District's offer of 30 minutes a week of group LAS was appropriate. The time would have been used to work on Student's social interactions in a small group environment using games. Mother insists that Student required two hours of LAS services per week by a NPA. With little foundation, she maintained that District's SLPs are incompetent. Mother failed to provide any probative evidence in support of increased LAS hours, or NPA services, especially where the goal related to the LAS services was designed to work on Student's pragmatic or social speech at school. On the contrary, given the very narrow area of deficit identified by Ms. Khalephari and the IEP team, District's offer was appropriate. Thirty minutes was sufficient to work on the goal of completing a circle of communication so as to increase Student's overall peer relations and social interactions. This was especially true given Ms. Pacifico-Banto's observations of Student's positive peer interactions at his school. (Legal Conclusions 1 through 10, 15 through 17; Factual Findings 1 through 18, 57 through 64, 77, 93 through 95, 101 through 102.)

Issue Two (B):

19. Mother failed to meet her burden of proof that District's offer of 120 minutes of OT on a consultation model was inappropriate, or that two hours of NPA OT was appropriate. His motor skills as measured by the psychoeducational assessments and the two OT assessments were typical; he did not demonstrate any motor or physical weaknesses and sensitivities found in autism spectrum disorder. Multiple PT assessments and an APE assessment did not reveal any physical or motor weaknesses that could be mitigated by OT services. On the contrary, after administering a battery of standardized tests, rating scales and observing Student, Ms. Dudley and Ms. Pacifico-Banto did not find Student deficient in motor or sensory skills. Like Ms. Khalephari, and unlike Ms. Sinclair and Ms. Dudley, Ms. Pacifico-Banto deferred to Mother's observations of Student in his home setting. If Mother's observations were accurate, Ms. Pacifico-Banto reasoned that his difficulties at home could affect his performance at school. She recommended that OT consultation services be provided to monitor Student in order to mitigate any problems that might arise at school based upon Mother's observations at home. Of particular concern from Mother's

observations, was that Student's purported weak organizational skills and attention would impact his performance at school. Although no deficits were found, Ms. Pacitico-Banto wanted to make sure Student didn't "fall through the cracks" due to something Mother observed. In addition, to the two OT assessments, Student was assessed twice by PTs, a District PT and an independent PT. Student was also assessed by a District APE teacher. Not one of these assessors observed a motor or sensory delay that required intervention for Student to access his education. District only offered OT consultation because Student was made eligible for special education as SLI. Mother failed to provide any probative evidence that District's offer denied Student a FAPE, and that he required any direct OT services. (Legal Conclusions 1 through 10, 15 through 17, and Factual Findings 1 through 8, 19 through 40, 65 through 85, 96 through 98.)

Issue Two (C):

20. Mother alleges that District's offer of placement in a general education elementary school class at Carthay was inappropriate for a variety of reasons which changed over the course of the hearing. District offered Student a general education classroom at his home school taught by a credentialed teacher with no more than twenty pupils. Student has always been a bright and capable pupil. Mother's concerns for a quiet environment or worries about Carthay's security were not credible. Student attends a private nonsecular general education class which is as large, if not larger, than Carthay's general education class. He is apparently thriving in that class. In sum, Mother failed to meet her burden of proof that District's offer in the June 2007 IEP team meeting was not an offer of FAPE in the LRE. (Legal Conclusions 1 through 10, 15 through 16, 17; Factual Findings 1 through 106.)

Compensatory education for Student

21. Mother contends that District should provide compensatory education for its failure to offer FAPE in the February or June 2007 IEP team meeting in the form of NPA services at the rate of two hours per week in the area of LAS and OT. Based on the following legal conclusions and factual findings, compensatory education is not appropriate.

22. School districts may be ordered to provide compensatory education or additional services to a pupil who has been denied a free appropriate public education. (*Student W. v. Puyallup School Dist.* (9th Cir. 1994) 31 F.3d 1489, 1496.) The conduct of both parties must be reviewed and considered to determine whether relief is appropriate. (*Ibid*.) These are equitable remedies that courts may employ to craft "appropriate relief" for a party. An award of compensatory education need not provide a "day-for-day compensation." (*Id*. at p. 1497.) An award to compensate for past violations must rely on an individualized assessment, just as an IEP focuses on the individual student's needs. (*Reid ex rel. Reid v. District of Columbia* (D.C. Cir. 2005) 401 F.3d 516, 524.) The award must be "reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place." (*Ibid*.)

23. Compensatory education would not be reasonably calculated to provide educational benefits in this action. The narrow area of pragmatic speech deficit addressed in Ms. Khalephari's assessment and in the June 2007 IEP no longer exists, if it ever did. In June 2007 the IEP team determined that Student had pragmatic deficits without the benefit of observations of Student in his school environment and feedback from his teachers. As of the May 2008 IEP team meeting, no such deficits were apparent. By that time, assessors had an opportunity to observe Student at his school and obtain data from Student's teachers. Ms. Goldberg persuasively testified that Ms. Khalephari's assessment was wrong. Similarly, other than Mother's observations, there was no evidence that Student required OT services. The OT consultative services that were offered would only monitor Student in his class to ensure that behaviors observed by Mother in their home did not migrate to the school environment. There were never any significant motor or sensory deficits reported in the two OT assessments. There was no support for OT intervention in the District or independent psychoeducational assessments, the two PT assessments or the APE assessment.

24. Compensatory education is not required where District was not obligated to provide the services to Student at the time they should have been offered. Student was parentally placed in a private nonsecular school. The IDEA requires states to provide some measure of special education and related services to disabled children in private schools, including parochial schools, see 20 U.S.C.A. § 1412(a)(10)(A)(i)(I); see also 34 C.F.R. § 300.130.133(a)(1). District was required to assess Student and to provide Student with a service plan. (34 C.F.R. §§ 300.131(c) & 132(b); Ed. Code §§ 56171, 56173.) "States are required to provide to children voluntarily enrolled in private schools only those services that can be purchased with a proportionate amount of the federal funds received under the program . . . . [The] statute does not require a school district to provide on-site services to a disabled child who is voluntarily enrolled in private school." (*KDM V. Reedsport School Dist.* (9th Cir. 1999) 196 F.3d 1046, 1049 rehg. en banc den. April 25, 2000, cert. den., 2000 U.S. LEXIS 7794 (citing *Fowler v. Unified Sch. Dist, No. 259,* (10th Cir. 1997) 128 F.3d 1431, 1436-37; See also 34 C.F.R. § 300.137 (a) (1).) The school district makes the final decision with respect to services to be provided to eligible parentally placed private school children with disabilities. (34 C.F.R. § 137 (b) (2).) Moreover, District was not required to pay for the cost of education, including special education and related services, of a child with a disability at a private school if District made an offer of FAPE available to the pupil and parents elected to place the child in the private school. (Ed. Code, § 56174.) Here, District made an offer of FAPE. Moreover, District does not provide services to parentally placed private school pupils eligible for special education under the category of SLI. Accordingly, even if District failed to offer Student a FAPE as of February 2007, and Student currently required compensatory services to correct a pragmatic speech deficit, which he does not, District was not obligated to provide Student with compensatory special education and related services. (Legal Conclusions 1 through 10, 22 through 24; Factual Findings 1, 9 through 35, 57 through 77, 93 through 97, 100 through 106.)

Issue Three:

25. District contends that as of the May 2008 IEP team meeting, Student was no longer eligible for special education. The same basic requirements as for an initial assessment apply to re-assessments. (20 U.S.C. § 1414(a)(2); 34 C.F.R. § 300.303 (2006); Ed. Code, § 56381, subd. (e).) To perform a reassessment, a school district must review existing assessment data, including information provided by the parents and observations by teachers and service providers. (20 U.S.C. § 1414(c)(1)(A); Ed. Code, § 56381, subd. (b)(1).) As more fully set forth below, based upon the overwhelming consistency between the 2007-2008 school year assessments and the numerous assessments administered to Student in the 2006-2007 school year, District met its burden of proof.

26. By the time the June 2007 IEP team meeting was held, Student, at five and a half years of age, was the subject of multiple assessments beginning with the WRC assessment in June 2006. In addition to Dr. Baker's psychoeducational assessment, Dr. Fischer prepared an independent psychoeducational assessment for review by the IEP team and Dr. Kelly prepared an outside psychological assessment for WRC which was considered by the IEP team. In the area of speech and language, Ms. Sinclair's assessment was supplemented by Ms. Khalephari's independent LAS assessment. In addition to Ms. Dudley's OT assessment, Ms. Pacifico-Banto prepared an independent OT assessment. Each assessment consisted of a wide array of standardized tests, rating scales and observations. In most critical areas, the assessment results were consistent. When questions were raised, but left unanswered, as in Dr. Kelly's assessment, the other assessments answered the questions. Overall, with the exception of Student's pragmatic speech, Mother's view of Student's deficiencies was not confirmed by a multitude of standardized assessments.

27. In June 2007, Student was made eligible for special education under the category of SLI due to a deficiency found in pragmatic social speech. Mother requested a new battery of assessments during the 2007-2008 school year. As part of these assessments, Student was observed at his school and teachers were interviewed. Student displayed no deficits in pragmatic speech. On the contrary, he was able to interact appropriately with his peers at school and participate in a group. In Ms. Goldberg's assessment Student did display a mild delay in sequencing sentences to retell stories and past events and in recalling and reciting numbers backwards. To be eligible for special education, however, Student's mild delay must adversely affect his educational performance, and require special education and related services. In the context of a multitude of other assessments and observations confirming his cognitive ability, there is insufficient evidence to conclude that his educational performance was impacted by such delays. Moreover, Student must require services that can not be supplied in the general education curriculum. Here, Ms. Goldberg competently testified that the language-rich general education elementary school curriculum is designed to work on retelling stories and past events, and reciting numbers. District met its burden of proof that Student no longer was eligible for special education as SLI.

28. Evidence that Student did not meet the eligibility criteria for special education under any other recognized category was overwhelming. Student did not evidence a

processing disorder of any kind including attention, and Student's cognitive ability and academic achievement, as well as his performance in school, disqualified him from eligibility under the category of severe learning disability. (34 C.F.R. § 300.8(c)(10)(i); Ed. Code, § 56337, subd. (a); Cal. Code Regs., tit. 5, § 3030, subd. (j).)

29. Student did not meet the eligibility criteria for special education as a result of autism or an autistic spectrum disorders. Autism means a developmental disability significantly affecting verbal and nonverbal communication and social interaction that adversely affects a child's educational performance. (34 C.F.R. § 300.8(c)(1).) Other characteristics often associated with autism are engagement in repetitive activities, movements, resistance to change, and unusual responses to sensory experiences; extreme preoccupations with objects. (*Ibid*; see also Cal. Code Regs. tit. 5, § 3030, subd. (g).) Mother insisted that Student demonstrated autistic-like behaviors and sensitivities, but her observations were repeatedly contradicted by that of Student's teachers and assessors.

30. Student was not eligible for special education as OHI, although Mother insisted that he was physically weak and clumsy, and suspected that he had autism or ADHD. A student shall be eligible under the category of other health impairment if both of the following are met: (1) The student 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 or a medically fragile condition such as …, attention deficit disorder or attention deficit hyperactivity disorder; and (2) The health impairment adversely affects the student's academic performance. (34 C.F.R. § 300.8(c)(9)(2006); see also Ed. Code, § 56441.11, subd. (b)(1)(H).) A student whose educational performance is adversely affected by a suspected or diagnosed attention deficit disorder (ADD) or attention deficit hyperactivity disorder (ADHD) and who meets the eligibility criteria for specific learning disability other health impairment under Education Code sections 56337 and 56339 and California Code of Regulations, title 5, section 3030, subdivision (f) or (j) is entitled to special education and related services. (Ed. Code, § 56339, subd. (a).) But if the student's ADD or ADHD does not adversely affect a student's performance, instruction shall be provided through the general education curricula. (Ed. Code, § 56339, subd. (b).) The multitude of assessments of Students motor and physical skills, and his social-emotional status did not reveal that Student suffered from a disability that would qualify him as OHI.

31. Mother reported that Student was depressed and anxious, but Student was not eligible for special education under the category of ED. ED means a condition exhibiting one or more of the following characteristics over a long period of time and to a marked degree that adversely affects a pupil's educational performance that manifest as: (A) inability to learn that cannot be explained by intellectual, sensory, or health factors; (B) inability to build or maintain satisfactory personal interpersonal relationships with peers and teachers; (C) inappropriate types of behavior or feelings under normal circumstances; (D) general pervasive mood of unhappiness or depression; (E) tendency to develop physical symptoms or fears associated with personal or school problems. (34 C.F.R. § 300.8 (c)(4)(i) (2006); Cal. Code Regs., tit. 5, § 3030, subd. (i).) Neither the IDEA nor its regulations, nor the Education

Code nor its regulations, define "to a marked degree" or "a long period of time." With respect to eligibility under subdivision (c), the focus is on the student's ability to control the behavior and to act pursuant to socially acceptable norms. (Off. of Special Education Programs, interpretative letter (August 11, 1989), 213 IDELR 247.) Mother's observations, incorporated into earlier assessments, were never corroborated in the school setting.

32. In sum, District has met its burden of proof that as of the May 2008 IEP team meeting, Student was no longer eligible for special education. At the time of the May 2008 IEP team meeting, Student had been the subject of approximately 17 assessment reports since his fifth birthday. Each assessment report referred to a multiplicity of standardized assessments, rating scales, and/or observations utilized by the assessor to determine whether Student was eligible for special education. Roughly, within a 16 month period of time, Student participated in or was the subject of approximately 50 tests, surveys, or observations. District initially assessed Student at Mother's request between December 2006 and February 2007. Mother requested independent assessments after the February 2007 IEP team meeting. Three months after District completed its initial psychoeducational assessment, WRC completed an outside assessment. About four months after District completed its initial assessments, independent assessments were completed. Not satisfied with the results of the independent assessments, Mother turned to the District again in fall 2007 to assess Student. These reassessments were completed prior to the May 2008 IEP team meeting. Mother also alerted Student's private school teachers and administrators of her concerns. They convened an SST and together informed Mother that they did not share her concerns. When Mother's observations were contrasted to the observations of Student's teachers and assessors, it became abundantly clear that her unwavering opinion that Student was eligible for special education was unsupportable. By the May 2008 IEP team meeting only Mother remained convinced that Student was eligible for special education. Ms. Goldberg noted relatively minor delays in retelling stories and counting backwards. She rejected specialized instruction because Student's language-rich elementary school curriculum provides ample opportunity for Student to practice and improve his skills. Based on overwhelming evidence, District has met its burden of proof that Student is no longer eligible for special education. (Legal Conclusions 1 through 10, 25, 28 through 31; Factual Findings 1 through 127.)

ORDER

1. All relief sought by Student is denied.

2. As of the May 6, 2008 IEP team meeting Student was no longer eligible for special education.

PREVAILING PARTY

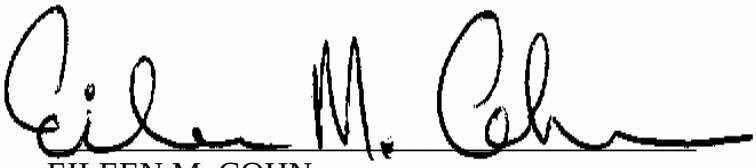
Pursuant to California Education Code section 56507, subdivision (d), the hearing decision must indicate the extent to which each party has prevailed on each

issue heard and decided. Here, Student prevailed on issue one and District prevailed on all remaining issues presented.

RIGHT TO APPEAL THIS DECISION

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

DATED: August 22, 2008



EILEEN M. COHN
Administrative Law Judge
Office of Administrative Hearings