

BEFORE THE  
OFFICE OF ADMINISTRATIVE HEARINGS  
STATE OF CALIFORNIA

In the Consolidated Matters of:

PARENT ON BEHALF OF STUDENT,

OAH Case No. 2016020288

v.

CAPISTRANO UNIFIED SCHOOL  
DISTRICT AND COMMUNITY ROOTS  
ACADEMY.

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CAPISTRANO UNIFIED SCHOOL  
DISTRICT,

OAH Case No. 2016010119

v.

PARENT ON BEHALF OF STUDENT.

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**DECISION**

Capistrano Unified School District filed a due process hearing request with the Office of Administrative Hearings on January 6, 2016, naming Parent on behalf of Student. Student filed a request for due process on February 3, 2016, naming Capistrano and the Community Roots Academy (collectively referred to as Districts). On March 7, 2016, OAH issued an order granting the parties' joint request to consolidate the two cases and designating Student's case as the primary case. OAH granted Student's motion to amend his request for due process in an order issued on April 8, 2016.

Administrative Law Judge Darrell Lepkowsky heard this matter in San Juan Capistrano, California, on June 1, 2, 7, 21, 22, and 24, 2016.

Student's mother appeared on his behalf. Student did not attend the hearing.

Alefia Mithaiwala, Attorney at Law, appeared on behalf of Districts. Present and appearing on behalf of Districts on different hearing days was either Sara Young,

Capistrano's Executive Director for Informal Dispute Resolution, or Capistrano Legal Specialists Kim Gaither and Linda Koo.

At the request of the parties, OAH continued this matter for the receipt of closing briefs. The parties timely filed their briefs. The record closed and the matter was submitted for decision on August 15, 2016, upon timely receipt of Districts' reply brief.

## ISSUES<sup>1</sup>

### *Student's Issues:*<sup>2</sup>

1. Does an exception to the two-year statute of limitations apply to allegations that Districts failed to assess Student from the beginning of the 2013-2014 school year through February 2, 2014?
2. Did Districts deny Student a free appropriate public education by failing to meet their child find obligations for Student from the beginning of the 2013-2014 school year, including failing to timely assess in all areas of suspected disability during the two years prior to the filing of the complaint, specifically in the areas of occupational therapy and speech and language?
3. Did Districts deny Student a FAPE at the February 3, 2014 individualized education program team meeting by failing to find him eligible for special education?
4. Did Districts deny Student a FAPE by failing to identify him under the eligibility categories of specific learning disability and other health impairment at his February 20, 2015 IEP team meeting?

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<sup>1</sup> An ALJ has authority to redefine a party's issues, so long as no substantive changes are made. (*J.W. v. Fresno Unified School Dist.* (9th Cir. 2010) 626 F.3d 431, 442-443.) Any changes to the issues from those in the parties' requests for due process or the Order Following Prehearing Conference were made pursuant to notice to, and agreement by, both parties, except as to the ALJ's minor changes in the numbering of the issues.

<sup>2</sup> In his closing brief, Student alleges numerous violations that were not included in his amended complaint and were not delineated as issues for hearing in the Order Following Prehearing Conference of May 23, 2016. As stated below, the party requesting the hearing is limited to the issues alleged in the complaint. (20 U.S.C. § 1415(f)(3)(B); Ed. Code, § 56502, subd. (i).) This Decision therefore does not address any issue raised for the first time at hearing or in Student's closing brief, except as to the validity of Districts' occupational therapy assessment, which the parties jointly stipulated would be litigated in this case.

5. Did Districts deny Student a FAPE in the February 20, 2015 IEP by failing to:
  - a. Have a special education teacher present at the IEP team meeting;
  - b. Make an appropriate offer of placement;
  - c. Make an appropriate offer of services in the areas of writing, working independently, penmanship, focus and verbal expression/communication; and,
  - d. Develop appropriate goals in the areas of writing, working independently, penmanship, focus and verbal expression/communication?
  
6. Did Districts deny Student a FAPE in the January 6, 2016 IEP by failing to:
  - a. Make an appropriate offer of placement;
  - b. Make an appropriate offer of services in the areas of writing, working independently, penmanship, focus and verbal expression/communication; and,
  - c. Develop appropriate goals in the areas of writing, working independently, penmanship, focus and verbal expression/communication?

Capistrano's Issues:

7. Were the following portions of Capistrano's February 2015 multidisciplinary assessment<sup>3</sup> appropriate such that Capistrano is not required to provide independent educational evaluations at public expense:

- a. Psychoeducational assessment; and,
- b. Occupational therapy assessment?<sup>4</sup>

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<sup>3</sup> Federal statutes and regulations use the term "evaluation" while California statutes and regulations generally use the term "assessment." The terms are synonyms and are used interchangeably in this Decision.

<sup>4</sup> The ALJ granted the parties' joint request at the hearing to add Districts' issue 7(b).

## SUMMARY OF DECISION

Student primarily argues that Districts should have found him eligible for special education and related services under the categories of specific learning disability and other health impaired beginning when he first enrolled in Districts in September 2013. Student also contends that Districts timely failed to assess him in all areas of disability, and that when Districts did find him eligible for special education, they failed to find him eligible under the proper category and failed to provide him with appropriate programming and services. Student further contends that Districts committed other procedural violations resulting in a denial of FAPE to him.

Districts assert that they properly assessed Student and that he did not qualify for special education until February 2015, when he qualified as speech or language impaired. Districts further contend that Student does not qualify under the category of specific learning disability, and did not qualify under the category of other health impaired at any time covered by this case.

Districts, in their case, contend that their February 19, 2015 psychoeducational and occupational therapy assessments are legally sufficient such that they do not have to fund the independent educational evaluations Student requested. Student contends that Districts' assessments contained errors, resulting in their invalidity.

This Decision holds that Districts' assessments met statutory requirements. However, by February 2015, Student's behaviors at school and failure to make expected progress in written expression were due to Student's attention deficit hyperactivity disorder. Districts should have found that Student qualified for special education and related services under the category of other health impaired. The failure to find Student eligible at that time denied him a FAPE, as did the failure to develop goals and timely failure to provide him with services and accommodations to address his ADHD and the written expression deficit that resulted from his disability. Student failed to prove the remainder of his allegations, including his contention that the statute of limitations should be tolled.

## FACTUAL FINDINGS

### *Jurisdiction and Student's Background*

1. Student was an 11-year-old boy who lived with Mother<sup>5</sup> and his siblings within Districts' boundaries at all relevant times. Student began attending school in Capistrano in September 2013, at Carl Hankey Elementary School, when Student began third grade. Student transferred to Community Roots Academy, a charter school within

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<sup>5</sup> Mother was a credentialed teacher with a master's degree who was working on her doctorate in psychology at the time of the hearing. She had no specific training or educational background in special education.

Capistrano's boundaries, in January 2014. Community Roots was its own local educational agency, but had a memorandum of understanding with Capistrano for the provision of special education services to students enrolled at Community Roots.

2. Districts found Student eligible for special education in February 2015 under the eligibility category of speech and language impairment. Approximately a month before the hearing in this case, Student's IEP team changed Student's primary disability to other health impaired based on his diagnosis of attention deficit hyperactivity disorder, and designated Student's speech and language impairment as a secondary disability.

3. Student attended a parochial school from preschool through the end of second grade. From kindergarten through second grade, Student excelled academically in mathematics and reading, but had difficulties with written expression. Student remained behind grade level in all areas of writing skills, including content, penmanship, and the mechanics of writing. In spite of his writing difficulties that year, Student's work samples indicated he was able to do his schoolwork and print his school assignments legibly.

4. Student also had difficulties at school with organizing his assignments and belongings, knowing when to speak and when to listen, and in displaying self-control in class. Based on some of the behavioral and attention difficulties Student's teachers noted at school, as well as difficulties she noted at home, Mother had Student assessed when he was five years old by a psychiatrist. The psychiatrist diagnosed Student with ADHD, and prescribed medications to address that disorder. Student had taken different medications to address his ADHD symptoms since then. Student had negative reactions to several of the medications. Some medications caused him to lose his appetite, resulting in a significant weight loss. Another caused him to become overly sensitive to heat, while others made him lethargic.

5. Student was also referred for an academic assessment at the end of kindergarten when he was six years old. His scores on the Woodcock-Johnson III Normative Update Tests of Achievement were all above the 90th percentile except in writing fluency, where Student scored in the 74th percentile (still in the high average range) and in spelling, where Student scored in the 88th percentile (above average). Student scored above the 99th percentile in broad math, brief reading, brief math, academic applications, letter-word identification, calculation, and passage comprehension.

#### *Events Outside the Statute of Limitations – August 2013 to February 2, 2014*

##### STUDENT'S INITIAL ENROLLMENT IN DISTRICTS – STATUTE OF LIMITATIONS ISSUES

6. Mother was unhappy with how the parochial school was addressing Student's writing issues and attention challenges in class. After Student finished second grade in June 2013, she enrolled him in Hankey Elementary for third grade.

7. Mother contacted Dana Aguilera, Hankey Elementary principal, in late August 2013, prior to the September 9, 2013 first day of school. Mother wanted to meet with Ms. Aguilera to give her information about Student and his needs and the concerns she had.

8. Mother met with Ms. Aguilera on August 29, 2013. She explained that Student had a diagnosis of ADHD and took medication for it. Mother informally requested that Capistrano assess Student for special education. Ms. Aguilera discussed the assessment process and explained that it could take up to 60 days to complete. School districts have 60 days after a parent gives written consent for an assessment to complete the assessment and hold an IEP team meeting.

9. Ms. Aguilera suggested to Mother that it would be better to wait to do an assessment until after Student's teacher had a chance to get to know him and observe him in the classroom, and to permit Student to adjust to a new school. If Student had difficulties at school, Ms. Aguilera could organize a student study team meeting to discuss his classroom needs. During the course of the fall 2013 school semester, Student's teacher, Terry Chambers, who was aware of the student study team referral process, never referred Student to a student study team because Student did not demonstrate any challenges at school that she could not address in class using her normal teaching strategies, or that otherwise warranted referral.

10. Ms. Aguilera suggested that Mother wait to formally request an assessment until after Hankey Elementary held teacher-parent conferences during the end of October or beginning of November, if Mother still thought it necessary at that time.

11. Mother agreed to Ms. Aguilera's suggestion to postpone her assessment request. She misunderstood the concept of a 60-day assessment period and believed that Student would be removed from class every day during that time to complete the assessment. Mother was concerned that so much removal from class would have a detrimental effect on Student's ability to learn his lessons and acclimate to the new school. Mother did not discuss her belief with Ms. Aguilera or her concerns about the assessment process. Mother did not ask Ms. Aguilera any questions about the assessment process to clarify any doubts or concerns she had. Ms. Aguilera never stated any misrepresentations to Mother about the assessment process. Beginning with the February 3, 2014 IEP team meeting, discussed below, and at least at every subsequent IEP team meeting, Districts offered Mother a copy of her procedural rights. Mother was aware since at least February 3, 2014, that she had a right to file for due process if she disagreed with any special education issues involving Districts. Mother did not avail herself of those rights until February 3, 2016, when she filed her complaint in this case.

12. Ms. Aguilera did not make any misrepresentations about Student's educational needs because she had no knowledge of those needs at the time. She did not make misrepresentations about the assessment process. Any misconception Mother had was based on her own interpretation of the process and not on statements made by Ms. Aguilera. Ms. Aguilera also did not withhold any information from Mother. She informed Mother of

how long an assessment would take and her opinion that it was more sensible to delay assessment a couple of months so that Districts would have a better understanding of Student and his needs, which Mother agreed to do. Mother's belief that the 60-day assessment period would entail removing Student from class daily during the entire time was a misunderstanding on her part and was not based on misinformation or misrepresentations from Ms. Aguilera.

#### FALL SEMESTER OF THIRD GRADE AT HANKEY ELEMENTARY

13. Ms. Chambers was Student's third grade teacher at Hankey Elementary. Ms. Chambers received her teaching credential in 1994, and began teaching in Capistrano that year. She taught at Hankey Elementary from 1995, through the time of the hearing, becoming a Master Teacher in 1996, which permitted her to supervise and mentor student teachers. She was a candid witness who gave persuasive testimony regarding Student's abilities in her class and her success in addressing his needs.

14. Mother began email communications with Ms. Chambers as soon as the school semester began. Ms. Chambers fully addressed any concerns Mother raised about Student's relationship with peers or his reaction to his medications. There was nothing about Student's academics or behavior in class during the fall 2013 semester that made him stand out from his classmates.

15. Student's reactions to his medication included loss of appetite and failure to drink enough liquids. Ms. Chambers addressed the issues by monitoring Student in class and having the adult on playground duty monitor him during lunch and recess. Ms. Chambers also ensured that if Student became overheated, which was another medication reaction, he would not have to engage in any physical activity. If necessary, Ms. Chambers sent Student to the nurse's office if he complained he was feeling ill. This happened a few times over the course of the semester. Ms. Chambers and Mother believed that Student sometimes exaggerated his symptoms so he could leave class, but his few absences during the semester did not negatively affect his schoolwork.

16. Other than Student's occasional reactions to his medication, Student did not stand out from the other children in Ms. Chambers's class. He was rarely overly talkative or fidgety. Student's behaviors were similar to that of other children in class because third graders had a tendency to be what Ms. Chambers termed as "wiggly;" meaning that they did not want to stay quietly in their seats all the time. In Student's case, he responded very well to simple redirection to keep him in his seat and on task.

17. Student also did not have much difficulty doing his homework assignments and returning them to school during third grade. Mother acknowledged to Ms. Chambers that Student was showing more responsibility for doing his homework than in the past.

18. Like many of his classmates, Student's written work was sometimes not up to expectation. He sometimes gave short answers and did not elaborate when giving responses

on a writing assignment, but he responded to the teaching strategies Ms. Chambers used with all her students to work on the structure of writing. Third graders were just beginning to learn the structures of writing, so many of her students needed strategies to help them write better. Student could do conventional spelling, could use typical vowel patterns in his writing, and could write a complete sentence. Student was functioning in the typical range of what Ms. Chambers expected from her third grade students. In Student's case, he was functioning at the higher end of the range in reading and language arts, in the average range for math, and in the low average range in writing.

19. Ms. Chambers had previously referred other children for assessment for special education. However, there was nothing about Student's academic performance or behavior in class that triggered concern for Ms. Chambers, and nothing that made her think he needed to be assessed. If he was not paying attention, she would change his seat to be closer to her, and he responded compliantly to redirection. Although Student received grades of "2" in the areas of writing and language for the first grading period at the end of October 2013, which meant he was progressing toward, but had not met grade standards, Ms. Chambers did not believe this was a concern. This was the first reporting period, and students were not expected to have met grade standards at that time. Many students only received "2's" on the first report card because they were just learning third grade curricula. Student's grades merely indicated that like many other third graders, while he was strong in some academic areas, he had weaknesses in others. For Student, his weakness was in writing. Even in Student's areas of strength, such as math, he received only a "3", indicating he was meeting but not surpassing grade level standards. The fact that he had "2's" and "3's" on his report card for his initial reporting period at a new school therefore did not put Districts on notice that Student might have a disability that warranted assessment.

20. Mother met with Ms. Chambers on October 30, 2013, for a parent-teacher conference. Ms. Chambers clarified that the process for a special education assessment could take up to 60 days, but that Student would not be pulled out of class for more than a few occasions for actual testing. Mother was concerned about whether Student's ADHD was affecting him in class, and had concerns about Student's lower report card scores in writing and language. She emailed Ms. Aguilera on October 30, 2013, requesting that Capistrano start the assessment process. After receiving Mother's email, Capistrano generated an assessment plan, which Mother signed on November 19, 2013.

21. Shortly after the parent-teacher conference, Mother asked Ms. Aguilera to have Student tested for participation in the Gifted and Talented Education program. Student's earlier scores on the Woodcock-Johnson when he was six years old qualified him to take the GATE testing. Student took the test in January 2014; his scores qualified him for the GATE program.

22. After Capistrano started its assessment process, Mother decided to transfer Student to Community Roots. She made the decision because of educational issues she had

with one of her other children. Although Mother was happy with Ms. Chambers's classroom for Student, she enrolled Student at Community Roots so that all her children would attend one school.

23. Jeremy Cavallaro was the Executive Director of Education for Community Roots, and had held that position since the school opened about five years before this hearing. He was one of the co-founders of the school. His purpose in founding it was to create a school using a teaching methodology called project based learning. Unlike traditional instruction, where each subject, such as math, is taught separately, project based learning integrates all subjects in a curriculum so that there is instruction on a variety of subjects at one time, depending on the project the class is doing. The students work on three or four projects a year. For example, when Student's class studied the California gold rush, they developed math problems related to it, researched people involved in the gold rush, and made a video related to the subject matter. The students generally worked in groups or with a partner, so they did not sit in traditional rows of seats.

24. Mr. Cavallaro hired all of Community Roots teachers. He selected each one based on their abilities to analyze texts in depth, articulate their thinking, and work in a project-based environment. It was apparent from the testimony of each of Student's teachers at Community Roots, including fourth grade teacher Heather Johnston and fifth grade teachers Ingrid Beatty and Emily Igarashi, that each was a dedicated educator focused on helping their students to succeed. They were each enthusiastic about their work and how to integrate each child's learning style and abilities to help them achieve success.

25. Community Roots did not directly employ any special education teachers or related service providers. Rather, it had an agreement with Capistrano for Capistrano to provide those services. For this reason, Capistrano continued to conduct Student's initial assessment even after he transferred to Community Roots in January 2014.

#### *February 2014 Determination That Student Was Not Eligible for Special Education*

##### DISTRICTS' FEBRUARY 3, 2014 MULTIDISCIPLINARY ASSESSMENT

26. Districts conducted their multidisciplinary assessment to determine if Student qualified for special education between December 2013 and February 2, 2014. The assessment consisted of a review of Student's records; informal assessment of Student, which included observations of him in his classroom at Hankey Elementary before he transferred to Community Roots; interviews with Mother and Ms. Chambers; rating scales completed by Mother and Ms. Chambers; and standardized testing. The standardized testing was done after Student transferred to Community Roots.

27. Capistrano school psychologist Katy Landis headed the team administering the initial assessment. Ms. Landis was a nationally certified school psychologist. She had a master's degree in school psychology, and an educational specialist degree. She had been a school psychologist since 2008, and had held that position with Capistrano since September

2013. Capistrano education specialist Anne Sabina assisted Ms. Landis by administering the academic achievement testing. Ms. Sabina had both general education and special education teaching credentials. She had been a special education teacher since 1981, and employed as such with Capistrano since 1991. Student presented no evidence that either Ms. Landis or Ms. Sabina was not qualified to administer their respective portions of Student's assessment.

28. Although Hankey Elementary had requested Student's records from his parochial school when he first enrolled in Capistrano, those records were not in the cumulative file Ms. Landis and Ms. Sabina reviewed for Student's assessment. They were not aware that he had received several "needs to improve" grades at the end of second grade, and were not aware of the comments on Student's report card for second grade. They were also unaware, as discussed below, that Mother had obtained a private occupational therapy assessment sometime during the time they were doing their testing.

29. Mother informed Ms. Landis that her primary concern for Student was his ADHD and the impact it had on him at school. Mother was also concerned about Student not eating enough at school due to his medication lessening his appetite. Ms. Landis did not find that Student's reactions to his medications were interfering with his ability to access his education, or that he was not eating enough at school. Mother indicated concerns with Student's behavior because at home he engaged in verbal fighting, was easily distracted, unable to finish simple tasks, had temper tantrums, easily frustrated, over-reacted emotionally, impulsive, had a short attention span, was disorganized, and had trouble listening to and following directions. At the time Ms. Landis administered her assessment, these behaviors were not manifesting at school. To the extent Student was distracted and off-task, his teacher was able to easily redirect him.

30. Ms. Chambers did not have similar concerns about Student at school. Student generally was prepared for class, completed his class work and homework, and participated in class. Student appeared to understand the content of the curriculum, and would ask his teacher for help if he needed it. He followed school rules, directives in class, and rarely required multiple prompts to get started on his work. At the time of the assessment, Student was meeting grade level standards in every subject except for writing, in which he was progressing toward the standard. Ms. Chambers had no concerns about any aspect of Student's education or behavior. Student was a bright pupil who was performing well in her classroom. Ms. Chambers was direct and forthright when she testified at hearing. Student presented no persuasive evidence to contradict Ms. Chambers's testimony. Her testimony was given significant weight.

31. To address Mother's concerns about Student's behavior, in addition to interviewing her, Ms. Landis had Mother and Ms. Chambers fill out rating scales from the Behavior Assessment Scale for Children, Second Edition. This test was designed to enable assessors to diagnose and classify several emotional and behavioral disorders a child might have. It had subsections measuring different aspects of behavior. Mother and Ms. Chambers both rated Student low for externalizing behaviors in the areas of aggression and conduct, but both agreed that Student was hyperactive. Their responses on the internalizing behavior

index, however, were markedly different. While Mother found Student to be at risk in the areas of depression, nervousness, and worry, Ms. Chambers did not note any concern at school for Student in any of those areas. Ms. Chambers's only concern was in the area of somatization, which is the conversion of mental experiences into bodily symptoms. Student would often complain of having stomachaches and headaches, which appeared to be less severe than what Student stated he felt. Student did not manifest any of those symptoms at home, and whatever he felt at school was not interfering with his education.

32. Both Mother and Ms. Chambers found that Student did not demonstrate any atypical behaviors, although they did rate Student as being at risk for withdrawal since he sometimes had trouble maintaining friendships.

33. In the area of school problems, while Mother rated Student at risk in the area of attention at home, Ms. Chambers rated Student as average in the areas of attention and learning in the classroom.

34. The Behavior Assessment also had ratings for a child's adaptive skills. Mother and Ms. Chambers rated Student as average in adaptability, social skills, leadership, and functional communication. The latter addressed concerns in receptive and expressive language. Student demonstrated no difficulties in either area at school or at home. While Mother found Student had difficulties completing chores at home, Ms. Chambers rated Student as having no difficulty with organization or in timely turning in work at school.

35. Ms. Landis also had Mother and Ms. Chambers complete the Conners Rating Scale, Third Edition, a screening tool that assessed a broad range of problems in the areas of cognition, conduct, anxiety, and social problems. The areas assessed by the Conners corresponded to criteria for ADHD in the Diagnostic Manual of Mental Disorders. While ADHD under the Education Code is a medical diagnosis, the intent of the Conners was to assess if a child was demonstrating ADHD symptoms at school and, if so, to what extent those symptoms were affecting the child's access to his or her education.

36. Again, there were significant differences between Mother's ratings of Student at home and Ms. Chambers's ratings of behavior observed at school. Both rated Student in the average range for defiance and aggression and learning problems issues. However, while Mother observed Student to demonstrate a high level of hyperactivity and impulsivity at home, Ms. Chambers found Student to only be somewhat higher than average at school. While Mother rated Student as elevated in the areas of inattention, executive functioning, and peer relations, Ms. Chambers found Student to be in the average range in those areas.

37. Ms. Landis observed Student during her administration of tests and in his classroom at Hankey Elementary before he transferred to Community Roots. During the testing process, Student was cooperative, engaged in conversation, and utilized strategies to complete work. He responded easily to prompting to get back on task. He was fidgety at times, but gave his best efforts throughout the testing.

38. In the classroom, Student's school performance and work habits were inconsistent. At times, they were unremarkable, but at other times, Student was easily distracted and impulsive when verbally responding. But, he engaged well with his classmates, and respectful and compliant with his teacher. Student sometimes needed to be prompted to get back on task, but the teacher was easily able to redirect him. Overall, Ms. Landis found that Student's efforts were inconsistent in that he sometimes would give a lot of effort to working on something and at other times he would not. This had the most significant impact on Student's completion of work and on the quality of the work. His greatest struggle was with written tasks.

39. Ms. Landis assessed Student's intellectual abilities using the Wechsler Intelligence Scale for Children-Fourth Edition. This test included formal and informal observations of a student's ability to process information as it comes through ears, eyes, and hands, and how the student uses the information to solve problems. Problems were presented on the test using activities that required the student to speak, look, and listen. The test yielded scores for verbal comprehension, perceptual reasoning, working memory, and processing speed. A full-scale intelligence quotient score was derived from averaging the scores in those four areas.

40. Student's composite score for all subtests of verbal comprehension was 121, which placed him above the expected level when compared to other children his age as the median score is 100. His composite score in perceptual reasoning was 123, also above the expected level. Student's working memory composite score was 116, slightly above the expected level. Student's processing speed composite score was 88, which was in the average range and thus in the expected level for children his age. When averaged together, these four scores yielded a full-scale intelligence quotient score of 119, which was at the slightly above expected level.

41. Student's average processing speed score, which was significantly lower than his scores in the other three areas, was often indicative of children with ADHD, learning disabilities, or traumatic brain injury.

42. Ms. Landis used an additional test, the Comprehensive Test of Phonological Processing, to assess Student's auditory processing and auditory memory. This test measured how a child understood and remembered verbal instructions. The test consisted of three sub-tests in the areas of phonological awareness, where Student scored slightly above average, and phonological memory and rapid naming, in which Student scored in the average range. The results of the Phonological Processing test indicated that Student's auditory processing skills were in the expected limits for a child his age.

43. The Beery-Buktenica Developmental Test of Visual-Motor Integration, Fifth Edition evaluated a child's sensory-motor skills by looking at the child's ability to reproduce designs using paper and pencil. The purpose of the test was to see how well a child could reproduce written material in the classroom, including penmanship skills. Student's score of

105 on this testing instrument indicated that he was right in the middle of the average range for children his age, indicating that he did not appear to have any sensory-motor deficits.

44. To evaluate Student's academic achievement, Ms. Sabina administered the Woodcock-Johnson III Test of Achievement, a standardized testing instrument. The purpose of the test was to determine a child's academic progress and to provide information on his or her academic strengths and weaknesses. The test consisted of clusters of areas, with subtests in each cluster. Scores ranging from 90 to 110 were considered to be in the average range.

45. Student's basic reading skills and reading comprehension composite scores were both 117, in the slightly above expected range. His listening comprehension composite score was 135, in the well-above expected range. Student's oral expression composite score was 120, slightly above expected. His math calculation score was 128, above the expected level, while his math reasoning score was 140, well above the expected level. Student's lowest score was in written expression, where his composite score was 102, right in the middle of the as expected level.

46. Ms. Landis also administered some subtests of the Wechsler Individual Achievement Test-Third Edition to obtain additional information about Student's academic progress. Student's sentence composition and reading comprehension scores were in the average range. His oral expression and math problem solving scores, as well as his listening comprehension scores were all in the well-above expected range.

#### FEBRUARY 3, 2014 IEP TEAM MEETING

47. Student's IEP team met on February 3, 2014, to review the multidisciplinary assessment and determine if Student was eligible for special education. The IEP team members were Mother; Ms. Landis; Ms. Sabina; Ms. Aguilera; Myla Candelario, another education specialist who provided specialized academic instruction to special education students at Community Roots; and Ms. Chambers. Mother received a copy of her procedural safeguards at the meeting, which Ms. Aguilera reviewed with her.

48. Ms. Landis and Ms. Sabina reviewed the entire assessment process, which included a review of all standardized tests administered, the rating scales completed by Mother and Ms. Chambers, interviews with Mother and Ms. Chambers, review of the records in Student's school file, and observations of Student in class and during testing. Based upon their view, Ms. Landis and Ms. Sabina recommended that Student did not meet the criteria for special education. They considered the two areas in which Student might have been eligible: other health impaired due to his ADHD diagnosis, and specific learning disability.

49. Ms. Landis and Ms. Sabina concluded that Student did not meet eligibility under other health impaired because his ADHD was not having any significant impact on Student's ability to access his education. Although Student was often distracted, he was easily redirected, and responded positively to prompting. He did not demonstrate any limits on his strength, vitality, or alertness due to his ADHD. He was progressing well

academically. Ms. Chambers did not have to significantly accommodate or modify her teaching strategies to redirect Student when he became distracted or unfocused. Student did not require any interventions that Ms. Chambers was not already using with her other students. Student was not disrupting the education of his peers, and his behaviors were not significant enough at the time to be interfering with his own education.

50. Although Mother had indicated significant concerns regarding Student's lack of focus and inability to complete tasks at home, very little of those concerns were evident in the school setting. Student completed his in-class and homework assignments. He participated well on his school projects, and was compliant with directives from his teacher and easily re-directed when off-task. Student was achieving average or better academically; his scores on the Woodcock-Johnson indicated that he was able to achieve academic success without special education intervention.

51. Ms. Landis and Ms. Sabina also concluded that Student did not meet the eligibility requirements for special education under the category of specific learning disability, although Student did have a deficit in the psychological processing area of attention. To qualify, Student would have to meet two criteria. First, he would have to demonstrate a significant discrepancy between ability and actual achievement. The discrepancy would have to amount to a difference in scores of at least 22.5 points, which is one and a half standard deviations, where a deviation is 15 points. When comparing Student's full-scale intelligence quotient of 119 with Student's lowest academic achievement score in written expression, which was 102, the discrepancy was only 17 points.

52. Additionally, even if Student had demonstrated a discrepancy between ability and achievement, he did not demonstrate an inability to access his education due to a learning disability. Student's academic achievement scores were all above average except his written expression score, which was in the middle of the average range. Student's scores indicated that he was learning and retaining information in a general education environment using only general education teaching methodologies and strategies. He did not require special education intervention to make this progress.

53. Based on all of this information, Student's IEP team concurred with Ms. Landis's and Ms. Sabina's conclusions that Student did not meet eligibility for special education at the time of the February 3, 2014 IEP team meeting.

#### DR. PALMER'S TESTING AND RECOMMENDATIONS

54. Although Mother agreed to the determination of ineligibility at the time of the initial IEP team meeting, Student now disputes the findings and determinations of Districts' IEP team members. Student argues that the multidisciplinary assessment did not consider the poor grades he received the prior year at his parochial school. However, that information was not in Student's file at the time of the assessment. Even if it had been available,

Student's academic performance in Ms. Chambers's class, as well as on the academic achievement test, indicated that at the time of assessment he was progressing as or better than expected in all areas, including written expression, his weakest area.

55. Student also argues that his somatization scores, which Ms. Chambers indicated were in the clinically significant range, should have notified Districts that his ADHD was having an effect on his education. However, there is no evidence that Student's headaches and stomachaches, whether real or imagined, were affecting his access to education.

56. Student's primary contention is that Districts should have used what is called a general ability index score to determine Student's intelligence quotient, and then use that score to determine if Student had a specific learning disability. The general ability index score is derived from averaging the subtests of a student's verbal comprehension score and perceptual reasoning score on the Wechsler Intelligence Scale. It disregards the working memory and processing speed scores when a student, like Student here, scores significantly lower in those areas than in verbal comprehension and perceptual reasoning.

57. Student contends that his general ability index score on Districts' administration of the Wechsler Intelligence Scale would have been 126. This contention is based on the findings and recommendations of Dr. David Palmer, a licensed educational psychologist who administered the Wechsler Intelligence Scale to Student in April, 2014. He did the testing at Mother's request and expense because she continued to believe that Student qualified for special education.<sup>6</sup>

58. Dr. Palmer's report and recommendations cannot be given much weight. First, although he determined that Student's general ability index was 126 based upon Student's verbal comprehension score of 121 and perceptual reasoning score of 123, there is no explanation of how he arrived at a general ability index score that is higher than either score in the two areas used to determine the general ability index. Dr. Palmer did not testify at hearing. Student's expert Dr. Perry Passaro did testify and was asked to comment on how a general ability index score was determined. Without being able to reference the instruction manual for the Wechsler Intelligence Scale, Dr. Passaro could not state specifically how the general ability index score was derived, was unsure of when and how the general ability index could be higher than the verbal comprehension or perceptual reasoning scores, and therefore could not confirm the validity of Dr. Palmer's finding that Student's general ability index score on Districts' administration of the Wechsler Intelligence Scales would be 126.

59. Dr. Palmer's written conclusions are also not given much weight because his testing and resulting report are suspect. Dr. Palmer was aware of Districts' multidisciplinary assessment dated February 3, 2014, because he specifically commented on it and derived a general ability index score from Districts' results on the Wechsler. In spite of knowing that

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<sup>6</sup> Student did not raise Districts' failure to fund Dr. Palmer's assessment as an issue for hearing in this case.

Districts had assessed Student using the Wechsler Intelligence Scale barely two-to-three months before he tested Student, Dr. Palmer administered that same edition of this test on April 12, 2014. As confirmed by school psychologist Kari Brown, who, as discussed below, administered part of Districts' February 2015 multidisciplinary assessment to Student, Dr. Palmer's test results on the Wechsler Intelligence Scale were not valid because he gave his test too soon after Districts' administered the same test to Student. The requirement that a significant amount of time pass between administrations of the same testing instrument is to prevent what is known as the "practice effect;" repeating the same test can result in illusory higher scores on the second administration of the test because the test taker is already familiar with the questions.

60. Student argues also that Dr. Palmer's results on his administration of the Wechsler Intelligence Scales and his subsequent conclusion that Student demonstrated a discrepancy between ability and achievement substantiated Student's position that Districts should have found him eligible for special education as learning disabled. Student attained a score of 134 in verbal comprehension; a score of 135 in perceptual reasoning; a score of 135 in working memory; and a score of 91 in processing speed on Dr. Palmer's administration of the Wechsler, for a full scale intelligence quotient score of 132. Based on these scores, using Districts' results on the written expression portion of the Woodcock-Johnson, Dr. Palmer found that Student had a discrepancy between ability and achievement and concluded that Student met the requirements for a specific learning disability.

61. However, Dr. Palmer's findings are not persuasive. He did not do a full assessment of Student. He based his recommendation after having only given Student one standardized test. He did not use a variety of assessment tools. He did not observe Student at school, and did not interview Student's teachers or get information from them in any way. The only test he administered was the Wechsler Intelligence Scale. Dr. Palmer's conclusions of eligibility are based solely on the discrepancy model. As stated above, Dr. Palmer improperly repeated the Wechsler Intelligence Scale, and the scores he obtained for Student on that test are therefore untrustworthy.

62. Additionally, Dr. Palmer failed to address the progress Student was making in class, and the fact that Student's processing speed score and his written expression score were in the average range. He failed to discuss the other requirement in finding a student eligible for special education under a specific learning disability: that the child was not able to make meaningful progress in a general education curriculum without special education supports. At the time of Districts' and Dr. Palmer's subsequent testing, Student was making progress in all aspects of his education with only the strategies and supports utilized by his general education teacher with all her students.

63. Dr. Palmer also suggested in his report that Student demonstrated signs of dysgraphia based upon his low processing speed scores. Dysgraphia is a visual motor dysfunction which may manifest as an inability to write. Dr. Palmer noted that further testing would have to be done to make a final diagnosis of dysgraphia. He did not do any further testing and therefore did not make the diagnosis. As stated above, Districts'

administered a visual-motor integration assessment to Student, in which he scored in the average range, indicating the lack of a visual-motor integration deficit. Dr. Palmer further speculated that Student might always have difficulties with penmanship and getting his thoughts on paper due to either a fine motor deficit (for which he did not test or suggest testing) or because Student might be a perfectionist who would not move on in his writing until the first thoughts written were perfect. Dr. Palmer also speculated that Student might have difficulties writing because he was thinking faster than he could write. Dr. Palmer suggested that the best way to address Student's slow writing issues was to teach him to use a word processor. These findings are more supportive of a disability arising from Student's ADHD rather than from a specific learning disability. Dr. Palmer did not make any specific recommendations about whether Student should have qualified for special education under the category of other health impaired.

#### TESTIMONY OF DR. PASSARO REGARDING DISTRICTS' FEBRUARY 2014 ASSESSMENT

64. Dr. Perry Passaro testified as Student's expert at hearing. Dr. Passaro was a licensed psychologist, a licensed educational psychologist, was a diplomate of the Academy of Cognitive Therapy, and had pupil personnel service credentials in school psychology, school counseling, and child welfare attendance administration. He had worked as a school psychologist, public school principal, and a director of special education. He had been in private practice for several years, and often contracted with school districts to administer independent evaluations. Dr. Passaro completed an independent assessment of Student in March 2016, at Mother's expense based on her disagreements, as discussed below, with Districts' February 2015 multidisciplinary assessment and Districts' 2015 and 2016 IEP's.

65. Dr. Passaro had only one criticism of Districts' February 2014 assessment. He believed that Districts should have explored further whether Student was suffering from anxiety based on the elevated score for somatization on Districts' administration of the Behavior Assessment Scale. However, in spite of the score, there is no indication that Student suffered from overall anxiety or that anxiety was impacting his school performance. Student sometimes asked to go to the school nurse because he said he had a stomachache or headache. Mother at one point had alerted Ms. Chambers to Student's habit of doing this. Ms. Chambers was aware of it, and responded appropriately to Student's needs by giving him time to rest if he requested it. There is no evidence that Student's symptoms impacted his education. Dr. Passaro acknowledged that a diagnosis of anxiety alone does not automatically result in special education eligibility. There is no persuasive evidence that Student required any special education intervention at the time of his February 2, 2014 IEP team meeting.

#### FAILURE TO ADMINISTER SPEECH AND LANGUAGE OR OCCUPATIONAL THERAPY ASSESSMENTS

66. Districts began the assessment process after receiving Mother's written consent and a form Mother filled out, at Districts' request, called a Parent Assessment of Development and Early Learning Inventory. On that form, the only concerns Mother

indicated were that Student's ADHD caused him to have a lack of organization, focus, and attention to detail, and difficulty following through on one-step directions. She indicated numerous concerns with him at home, related generally to Student's high level of frustration, temper tantrums, distractibility, and inability to complete tasks. The majority of Student's behaviors Mother saw at home were not present at school. Mother did not indicate any concerns she had about Student's academic progress, or concerns she had about Student's speech abilities. She did not indicate any concerns about Student's fine or gross motor skills, other than the fact that he did not learn to tie shoes by age six.

67. Ms. Chambers did not have any concerns about Student in class. She did not have concerns about his speech, or any of his gross or fine motor skills. As of his first trimester report card, Student's penmanship was satisfactory. There was no indication that any articulation deficit might be interfering with his access to his education or that any articulation errors were not attributable at the time to Student's age. Student did not stand out from his classmates in any area that would have triggered in Ms. Chambers's mind a need to have Student assessed in the areas of speech and language or occupational therapy.

68. After Districts began their assessment process in December 2013, Mother obtained an occupational therapy assessment from Kaiser Permanente Hospital. She had been concerned because of Student's delays in learning to tie his shoes, and because of some difficulties he was having participating in sports. The Kaiser assessor tested Student's fine and gross motor skills, including administering a testing instrument called the Bruininks-Oseretsky. The only area in which Kaiser found Student to have any significant gross motor impairment was when doing a cross-lateral arm/leg swing. Kaiser's testing did not indicate that Student had any fine motor deficits. Part of the fine motor testing included examination of Student's handwriting. Kaiser found Student's letter formation to be appropriate and that he had minimal difficulties with letter alignment.

69. Per its December 27, 2013 assessment, Kaiser found that Student did not demonstrate any clinical indications warranting occupational therapy services. Kaiser did suggest that Student be evaluated for educational based occupational therapy assessment, but its report did not state why Kaiser's assessor felt that such an assessment was warranted given the lack of deficits found in its own testing. Kaiser's assessor did not testify at the hearing.

70. Mother left the Kaiser report with a clerical staff member at Hankey sometime in January 2013, but the report was not given to Ms. Aguilera or any of Districts' assessors or teaching staff. The report was not in Student's file and Mother never mentioned it to either Ms. Landis or Ms. Sabina during the assessment process, so neither was aware that Student had been assessed for occupational therapy needs. Mother never specified an area of concern for fine motor or gross motor deficits she believed Student might have, and Ms. Chambers did not note any difficulties in those areas in class. Mother did not bring a copy of Kaiser's report to the February 3, 2014 IEP team meeting to give to the other IEP team members. Districts IEP team members therefore were not aware it existed at the time of the IEP team meeting.

71. However, even had she seen it, Ms. Landis would not have considered any of its findings a basis for recommending an occupational therapy assessment because Kaiser did not find any significant deficits that might have been impeding Student's access to his education. Additionally, she had assessed Student's fine motor skills using the Visual-Motor Integration Test. Student's scores on that test were in the average range, indicating that no further testing was warranted.

72. Student did not present any evidence that contradicted Ms. Landis's conclusions, and the other evidence at hearing, that Student did not demonstrate any deficits that needed to be addressed through occupational therapy and therefore should have been assessed at the time. Student's expert, Dr. Passaro, did not address Student's occupational therapy needs in his assessment, in his assessment report, or during his testimony. Nor did he offer any critique of the lack of assessment in those areas in Districts' February 3, 2014 multidisciplinary assessment.

73. Student also failed to provide any evidence that Districts should have administered a speech and language assessment to him in February 2014. Student did not present a speech and language expert to address this issue. Student's teacher did not find that Student presented with any age-inappropriate speech patterns at the time Districts assessed him during the 2013-2014 school year. Neither Ms. Landis nor Ms. Sabina had any difficulty understanding Student's speech during their assessments. Mother did not indicate any concern about Student's speech. Dr. Passaro, Student's expert, did not find any indications that Student demonstrated any speech deficits.

74. There is no evidence that contradicted Districts' position that Student did not have a suspected speech or language disability that warranted testing or services at the time they conducted the February 2014 multidisciplinary assessment. The fact that Student later qualified for special education due to a speech and language impairment does not, by itself, lead to the conclusion that Student should have been assessed earlier under that disability category.

#### *February 19, 2015 Multidisciplinary Assessment*

##### SPRING SEMESTER 2014

75. Student began attending Community Roots in January 2014 for the second semester of third grade. His teacher was Michelle Voccola.<sup>7</sup> Community Roots' teachers prepared written overviews of a student's progress at the end of each semester when report cards were issued. Each child received a separate report along with his report card. The report first described in general the class projects in which all students participated. The latter portion of the report addressed the particular child's specific progress during the semester.

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<sup>7</sup> Ms. Voccola did not testify at the hearing.

76. Per his report card for the spring 2014 semester, Ms. Voccola noted that Student demonstrated an academic strength in math. Student had additionally strengthened his writing abilities. His penmanship had become more legible. He was using graphic organizers to gather his thoughts. Student's writing improved when he took his time to develop ideas.

77. However, while Student had been fairly organized in Ms. Chambers's class and did not have difficulty turning in homework and completing assignments, he had not been able to do so after transferring to Community Roots. Ms. Voccola noted that she had to consistently engage in conferences with him to ensure that all steps of the writing process were adhered to, especially when first drafting his ideas. He needed repetitive encouragement to begin and complete his writing tasks. He was not timely turning in writing assignments and his work areas were unorganized. Much of Student's incomplete work, as well as much of his completed work, got buried in his desk.

78. Nonetheless, Student still met or exceeded expectations in practically every academic area. There were only a few areas in which Student still was at the "progressing toward semester expectations" (grade of "2"). The first areas were with written work in the areas of spelling, and in writing narratives. He also received a "2" in the areas of listening critically and responding appropriately to oral presentations and in the area of delivering presentations. However, Student still made notable progress in improving his writing, as to both legibility and exposition of ideas. His progress was significant enough for Ms. Voccola to comment on it in her semester report, and for Mother to write to Ms. Voccola to express that Student had grown considerably in the short time he had been in Ms. Voccola's class. Mother also acknowledged to Community Roots' Executive Director Mr. Cavallaro, that Ms. Voccola had been an amazing teacher for Student and had accommodated all of his needs. Although Student had some challenges during the spring 2014 semester, there was no persuasive evidence that Student failed to make meaningful progress during the semester or that he should have been found eligible for special education at that time.

#### FALL SEMESTER 2014

79. Student was assigned to Heather Johnston's fourth grade classroom for the 2014-2015 school year. Ms. Johnston, who testified at hearing, had a master's degree in psychology and a multiple subjects teaching credential. She worked as an independence facilitator for special education students and then as a general education teacher at Capistrano before being hired to teach at Community Roots in 2011. She was direct and forthright during her testimony. It was obvious she cared deeply about all her students and worked hard to help them succeed in class.

80. Student was very focused the first few days of school. However, a few days into the semester, Ms. Johnston noted that Student had begun have difficulties, particularly in the afternoon after lunch. He was especially distracted when asked to do writing assignments, and was having difficulty completing them.

81. Student had not taken any medication for his ADHD during summer, but had resumed the medication regimen when he started school. When not medicated, Student's behavior at school changed. He could become much more wound up, too full of energy, and appear as if he was bouncing off the walls. He often disrupted class by blurting out answers and information and not able to remain in his seat. Even when Student remembered the medication, it sometimes appeared that the medication was wearing off too soon. Ms. Johnston contacted Mother one day in November 2014, to comment about how much of a handful Student had been that day. Mother suggested that Ms. Johnston have Student take a break and go running on the playground to release his energy. Student's behaviors interfered with his classmates' ability to access their education, in addition to impeding his own education.

82. One of Student's greatest difficulties was completing and turning in homework assignments. Student often misplaced his homework assignments. In response, Ms. Johnston began texting homework assignments to Mother or sending her a photograph of the assignment. Although this assisted Mother in knowing what assignment Student had to complete at home, Student still misplaced work between finishing it at home and the time he needed to turn it in at school.

83. Student's report card for fall 2014 included a separate narrative from Ms. Johnston. The narrative first discussed what the class had done as a whole, and concluded with a discussion of Student's strengths and weaknesses in school during that semester. Student was able to prepare multi-paragraph written assignments, but only when using a laptop computer. He continued to struggle to put his thoughts on paper. He continued to have difficulty putting sentences together and to use proper writing conventions at times. Student's grade of "2" in several areas, indicating he was not meeting grade level standards, was due to his inability to put his knowledge on paper and to his lack of organizational skills. He also needed to improve his self-management skills. His deficits in self-management were interfering with his ability to meet grade level standards.

84. While Student's lack of progress toward grade standards the prior year was not notable because he had just enrolled at Capistrano before being assessed, by late fall of 2014, Student had received "2's" in written expression for over a year. Given his above-average intelligence, Student's failure to reach grade-level standards was an indication that something was interfering with his ability to access his education.

85. Mother continued to have concerns about Student's ability to fully access his education. Her concerns were heightened because Student's intelligence quotient was above average and because he qualified for the GATE program, but he still was not meeting grade expectations in writing. She also had concerns about Student's lack of focus in the classroom and his classroom behaviors, which she felt were interfering with his progress.

86. In late November 2014, Mother requested that Districts assess Student again for special education eligibility. Ms. Johnston agreed with the referral for assessment. Both

she and Mother had concerns with Student's challenges with writing, his penmanship, his distractibility in class, and with some of his behaviors that were negatively affecting the ability of Student and his classmates to learn.

87. Districts developed an assessment plan, which Mother signed on December 8, 2014. In addition to a psychoeducational assessment, Districts proposed doing speech and language and occupational therapy assessments. The latter assessment was in response to Ms. Johnston's concerns about Student's handwriting. Student's penmanship continued to be poor. Ms. Johnston wanted to see if an assessment might provide answers to the reasons for Student's poor handwriting, which was negatively impacting his ability to timely complete his assignments and to produce quality written work. Districts timely began the assessment process after receiving Mother's consent.

#### PSYCHOEDUCATIONAL ASSESSMENT

88. Capistrano school psychologist Kari Brown headed Districts' multidisciplinary assessment team assigned to complete Student's February 2015 assessment. Ms. Brown had three master's degrees in: educational psychology; school counseling; and marriage and family and child therapy. She had worked as an educational psychologist since 1998, and had worked at Capistrano since 2001. Her core expertise was with children who had ADHD, emotional disturbance, and autism.

89. Educational specialist Lindsay Carucci administered the academic achievement portion of the assessment. Ms. Carucci had a master's degree in special education, and had both a mild/moderate teaching credential and kindergarten-to-12th grade multiple subject teaching credential. Both Ms. Brown and Ms. Carucci were highly trained, competent professionals who had many years of experience administering psychoeducational assessments. They timely completed a detailed and quality assessment, which was reviewed in a comprehensive multidisciplinary assessment report dated February 19, 2015, and presented at an IEP team meeting on February 20, 2015. Student presented no persuasive evidence that Ms. Brown or Ms. Carucci were not qualified to administer the assessment.

90. The psychoeducational assessment consisted of several parts. It included a review of Student's records, including prior assessments; informal assessment procedures such as observations of Student in class and during the testing process; interviews with Mother and Ms. Johnston; collection of information through rating scales completed by Mother and Ms. Johnston; information provided by Mother and Ms. Johnston on forms they completed for the assessment; and standardized testing. The testing and interviews of Student for the psychoeducational assessment, as with the speech and language and occupational therapy assessments, were done in English, his primary language.

91. Student did not provide any persuasive evidence that contradicts the assertions by all four assessors who were part of the multidisciplinary process that they were qualified to administer their respective assessments or that the tests they used were not valid for the

purposes stated. Nor is there any evidence that the tests were biased in any manner, that they were not age-appropriate for Student, that they were scored incorrectly, or administered or scored in any way contrary to the test publisher's instructions.

92. Mother completed two versions of a Capistrano form entitled Health and Developmental History. In response to questions on the first form, Mother indicated that there were some stressful situations at home that might be affecting Student. She noted that Student was on medication that caused him to lose his appetite and might be contributing to his headaches. She indicated several behaviors Student engaged in that had earlier been determined to relate to his ADHD, such as being over-active, impulsive, easily frustrated, disorganized, lacking in self-control, and having problems completing homework. Mother also noted that she believed that Student had delays in his fine and gross motor skills.

93. The following week, Ms. Brown had Mother fill out a second version of the Health and Developmental History form that required information that was more specific. On the second form, Mother added additional concerns she had about Student's writing and speech. However, in spite of stating a concern about Student's speech, Mother indicated that Student had no difficulty with either speech or communication in a subsequent area of the form. Mother also indicated that Student had no difficulties with his muscles or bones. Mother again indicated her primary concerns for Student were issues relating to his ADHD.

94. Ms. Johnston provided feedback concerning Student's issues in class on a teacher information sheet as part of the assessment process. Student rarely followed directions the first time, and had difficulties with organization, focus, and attention. He did not take his medication consistently. Student's poor penmanship and difficulty putting his thoughts on paper affected him in all academic areas.

95. Ms. Brown reviewed Student's school file, including Districts' February 2014 multidisciplinary assessment and Dr. Palmer's April 2014 administration of the Wechsler Intelligence Scale, and information from Student's prior enrollment in parochial school. Ms. Brown incorrectly identified the amount of discrepancy Dr. Palmer had found between Student's abilities and his achievement. However, that fact does not invalidate Ms. Brown's assessment. Whether Dr. Palmer found a discrepancy in spring 2014 was not a determinative factor in Districts' assessment process.

96. Ms. Brown conducted three formal observations of Student in his classroom. Each observation lasted 25 to 30 minutes. She also observed him during the testing process and while she was in his classroom for other reasons. Student was off-task or engaging in disruptive behavior during each of her observations. Instead of working on the assigned task, he was playing with his watch, tapping his fingers on his desk, wandering around the class talking to other students, rolling a pencil around on his desk, or reading a book that was not part of the assignment. At times he was staring at the wall and not actively participating in the classroom discussion other than when directly asked to respond to a question. The fact that Student was engaging in all these behaviors in spite of the strategies Ms. Johnston was

using to redirect him in class, undermined Districts' later determination at the February 20, 2015 IEP team meeting that Student's behaviors, caused by his ADHD, were not affecting his access to his education.

97. Ms. Brown administered several testing instruments as part of this assessment. Because Student was fidgety and distracted during testing, she had to break testing up into smaller sessions than normal to maintain Student's attention.

98. Ms. Brown used the Woodcock-Johnson Tests of Cognitive Abilities, Third Edition, a standardized test, to measure Student's intellectual abilities. Ms. Brown chose this test rather than the Wechsler Intelligence Scale because Student had been tested on the Wechsler twice in the last year, once by Districts and once by Dr. Palmer. Scores of 90 to 110 on Woodcock-Johnson – Cognition test were considered to be in the average range when compared to same-aged peers. Ms. Brown administered the standard battery of the test, which consisted of seven subtests, each measuring a different area of cognitive ability. The seven subtests were then combined into cluster areas for collective scoring.

99. The verbal ability standard scale was made up of a verbal comprehension subtest. The cluster measured language development, including the comprehension of individual words and the comprehension of relationships among words. Student's standard score was 119, which was in the high average range.

100. The thinking ability standard scale measured a sampling of the different thinking processes that might be invoked when information in short-term memory could not be processed automatically. The cluster included subtests for each of the four thinking abilities: long-range retrieval, visual-spatial thinking, auditory processing, and fluid reasoning. The subtests categories were visual-auditory learning, spatial relationships, sound blending, and concept formation. Student's composite score was 119, in the high average range.

101. In her report, Ms. Brown mistakenly stated that Student's score on the thinking ability cluster was 134, in the superior range. This was his score on the sound blending subtest. Student's score on the thinking ability cluster was 119. Student points to this mistake as a reason to invalidate Districts' psychoeducational assessment. However, the correct score is included in the multidisciplinary report on the chart for the scores Student earned on each aspect of the Woodcock-Johnson-Cognition test, and the correct score is indicated on the raw data testing protocols. The correct scores were later discussed during the IEP team meeting on February 20, 2015. There is no evidence that Ms. Brown incorrectly administered or scored the test, and no evidence that the mistake in referencing the score on the report impacted Student's scores on the test or the ultimate decisions of the IEP team. A few editorial mistakes in the report, where the correct information was plainly delineated and later discussed, did not invalidate the assessment.

102. The cognitive efficiency standard scale represented the capacity of Student's cognitive system to process information automatically. There were two subtests in this

cluster, one that measured processing speed, and one that measured short-term memory. Student scored 112 overall, also placing him in the high average in this area.

103. The Woodcock-Johnson-Cognition also rendered a general intellectual ability score. Student's score was 130, in the superior range of intellectual ability for his age group. It was this overall intellectual ability score that Ms. Brown would later use to determine whether Student evidenced a significant discrepancy between ability and achievement.

104. As had Ms. Landis the prior year, Ms. Brown administered the Beery-Buktenica Developmental Test of Visual-Motor Integration to Student to test his sensory-motor skills, this time using the newer sixth edition. Ms. Brown administered two portions of the Beery-Buktenica to Student to measure his ability to judge size, shape, angulations, spatial orientation, and to use fine motor skills in reproducing shapes. The visual perception subset measured visual acuity and visual perception. Student scored a standard score of 104, in the mid-average range, similar to his score the year before. The motor coordination section of the Beery-Buktenica assessed Student's ability to control finger and hand movements to see if he could draw within a targeted area. Student's score on this section was 96, also in the average range. Student's average scores on Ms. Brown's administration of the Beery-Buktenica were consistent with the results of Lindsey Morris's occupational therapy assessment, discussed below. The results of the testing indicated Student did not have any sensory-motor deficits. Student put on no evidence that contradicted Districts' testing in this area.

105. Ms. Brown assessed Student's social-emotional and behavioral development using two testing instruments. The first was the Behavior Assessment System for Children, Second Edition, a ratings scale that was completed by Mother and Ms. Johnston. Student also completed a self-scoring scale. The purpose was to determine if Student was demonstrating any behaviors that were clinically significant and were impacting his education. A parent's ratings could be important if a child's behaviors at home were also manifesting at school or if the home behavior was having an impact on the child's ability to access his education.

106. The Behavior Assessment looked at five behavior composite areas, each of which had several behaviors that were rated. The first four composites – externalizing problems, internalizing problems, school problems, and the behavioral symptoms index – were classified as clinical scales. The higher the score, the more the child was having difficulties in that area. Any score over 70 was clinically significant and suggested maladjustment by the child. The last composite, adaptive skills, was considered an adaptive scale. For the adaptive scales, a score below 30 was clinically significant and suggested adaptive maladjustment by the child.

107. In the home setting, Mother's scoring placed Student at-risk in the subdivisions of aggression, somatization, and atypicality. She scored Student in the clinically significant range in the areas of hyperactivity, and attention problems. Mother

scored Student a 24 for activities of daily living at home, indicating that there was a significant problem. However, other than having difficulties in learning to tie his shoes, the daily living problems at home were not affecting Student at school.

108. Ms. Johnston likewise scored Student at-risk in somatization. She also found Student at-risk in the area of attention problems. Her scoring coincided with Mother's in finding Student clinically significant for hyperactivity.

109. Student's self-scoring indicated that he felt he had a clinically significant problem with his attitude to teachers, something Ms. Johnston did not see from her perspective. Student also acknowledged in his scoring that he had an attention problem.

110. Ms. Brown also had Mother and Ms. Johnston complete the Conners Rating Scales, Third Edition, as Ms. Landis did the previous year. A score above 70 was considered very elevated, and indicated a child's behavior was of much more concern than typical for his age. Mother's ratings indicated that Student had significant difficulties with executive functioning at home. Both she and Ms. Johnston rated Student as either elevated or very elevated in the areas of hyperactivity/impulsivity and inattention. Ms. Johnston's scores corresponded to the information she provided in her interview with Ms. Brown, indicating that Student had difficulty in attention, focus, organization skills, writing, penmanship, and in being able to focus on putting his thoughts on paper in all academic areas.

111. Mother's and Ms. Johnston's scoring on the Conners confirmed that Student met the profile of a child with ADHD.

112. Ms. Brown also had Student fill out a self-reporting questionnaire called the Piers-Harris Children's Self-Concept Scale, Second Edition. It was designed to assess how children feel about themselves in areas such as behavior, intellectual and school status, physical appearance and attributes, anxiety, popularity, and happiness and satisfaction. Student did not score himself as having significant problems in any areas. His highest score, in anxiety, was in the high average range.

113. Ms. Carucci administered the Woodcock-Johnson III Tests of Achievement to determine Student's academic levels. It assessed oral expression, written expression, listening comprehension, basic reading, reading comprehension, math calculation, and math reasoning. Scores between 90 and 110 placed a child in the average range.

114. Student's academic achievement scores were similar to those he achieved on Districts' assessment the previous year. Student's basic reading skills were above average. His reading comprehension was in the superior range as was listening comprehension. His oral expression was in the high range. Student's math calculation skills were in the high average range. Student excelled on the math reasoning section, scoring in the very superior range.

115. As in the previous year's testing, Student's area of weakness was in written expression. His score in the section was 100, average.

116. Student contested the validity of the academic testing because Ms. Carucci chose not to administer an optional subtest in the area of spelling. Student provided no persuasive evidence that failure to administer the spelling subtest invalidated Districts' psychoeducational assessment.

117. Dr. Passaro was asked during his testimony to comment on the validity of Districts' February 19, 2015 psychoeducational assessment. He did not find any portion of the assessment to be invalid or inadequate. He specifically did not state that the assessment was invalid because it did not include the spelling subtest of the Woodcock-Johnson-Achievement test.

118. Dr. Passaro did state that the only weakness in the psychoeducational assessment might be Districts' failure to further probe Student's scores in written expression, which were much lower than his scores in all other academic areas. However, there is no evidence that further testing in written expression would have yielded any different result given that Student's score was almost identical to his score the year before. Further weakening the persuasiveness of Dr. Passaro's observation, which he made almost in passing, was the results of his own academic assessment of Student. Dr. Passaro and his assessment team tried to administer a writing assessment called the Test of Written Language. The team had to terminate the test because Student refused to do it. Dr. Passaro did not attempt to administer the test at a later date and did not attempt to use another written language assessment instrument in its place. In light of the very comprehensive<sup>8</sup> nature of Dr. Passaro's psychoeducational assessment, the fact that he chose not to pursue further written language assessment indicates that additional written language testing was not a necessary element of the assessment process.

#### OCCUPATIONAL THERAPY ASSESSMENT

119. Lindsey Morris administered Districts' occupational therapy assessment of Student. Ms. Morris was a licensed occupational therapist with a master's degree in occupational therapy. She had been an occupational therapist since 2009, first working with a private agency. She had worked for Capistrano since 2011. She had extensive experience administering assessments and providing occupational therapy to students who were, or might be, eligible for special education and related services. She was direct and knowledgeable about her profession during her testimony, and gave clear, concise information about her assessment process and what conclusions she drew from the tests she

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<sup>8</sup> Dr. Passaro's assessment consisted of interviews with Mother and Student's teacher; a clinical interview of Student; observations of Student at school; review of those records of Student provided to him; inventories and rating scales completed by Mother, Student's teacher and Student; and several more standardized tests than Districts had administered.

administered to Student. Student presented no persuasive evidence to challenge the validity of Ms. Morris's credentials as an assessor or the validity of the assessment she administered.

120. Districts included an occupational therapy assessment as part of the February 2015 multidisciplinary assessment based on concerns expressed by Mother and Ms. Johnston about Student's handwriting and difficulties with written work. The assessment process Ms. Morris conducted included testing for potential fine and gross motor deficits. She also included assessments to check for any sensory processing issues because an underlying sensory problem can impact handwriting and affect a child's ability to pay attention in class. Ms. Morris's assessment included both standardized and non-standardized measures. The non-standardized measures included a review of Student's records; information received from Mother and Ms. Johnston through forms they completed; a review of Student's work samples; a handwriting sample from Student obtained during the assessment; and observations of Student's classroom behaviors and sensory-motor performance.

121. Mother continued to have concerns about Student's difficulty with penmanship and with getting his thoughts expressed on paper, as well as concerns she saw in his ability to use proper grammar and writing conventions. She also indicated her concern about Student's inability to maintain focus, follow one-step instructions, and his difficulty accepting responsibility. She was also concerned about his excessive talking. Some of her concerns, such as Student's habit of challenging everything, were much more evident at home than they were at school.

122. Ms. Johnston's input was similar to the comments she made to Ms. Brown. She was concerned because Student's production of written assignments was minimal, his writing was difficult to read, he continued to require multiple prompts to stay on task and complete assignments, he was disorganized, and he forgot to turn in homework assignments on a regular basis.

123. Student's behavior during Ms. Morris's classroom observation was similar to that observed by Ms. Brown. Student had to be prompted to work on his assignments. During most of the observation, Student was either talking with peers seated near him who were trying to work on assignments, or he was getting out of his chair to talk to peers sitting at other tables, also interrupting their work. Student returned to his seat when Ms. Johnston directed him back to it, but began rolling a pencil on his desk, bothering a peer sitting next to him. When the peer asked him to stop, he ignored her and started trying to talk to other students about soccer. The peer politely asked Student to stop talking but he ignored her and continued with his conversation. The other students finished the assignment; Student did not finish his.

124. Although Student was very talkative during the standardized testing Ms. Morris administered, he took his time on the tests and answered questions carefully.

125. Ms. Morris administered three standardized testing measures to Student: the Bruininks-Oseretsky Test of Motor Proficiency, Second Edition, the same test Kaiser

Permanente used the previous year with Student; the Developmental Test of Visual Perception, Third Edition; and the Sensory Processing Measure – Home and Classroom forms. Ms. Morris utilized standard test administration protocols with Student except on one subtest, where she had to give him an additional prompt. There is no evidence that the utilization of an additional prompt on one subtest would invalidate the assessment. The testing tools Ms. Morris selected were not racially, culturally, or sexually biased or discriminatory. The entire assessment process was administered in Student's native language of English. Ms. Morris did not base her assessment findings on only one test. Rather, she used a variety of standardized and non-standardized measures. With the one exception on one subtest of the assessment, she followed the manual's instructions developed by the tests' developers, and specifically chose tests and used non-standardized measures to address the potential deficits which concerned Mother and Ms. Johnston.

126. For the Bruininks, Ms. Morris administered three subsets: fine motor precision; fine motor integration; and manual dexterity. The first two subtests measured the control and coordination of a child's hands and fingers to see if the child was able to adequately grasp implements for writing, drawing, and cutting. For the fine motor portion, Student had to draw, fold, or cut within specified boundaries. Student's ability to complete these tasks was in the average range. For the fine motor integration subtest, Student had to reproduce several geometric shapes with a range of complexity. Although Student's lines were not always straight, he was able to reproduce all of the shapes. His score on this subtest was also in the average range.

127. The manual dexterity subtest consisted of activities that involved reaching, grasping, and coordinating the use of both hands with small objects. The emphasis of the activities was on speed and accuracy. Student also scored in the average range on this subtest.

128. The Developmental Test of Visual Perception, Third Edition contained five subtests that measured different but interrelated visual-perceptual and visual-motor abilities. There were two categories of subtests. One was motor reduced, where Student engaged in activities that did not require pencil and paper. Student scored in the superior range on the combined motor reduced subtests. The visual motor integration subtests consisted of activities requiring pencil and paper. Student scored in the poor range on these tests only because he lifted his pencil from the paper, which significantly decreased his scores. The general visual perception score combined the scores of all subtests. Even with his poor showing in visual motor integration, due to having not followed the direction to keep his pencil on the paper, Student's overall score on this test was in the average range.

129. Ms. Morris also assessed Student's graphomotor skills. These consisted of a combination of cognitive, perceptual, and motor skills that enable a person to write. Ms. Morris had Student complete a short writing assignment to assess him in this area. Student was asked to write upper and lower case letters, copy something near to him and something far away, write from dictation, and compose a sentence. Student was able to write 25 of 26 upper and lower case letters legibly. Most of his uppercase letters and all of his

lowercase letters were written on the proper line on the paper. Student was asked to copy letters and words from a nearby horizontal surface, similar to having to take notes in class. Student was able to write the letters and words accurately and legibly, with the majority on the proper line. He did improperly use some uppercase letters in the sentence.

130. On the exercise copying from a distance, Student's copying was 71 percent accurate. His words were fully legible and appropriately spaced. Almost all words were on the proper lines. Student's accuracy score decreased because he misspelled two words.

131. Student was able to transcribe from dictation with 100 percent accuracy. His spacing of letters and words was totally accurate and fully legible. He placed over 90 percent of the letters and words on the proper lines.

132. The sentence Student composed was fully legible, the words were appropriately spaced, and all were placed on the proper lines on the paper.

133. Ms. Morris noted during her observations of Student that he had average muscle tone, and that his strength and range of motion were within normal functional limits for an educational setting. Student did not have any gross motor deficits that were preventing him from moving around the school campus or his classroom. He also had adequate self-help and adaptive skills.

134. The Sensory Processing Measure was a set of rating forms given to Mother and Ms. Johnston to fill out that assessed sensory processing, social participation, and praxis, which is the ability to plan and organize movement. The areas assessed were social participation; vision; hearing; touch; body awareness; balance and motion; planning and ideas; and total sensory systems. Scores of 40-to-59 were in the average range. The higher the score, the more a problem might exist. Mother's responses indicated at home, Student's only problem was in the area of social participation, where her responses in that area scored Student at 60, barely below normal expectations for a child his age.

135. Overall, Ms. Morris found that Student did not present any deficits or needs that required remediation through occupational therapy. Student's performance on the writing sample was significantly better than his work product in class. Student's ability to produce legible written work when given the time indicated that he did not have any gross motor or fine motor deficits that interfered with his writing. Instead, either Student was not motivated to produce legible work or his lack of attention or focus was preventing him from producing adequate written work product. Since there was no gross or fine motor basis for Student's writing deficits, Ms. Morris recommended that Student be held to the standard of his best writing sample. She also suggested that he be able to type longer assignments.

136. Ms. Morris noted that Student had attention problems in class that were not attributable to any gross or fine motor deficits. Student fidgeted in his chair, performed inconsistently on daily tasks in class, failed to complete assignments that had multiple steps, and poorly organized his school materials. Ms. Morris recommended that several

accommodations be implemented in Student's classroom: pairing auditory instructions with visual supports; use of a multisensory approach in teaching him; having Student repeat back instructions; breaking assignments into smaller tasks; use of checklists to keep Student on task; incorporation of movement breaks into Student's day; provide him with fidget implements if needed; provide rewards for neatness; and implement the use of folders to organize his work.

137. Ms. Morris's findings were summarized in a report that was integrated into Districts' February 19, 2015 multidisciplinary assessment.

138. Student did not present the testimony of an occupational therapist to counter Ms. Morris's assessment, findings, or recommendations. Student failed to present any persuasive evidence which contradicted the validity of Ms. Morris's competency as an assessor, her assessment, or her assessment report. Student contended that Ms. Morris's assessment and report were invalid because she made an editorial error in the summary portion of her report by inadvertently reporting Student's visual motor integration score was in the 79th percentile, when, in fact, it was his standard score that was a 79, placing Student in the eighth percentile. However, the true scores are clearly delineated in the charts Ms. Morris included in her assessment, and the scores were clearly discussed at Student's IEP team meeting. Ms. Morris's summary acknowledged that Student scored very low in visual motor integration, explaining that the low score was due to Student raising his pencil off the page during the test rather than any actual fine motor deficits he had. Student has not offered any persuasive evidence or argument that an editorial error should invalidate an otherwise adequate assessment.

139. Student also argued that Ms. Morris's assessment was invalid because she did not review Kaiser's occupational therapy assessment. However, the report was not in Student's educational file and Mother did not attach a copy of it to the input form she prepared at Ms. Morris's request. Ms. Morris did have occasion to review the report after completing her assessment. She testified that the report would not have altered her testing of Student and would not have changed her recommendation that Student did not qualify for educationally based occupational therapy services.

140. Student also argues that he had dysgraphia and Ms. Morris should have addressed that. Dysgraphia is a neurological disorder and can only be diagnosed by a psychologist. Although Dr. Palmer had found that there were signs Student had dysgraphia, he did not make a diagnosis because he did not test for it. More significant is that Dr. Passaro did not make that diagnosis, or even imply that Student had dysgraphia, in his report or his testimony at hearing. No persuasive evidence exists that Student had dysgraphia.

141. Student presented no persuasive evidence that contradicted Ms. Morris's findings or recommendations, or supported his contention that Ms. Morris's assessment was invalid or that he qualified for occupational therapy services.

## SPEECH AND LANGUAGE ASSESSMENT

142. Capistrano speech-language pathologist Christina Lanners administered a full speech and language assessment to Student as part of the February 19, 2015 multidisciplinary assessment. Ms. Lanners had a master's degree in speech-language pathology, was licensed in the state of California, and had her certificate of clinical competence from the American Speech-Language Hearing Association. She had been a speech-language pathologist since 2000, and had worked at Capistrano since 2001.

143. Ms. Lanners's assessment included her review of Student's records; administration of standardized tests; and observations of Student in class, on the playground, and in her office during her testing of him.<sup>9</sup>

144. On the standardized testing, Student's receptive language skills, his ability to understand non-literal language and make inferences, and his pragmatic language abilities, were all in the average-to-above average range.

145. Ms. Lanners used the Goldman-Fristoe Test of Articulation, Second Edition to assess Student's articulation of consonant sounds. Student demonstrated difficulty with several sounds, in particular the "s" and the "z" sounds, which he consistently mispronounced when the letters were at the beginning, in the middle, or at the end of words. He also mispronounced the "s" sound at the beginning of words when the "s" was combined with another consonant, such as the "s-p" sound. Student had a total of 10 pronunciation errors. This placed him in the fourth percentile on the Goldman-Fristoe scoring. Student made the same errors in conversational speech as he did when formally tested on the Goldman-Fristoe.

### *Eligibility Determinations at the February 20, 2015 IEP Team Meeting*

146. Districts convened an IEP team meeting for Student on February 20, 2015, to discuss the results of their multidisciplinary assessment. The following IEP team members attended the meeting: Mother; occupational therapist Ms. Morris; speech-language pathologist Ms. Lanners; school psychologist Kari Brown; Ms. Beaty, who would be Student's fifth grade teacher at Community Roots the following year, and who was the designated administrative representative at the IEP team meeting as she had an administrative credential; and education specialists Lindsay Carucci and Myla Candelario.

147. Student contends that there was no special education teacher present at the meeting, and therefore all legally required IEP team members were not present. He contends Ms. Candelario was not actually present at the meeting although her name is typed on the attendance form that all team members signed. Student contends that Mr. Cavallaro, the

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<sup>9</sup> The validity of Ms. Lanners's speech and language assessment is not at issue in this case.

Community Roots director, signed the IEP attendance page in Ms. Candelario's place. Mr. Cavallaro and Ms. Candelario refuted that this had occurred. Both testified that Ms. Candelario attended the meeting.

148. It is unnecessary to resolve this dispute because education specialist Lindsay Carucci, the special education teacher who had administered the academic testing to Student, attended the entire meeting. All required IEP team members were in attendance.

#### FAILURE TO FIND ELIGIBILITY UNDER SPECIFIC LEARNING DISABILITY

149. Student's IEP team reviewed all parts of Districts' multidisciplinary assessment. Based on the results of the assessments she administered and Ms. Carucci's academic testing, Ms. Brown concluded that Student demonstrated significant evidence of a processing deficit in the area of attention. Based upon Student's score of 130 on the general intellectual ability portion of the Woodcock-Johnson – Cognition, and Student's score of 100 on the written expression portion of the Woodcock-Johnson – Achievement, which was a difference of 30 points, Ms. Brown concluded that Student demonstrated a significant discrepancy between his intellectual abilities and written expression achievement. Nevertheless, because Student's written expression score was still in the average range, Ms. Brown concluded that Student did not meet the eligibility requirements for special education as a student with a specific learning disability. She based this conclusion on her estimation that Student was not exhibiting an adverse educational performance based upon his learning disability, and did not have educational needs that could not be met in a general education classroom. The other members of the Districts' IEP team concurred with Ms. Brown's conclusions.

150. Student contends Districts incorrectly concluded that he did not meet eligibility requirements for a specific learning disability. Student first offers the assessment completed by Dr. Palmer in April 2014 as support for his position. As discussed above, Dr. Palmer's report cannot be given much weight.

151. Student also offers Dr. Passaro's March 2016 psychoeducational assessment and report, along with Dr. Passaro's recommendations, to support a finding that Student had a learning disability that impacted his access to his education. While Dr. Passaro's comprehensive assessment was done subsequent to the time period covered in this case, it may be considered to determine whether Districts' decisions on eligibility were objectively reasonable at the time. Additionally, Dr. Passaro commented on Districts' findings of eligibility based on his review of Districts' assessments.

152. Dr. Passaro's assessment consisted of a review of those records provided to him by Student;<sup>10</sup> interviews with Mother and Ms. Beaty; observations of Student at school

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<sup>10</sup> Dr. Passaro did not receive copies of all of Student's records. For example, he did not receive report cards.

and during testing; administration of rating scales and inventories completed by Mother and Ms. Beaty; and several standardized tests.

153. The results Dr. Passaro obtained from Student on the intelligence tests and on academic testing were comparable to the results Districts obtained in their February 19, 2015 multidisciplinary assessment. Student's full scale intelligence score was 118 on the Stanford-Binet Intelligence Scales, Fifth Edition. To measure Student's academic achievement, Dr. Passaro used the Woodcock-Johnson IV Tests of Achievement. Comparable to the testing results obtained by Districts, Student scored high average in broad reading and math. Student's score of 92 in broad written language placed him in the low average range. Dr. Passaro found that Student had a 26 point discrepancy between ability and achievement, when comparing Student's intelligence score to the score in broad written language. Dr. Passaro's overall testing results indicated Student had deficits in the basic psychological processing area of attention. The processing deficit and the 26 point discrepancy indicated Student might have a learning disability in written language.

154. However, Dr. Passaro's assessment report contained very little discussion of how the discrepancy was affecting Student's access to his education. As discussed in more detail below, the bulk of discussion, impressions, and recommendations in Dr. Passaro's report addressed how Student's attention deficit hyperactivity disorder was affecting his education, and how best to address the deficits to increase Student's access to, and progress in, his education.

155. During testimony, Dr. Passaro acknowledged that Student's slightly below average score on the spelling subtest of the Woodcock-Johnson did not, by itself, indicate a learning disability. He also acknowledged that Student's low average score in broad written language did not support a finding of a learning disability because the score indicated that Student was able to function at least on an average level, and was retaining information at least at an average level. Rather, Dr. Passaro explained that his finding of a specific learning disability was based on the cumulative information he had obtained about Student, and the fact that Student was having difficulty writing. Those difficulties were emphasized by Student's inability to complete the Test of Written Language, because Student simply did not want to do a writing test and would not participate in that testing.

156. Dr. Passaro's support of eligibility under specific learning disability was lukewarm, and failed to persuasively support the finding of a specific learning disability. As discussed below, Dr. Passaro's observations and recommendations more strongly supported a finding that it was Student's ADHD that caused him to be disruptive in class, that interfered with his ability to clearly and quickly and legibly write down his thoughts, and that was interfering with his access to his education. There was no persuasive evidence that Student's processing deficit was interfering with his education to the extent that Student qualified for special education under the category of specific learning deficit.

## FAILURE TO FIND ELIGIBILITY UNDER THE CATEGORY OF OTHER HEALTH IMPAIRED

157. Ms. Brown incorrectly concluded that although Student had ADHD, he did not qualify for special education under the category of other health impaired because his ADHD was not demonstrating a significant impact on Student's academic or social performance.

158. Districts' belief that Student's lack of ability to produce a legible written work product and his inability to progress at an expected level in written expression was due to his lack of motivation, was misplaced. Districts were aware that Student's handwriting was illegible; that he required significant intervention to complete assignments in class; that in spite of his teacher's efforts, he still failed to complete and/or turn in homework assignments; that his talking in class was so disruptive to his peers that he had to sometimes be asked to leave the classroom; and that, without his medication, Student was so full of energy that he was sometimes bouncing off the walls. Ms. Johnston had referred Student for assessment because his written work product was so bad that she believed that he would qualify for special education; she was surprised that he did not. She was surprised at the outcome of assessments, but accepted Ms. Brown's and Ms. Morris's opinions that Student just needed to pay more attention to his writing to achieve the results he had on the psychoeducational and occupational therapy assessments.

159. However, the fact that Student could produce legible work in a one-on-one environment with no time pressures, as he did during Ms. Morris's testing, should have indicated to Districts that something was interfering with his abilities to produce adequate work. The fact that Student was still not meeting grade level standards in written expression after a year-and-a-half of attending school with Districts, despite his high intelligence and strong abilities in all other areas, was another indication that written expression was not just an inherent weakness. Further emphasizing the fact that Student was capable of producing grade level work was that he was able to do so when provided with alternative methods for written communication, such as on a laptop or other similar assistive technology.

160. Each of Districts' assessors observed Student in class and noted how his behaviors were disruptive to Student and his classmates. They noted that he was inattentive in class, disruptive of others, did not turn in assignments, and struggled to make progress in writing because he could not focus on getting his thoughts on paper. Districts were aware that Student was not turning in homework assignments and that his grades, at least in areas related to written expression, was suffering as a result.

161. Dr. Passaro persuasively testified that Districts should have found Student eligible under other health impaired at least by the February 20, 2015 IEP team meeting. Dr. Passaro's testing and observations of Student a year later mirrored Districts' testing and observations in February 2015. Both assessments indicated Student was having difficulty with written expression, although he was successful in all other areas. Both assessments found Student to be either at-risk or clinically significant in areas related to school problems, behavioral symptoms, externalizing problems, hyperactivity, and attention problems.

162. Districts minimized how Student's deficits in these areas were affecting him in class. Dr. Passaro noted that Student was inattentive and overactive throughout the entire observation. This behavior resulted in frequent redirection by Student's teacher. Even when Student appeared on-task, Student had difficulty working quietly. Student constantly attempted conversation at inappropriate times with his classmates during the entire observation, and could not remain quiet even when the other children spurned his attempts to talk. He was not able to comply with his teacher's requests that he stop talking. At one point, she had to move him to the front of the classroom away from the other students.

163. Ms. Beaty confirmed to Dr. Passaro that Student was inattentive, talkative, and easily distractible. Student often failed to complete classwork and turn in homework. He was often in trouble in class for talking out of turn and being off-task. Student had difficulty sustaining attention. He did not seem to listen when spoken to directly, did not follow through on instructions, and gave up on assignments when faced with something he found difficult. Student often would not remain in his seat, and would constantly fidget with things. Student often disrupted instruction and sometimes needed to step outside because of his behavior. Dr. Passaro's observations of Student in March 2016, were nearly identical to the observations of Student by Districts' assessors in February 2015. Ms. Beaty's description of Student's behaviors in class was nearly identical to the behaviors Ms. Johnston noted a year earlier.

164. Dr. Passaro concluded that Student's lack of attention and disruptive behavior was a significant factor in his lack of achievement, which was primarily in the area of written expression, and, to some extent, in math reasoning. In addition to developing a behavior support plan, Districts needed to provide Student with the skills to learn self-monitoring and self-management. Student also required individualized academic instruction to address his written expression deficits. Because Dr. Passaro's findings mirrored Districts' testing and observations on the February 2015 multidisciplinary assessment, Dr. Passaro's opinion that Districts should have found Student eligible under other health impaired in February 2015, is more persuasive than Districts' opinion to the contrary.

#### ISSUES WITH ANXIETY

165. Student also argued that he suffered from anxiety and that those needs should have been addressed by Districts in his February 2015 and January 2016 IEP's. Student contends that he required counseling to address the anxiety. Ms. Brown's assessment did not indicate any significant anxiety issues. Dr. Passaro administered several testing instruments to Student in spring 2016 that addressed anxiety. Student's scores on each showed few, if any, indications of anxiety. Dr. Passaro believed that Student was hiding his true feelings about his possible anxiety because boys, as a whole, downplay such feelings. Dr. Passaro believed that Student demonstrated a clinical generalized anxiety disorder based on information received from Mother about Student's behavior at home. At the time of Dr. Passaro's assessment, there were issues with one of Student's siblings that might be affecting his relationships at home. However, no persuasive evidence exists that when

Districts developed their IEP's Student suffered from anxiety to an extent that it interfered with his access to his education, or that he required counseling as a related service.

#### ELIGIBILITY UNDER SPEECH AND LANGUAGE IMPAIRED

166. After review of all components of the February 2015 multidisciplinary assessment, Student's IEP team determined that Student had an articulation deficit based on his low results on the Goldman-Fristoe test. The team concluded that he would benefit from speech and language therapy to address the articulation problems. Based on that need, Districts determined that Student qualified for special education eligibility under the category of speech or language impairment. The IEP team developed a goal to work on Student's articulation. Districts offered Student 30 minutes a week of speech and language therapy to address the goal, along with consultation to Student's teacher by the speech pathologist. There is no evidence that either the goal and/or speech therapy services offered were inadequate or otherwise failed to meet Student's needs.

167. The IEP team also discussed the recommendations for the classroom accommodations Ms. Morris and Ms. Brown had made in their assessments. As discussed above, Ms. Morris made several recommendations for classroom accommodations and for assistive technology, recognizing that Student's difficulty in written expression and illegible handwriting interfered with his education.

168. Ms. Brown also concluded that Student had attention deficits that were interfering with his learning. However, she ultimately concluded that the deficits could be addressed through accommodations in the classroom. She believed that Student did not require any special education interventions because she believed that all accommodations suggested by Ms. Morris could be addressed in a general education classroom. Ms. Brown recommended that Districts find Student eligible for an accommodations plan under Section 504 of the Rehabilitation Act<sup>11</sup> and provide the accommodations through the plan in the general education setting. Districts noted this on the February 20, 2015 IEP document.

169. Districts, however, failed to recognize that once a child is found eligible for special education, all of the child's deficits need to be addressed through his IEP. Irrespective of whether Student should have been found eligible under other health impaired at the IEP team meeting, Student's needs in the areas of attention, assignment completion, and written expression should have been addressed on his IEP through goals, accommodations, and services.

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<sup>11</sup> A 504 plan is an educational program created pursuant to Section 504 of the Rehabilitation Act of 1973. (29 U.S.C. § 794; see 34 C.F.R. § 104.1 et. seq. (2000).) Generally, the law requires a district to provide program modifications and accommodations to students with physical or mental impairments that substantially limit a major life activity such as learning.

170. In spite of Ms. Brown's determination that Student's ADHD was negatively impacting his ability to learn, and in spite of specific and concrete recommendations from Ms. Morris to address Student's need for assistive technology and accommodations, no accommodations or services were memorialized in the February 20, 2015 IEP related to Student's ADHD. And, Districts developed no goals to address any of these deficits.

*Events Between February 2015 and January 2016*

STUDENT'S CLASSROOM PERFORMANCE

171. After the February 20, 2015 IEP team meeting, Ms. Johnston began implementing many of the accommodations Ms. Morris had recommended. She provided him with graphic organizers and checklists on the board to review assignments. She also used strategies to redirect Student with verbal prompts if Student was distracted or unfocused. Although Student was compliant and responded initially to the redirection, he would generally continue to repeat the behavior, such as talking out of turn, attempting to converse with classmates who were trying to complete assignments, and wandering around the classroom. His written expression assignments continued to be poorly written and incomplete, both as to penmanship and content.

172. Ms. Johnston's classroom supports included 16 laptops for use by the entire class. All classrooms at Community Roots had similar access to this technology. Ms. Johnston provided Student access to the device in class. However, he still was required to do assignments on printed forms, and those remained illegible and incomplete.

173. Although many of the accommodations Ms. Morris suggested and Ms. Johnston implemented were strategies that general education teachers could use with all students, several were not. For example, if Student needed a movement break, Ms. Johnston would give him opportunities to move around the classroom, or to take items to the school office so that he could leave the classroom. She sometimes let Student work outside the classroom to complete an assignment. Student's need for movement breaks to release energy was the result of his ADHD. Ms. Johnston allowed Student to leave the classroom because his pent up energy resulted in disruptive behavior. Letting pupils leave the room because they have too much pent up energy was not a tactic used with all general education pupils. The fact that any of this was necessary is an indication that Student was having difficulty in the classroom and that his behaviors were interfering with access to his education.

174. Ms. Johnston also broke up assignments for Student so that he could complete the assignment in parts. This is sometimes called "chunking" an assignment. She would give Student rewards, such as additional reading time, to encourage him to finish assignments that he no longer wanted to complete. She had Student repeat instructions back to her to ensure that he understood them. Ms. Johnston also sometimes shortened the amount of work Student would need to do for each assignment. These types of modifications and accommodations are generally not used with all pupils in a general education classroom.

175. By the end of the 2014-2015 school year, when he finished fourth grade, Student still continued to need significant support during writing assignments. He continued to have difficulty putting his thoughts down on paper and creating an organized structure for his essays. He needed to constantly edit his work and spell correctly. Student failed to meet grade standard expectations in writing opinion pieces and narratives. He did not meet grade level standards in planning, revising, and editing his writing, in punctuation conventions, or spelling. He continued to need to improve in the area of self-management. Contrary to Districts' position, Student's continued demonstrating a lack of progress in these areas.

176. Student was assigned to Ms. Beaty's classroom for fifth grade. Ms. Beaty had taught at Community Roots since 2011. She had taught elementary school grades at Capistrano for six years prior to transferring to Community Roots. She co-taught the class with Ms. Igarashi, who had taught at Community Roots since 2014. Ms. Igarashi had a master of arts in teaching. Prior to becoming certified as an elementary school teacher, she had been a children's naturalist and program director, and later education coordinator at a land conservancy. As were all teachers at Community Roots, Ms. Beaty and Ms. Igarashi were hired by Mr. Cavallaro based upon the superior quality of their education and experience, and their ability to implement a project-based curriculum.

177. Ms. Beaty's and Ms. Igarashi's dedication to their teaching profession and to their students was evident during their testimony. It was clear that they tried their utmost to address Student's needs using the many strategies they had learned as general education teachers. Both implemented some of the informal strategies contained in Ms. Morris's occupational therapy report. However, because the accommodations were not included in the IEP, it is unclear to what extent Ms. Beaty or Ms. Igarashi were aware of them, and unclear to what extent they implemented the recommendations. It is clear that Student continued to engage in disruptive behavior in class, continued to be unfocused and unorganized, continued to fail to complete assignments and turn in homework, continued to write illegibly, and continued to fail to meet grade level standards in written expression.

178. By the end of the first semester of fifth grade, Student continued to have difficulty summarizing in writing what he had read. He continued to be reluctant to write. Although in fifth grade and having above-average intelligence, on writing assignments Student was only able to write one paragraph with simple paragraph and sentence structure. He was not remembering information and therefore was not able to name the capital of each state, a fifth grade requirement. He continued to have off-task behavior, poor organization and study habits. Notably, he was still required to do work using hand-writing instead of using assistive technology.

179. A review of Student's fifth grade class assignments demonstrated his continued difficulties with writing. The hand-written work was most often unreadable. Written words ran into each other. Capitalization and punctuation conventions were not followed consistently. Even on lined paper, words were not evenly written. And the letters

themselves were so poorly written that the words were often undecipherable. A comparison with Student's school work for second grade indicated that his writing was better in second grade than in fifth grade.

180. Conversely, Student's type-written work in fifth grade was clearer, more logical, and comprehensible.

181. Student also had a Spanish class since beginning at Community Roots. John Glass taught the class. Although Mr. Glass did not note as many maladaptive behaviors from Student initially, by fifth grade the behaviors had significantly increased. Student could not stay on task, and could not complete work, which affected his daily grades in Spanish class. He would not remain seated in class, even when Mr. Glass moved Student to another seat. Student was sometimes defiant. There were times when Mr. Glass requested Student to move seats up to six times during one class period, but Student continued talking and refused to cooperate. Student did not turn in homework, and, as a result, was scoring low on quizzes. Mr. Glass had to request Mother to talk to Student about his behavior and defiance. Student's behavior in Spanish class did not improve.

#### MOTHER'S REQUEST FOR AN INDEPENDENT EVALUATION

182. On November 9, 2015, Mother requested that Districts fund an independent educational evaluation for Student. On November 19, 2015, Districts responded to the request, as well as to prior communications from Mother, interpreting Mother's request to be one for an independent psychoeducational evaluation by Dr. Passaro. Districts denied the request for a psychoeducational independent evaluation in a letter dated December 9, 2015. Until the beginning of the hearing, neither Mother nor her then-attorney corrected Districts' belief that Mother was only requesting funding for an independent psychoeducational evaluation. On January 6, 2016, Districts filed for due process to defend the validity of their February 19, 2015 psychoeducational assessment. Districts amended their due process request after the start of the hearing based upon Mother's written request during the hearing for an independent occupational therapy evaluation, which Districts had subsequently denied.

#### *January 6, 2016 IEP*

183. Districts convened Student's annual IEP team meeting on January 6, 2016. Team members included Mother; Mr. Cavallaro; Ms. Beaty; Ms. Candalario; Ms. Morris; Ms. Lanners; and Ms. Brown. All required IEP team members were present. As she had been at every IEP team meeting convened by Districts for Student, Mother was offered a copy of the procedural safeguards. The team reviewed Student's present levels of performance, his unique needs, and the areas that needed support, accommodation, and/or intervention.

184. Student's writing was still a major area of deficit. He struggled with visual and verbal explanations even in math, which was his area of strength. He had difficulty

writing out his rationalizations for his answers to math questions. The difficulty stemmed from his overall problems with written expression.

185. Based on their recognition that Student was still failing to make expected progress in writing, Districts developed a writing goal for him. At the time of the January 6, 2016 meeting, Student was only able to independently write one simple paragraph. The object of the goal was for Student to write two paragraph narrative responses to an informative topic. The goal required Student to state a clear topic, to correctly format paragraphs that linked sequences of events, that included transitional words to connect the events and the paragraphs, and that contained a connected conclusion. Student would be given points for each of the stated tasks, with the goal being for him to achieve five points on five consecutive writing assignments, by the end of a year. The goal was concrete and measurable, and specifically addressed Student's writing deficits. Student presented no evidence that the goal was not appropriate, that it did not address Student's needs at the time of the January 6, 2016 IEP team meeting, or that he required other writing goals. Dr. Passaro's recommendations on instructional interventions for Student were very similar to the objectives of the goal Districts developed for this IEP. Dr. Passaro did not criticize Districts' writing goal in his assessment report or during his testimony.

186. To achieve his writing goal, Districts offered Student specialized academic instruction by a special education teacher in a small group setting in a separate classroom for 45 minutes, three times a week. Ms. Candalario ultimately was the teacher that taught the class. Student provided no persuasive evidence that the type and amount of specialized academic instruction did not meet his needs at the time or that it would not provide him with an opportunity to make meaningful progress on his education.

187. Student contends that providing instruction outside of his general education classroom was not his least restrictive environment. He points to the fact that one of the ways in which Districts revised his IEP in May 2016, was by deciding to have Ms. Candalario provide instruction to Student in his fifth grade general education classroom rather than having him go to a separate class. Student contends that he had already made known to Districts that being pulled out of class for speech and language instruction undermined his self-esteem. Ms. Candalario made the decision to change the teaching model as Student was resisting instruction because he did not want to leave his classroom.

188. There is no evidence that Districts should have offered push-in specialized academic instruction in January 2016. At that time, the only indication that Student was resistive to being removed from class for speech and language was a single communication from Mother to Ms. Lanners. There is no evidence that Student's dislike with being removed from class interfered with his progress in speech therapy.

189. Nor is there any evidence that at the time of this IEP team meeting Districts should have first attempted a push-in instructional model. To the contrary, the evidence demonstrated that Student would constantly talk to other children during instruction or when all students were supposed to be working independently on assignments, would not remain in

his seat, and was not completing work. His behavior was disruptive to his learning and that of his classmates. Student's behaviors were not conducive to a push-in model of instruction. Additionally, Dr. Passaro also recommended that Student receive separate specialized academic instruction. He recommended that background distractions be limited, which further supported Districts' decision to provide specialized academic instruction in a separate classroom with few other children present to avoid distractions for Student.

190. Although Districts did not change Student's eligibility for special education to other health impaired, they recognized the need to provide accommodations to Student to address his ADHD. They included the following accommodations in the January 6, 2016 IEP: typing assignments when possible; dictating ideas and copying them afterward; movement breaks throughout the day; access to hard copies of classroom notes; having Student repeat instructions; breaking assignments into smaller tasks with specific completion dates for each task; collaboration with Student on preparing a "how to" checklist of the steps of each assignment; collaboration and consultation between the occupational therapist and Student's teachers and staff regarding strategies to modify Student's work and strategies to help make his written work more legible. The accommodations and modifications provided in the IEP were very similar, though not as extensive, as those recommended by Dr. Passaro. The accommodations were based on the information about Student that Districts had at the time and were adequate to address his needs.

191. Districts maintained Student's special education eligibility as speech or language impaired. The IEP team updated Student's speech and language goal. Districts continued to offer Student speech and language therapy for one 30-minute session per week. Student presented no evidence that his speech and language goal or services were not adequate to address his needs.

192. Student presented no persuasive evidence that he required occupational therapy or any other programming or services in addition to those provided in the January 6, 2016 IEP. Student contends that Districts should have provided him with a one-on-one aide, as recommended by Dr. Passaro in his assessment report. However, there is no persuasive evidence that, at the time the IEP was developed, Districts should have known that the services, programming, accommodations, and modifications included in the IEP would not be sufficient to address Student's needs without the addition of a one-on-one aide.

193. However, in spite of recognizing at this IEP team meeting that Student had sufficient deficits as a result of his ADHD, and in spite of including significant programming, services, accommodations, and modifications to address those needs, Districts failed to propose any goals in the area of behavior. Like its failure in the previous year's IEP, the lack of goals to address Student's behavior resulted in an inability to track and evaluate Student's behavioral progress and contributed to Student's continued inability to focus and attend in class.

*Events Subsequent to the January 6, 2016 IEP Team Meeting*

194. Mother privately contracted with Dr. Passaro to obtain an independent psychoeducational evaluation. Dr. Passaro administered the assessment over several days from late January to early March 2016. His report was dated March 25, 2016.

195. Districts convened an amendment IEP team meeting on May 10, 2016, at Mother's request, to review Dr. Passaro's report and recommendations. Between the January 6, 2016 IEP team meeting and the May 10 meeting, Student had made progress on his writing. He had increased his ability to write coherent paragraphs and, at times, able to write up to three paragraphs on a given topic. He was most successful when able to use a laptop or other assistive technology to produce work. Districts had also provided him with voice to text software that was assisting Student as well. Districts' interventions through accommodations and specialized academic instruction had successfully increased Student's ability to produce adequate written work.

196. Nonetheless, Student's behaviors remained a challenge. Student was regularly neglecting to turn in homework. He continued to require much prompting to stay on task and to stay organized. While his behavior did not deteriorate after January 2016, it did not improve either.

197. Based upon Dr. Passaro's observations, findings, and recommendations, as well as Student's continued difficulties attributable to his ADHD, Districts added other health impaired as Student's primary category for special education eligibility. Student's deficits were no different in May 2016, than they had been in February 2015. Districts acknowledged at this IEP team meeting that Student's poor handwriting and deficits in written expression were due to Student's inattention and thus related to his ADHD. Districts' decision to change the eligibility at this point based on behaviors that Student had been engaging in for at least two years supports a finding that Districts should have found eligibility under other health impaired by February 2015. Districts retained speech or language impairment as a secondary disability category.

198. Districts also developed four new goals for Student in the area of being on task, following directions, completion of in-class work, and completion of homework. The goals all addressed deficits that Student had manifested since at least February 2015, and should have been developed for him at that time. Districts also offered to conduct a functional behavior assessment of Student to determine the basis of Student's behaviors in class and to develop a behavior intervention plan.

199. In spring 2016, Student participated in statewide academic testing for the California Assessment of Student Performance and Progress. The testing was done solely by computer and therefore did not require the students to handwrite answers. Scoring on the test used the following scoring matrix: standard not met; standard nearly met; standard met; standard exceeded.

200. The mathematics component of the test had a possible maximum score of 2,700. Student exceeded the standard; he scored 2,644 on the test.

201. The English language arts/literacy portion of this test had a maximum possible score of 2,701. The test covered reading, writing, listening and research/inquiry. The writing portion looked at how well a student could produce effective and well-grounded writing for a range of purposes and audiences. Student's score exceeded the standard; he scored 2,638. Student's score was higher than the average of his classmates at Community Roots. Student's superior performance, which included a writing component done on a computer, supports a finding that when Districts provided him with accommodations and specialized academic instruction, Student could not only meet grade level expectations, but could exceed them. It also supported a finding that any discrepancy between ability and achievement was not hindering Student's ability to learn. Student's progress supports a finding that he did not and does not qualify for special education under specific learning disability.

### *Remedies*

202. Student did not put into evidence any support for requested remedies, other than the assessment report prepared by Dr. Passaro and the invoice for Dr. Passaro's assessment. Dr. Passaro charged \$4,500.00 for his assessment. Mother credibly testified that she had paid that amount in full.

203. Student did not question Dr. Passaro about issues concerning compensatory education or services for Student and Dr. Passaro did not address the issues in his report. The only discussion regarding remedies during Dr. Passaro's testimony was whether Student required placement at the University of California at Irvine's Child Development School. That school is designed for special education students who are not making progress in programs available at public schools. Dr. Passaro had recommended this school in his report. However, he acknowledged that the school is not certified as a non-public school by the State of California. He also agreed, as he had stated in his report and to Student's IEP team at the May 10, 2016 IEP team meeting, that it was important to retain Student in a general education program with specialized academic supports and accommodations unless Student did not demonstrate progress. At Student's May 10, 2016 IEP team meeting, Dr. Passaro, who attended the meeting by telephone, stated that Student required pull-out specialized academic instruction with a special education teacher either in a small group or in a one-on-one setting. This is what Districts provided Student in his January 6, 2016 IEP.

204. Student progressed in writing once Districts began providing him with specialized academic instruction, accommodations, and modifications to address his attention deficits. This was demonstrated by Student's in-class work and superior showing on the statewide testing after the supports were formally instituted. This supports a finding that at least as of the time of the hearing, Districts' general education program with supports, accommodations, appropriate goals, and specialized academic instruction, resulted in Student's ability to make meaningful progress in his education. Student demonstrated that

Districts should have provided him with specialized academic instruction in his February 20, 2015 IEP, 11 months earlier than it did as Student had significantly similar deficits. Student is entitled to compensatory education for the loss of instruction. Student has not proven that, as of the time of the hearing, he required a non-public special education school placement to make meaningful progress in his education. Nonetheless, at the hearing, Mother indicated her intent to privately place Student at the Child Development School.

## LEGAL CONCLUSIONS

### *Burden of Proof*

1. At a due process hearing, the party filing the complaint has the burden of persuasion by a preponderance of the evidence. (*Schaffer v. Weast* (2005) 546 U.S. 56-62 [126 S.Ct. 528, 163 L.Ed.2d 387]; see 20 U.S.C. § 1415(i)(2)(C)(iii) [standard of review for IDEA administrative hearing decision is preponderance of the evidence].) In this case, Student had the burden of persuasion as to his issues, and Capistrano had the burden of persuasion as to its issues.<sup>12</sup>

### *Introduction: Legal Framework under the Individuals with Disabilities Education Act*<sup>13</sup>

2. This hearing was held under the IDEA, its regulations, and California statutes and regulations intended to implement it. (20 U.S.C. § 1400 et. seq.; 34 C.F.R. § 300.1 (2006)<sup>14</sup> et seq.; Ed. Code, § 56000, et seq.; Cal. Code. Regs., tit. 5, § 3000 et seq.) The main purposes of the IDEA are: (1) to ensure that all children with disabilities have available to them a FAPE that emphasizes special education and related services designed to meet their unique needs and prepare them for employment and independent living; and (2) to ensure that the rights of children with disabilities and their parents are protected. (20 U.S.C. § 1400(d)(1); see Ed. Code, § 56000, subd. (a).)

3. A FAPE means special education and related services that are available to an eligible child at no charge to the parent or guardian, meet state educational standards, and conform to the child's IEP. (20 U.S.C. § 1401(9); 34 C.F.R. § 300.17.) "Special education" is instruction specially designed to meet the unique needs of a child with a disability. (20 U.S.C. § 1401(29); 34 C.F.R. § 300.39; Ed. Code, § 56031.) "Related services" are

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<sup>12</sup> Capistrano alone filed the complaint concerning the validity of its psychoeducational and occupational therapy assessments.

<sup>13</sup> Unless otherwise indicated, the legal citations in the introduction are incorporated by reference into the analysis of each issue decided below.

<sup>14</sup> All references to the Code of Federal Regulations are to the 2006 edition, unless otherwise indicated.

transportation and other developmental, corrective, and supportive services that are required to assist the child in benefiting from special education. (20 U.S.C. § 1401(26); 34 C.F.R. § 300.34; Ed. Code, § 56363, subd. (a).) In general, an IEP is a written statement for each child with a disability that is developed under the IDEA's procedures with the participation of parents and school personnel. The IEP describes the child's needs, academic and functional goals related to those needs, and a statement of the special education, related services, and program modifications and accommodations that will be provided for the child to advance in attaining the goals, make progress in the general education curriculum, and participate in education with disabled and non-disabled peers. (20 U.S.C. §§ 1401(14), 1414(d); Ed. Code, § 56032.)

4. A student is eligible for special education and related services if she is a "child with a disability" such as having a specific learning disability or some other health impairment, and, as a result thereof, needs special education and related services that cannot be provided with modification of the regular school program. (20 U.S.C. § 1401(3)(A); 34 C.F.R. § 300.8(a)(1); Ed. Code, § 56026, subds. (a) & (b).)

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

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

7. To assist courts and administrative tribunals, the Supreme Court established a two-part test to determine whether an educational agency has provided a FAPE for a disabled child. (*Mercer Island, supra*, 592 F.3d at p. 947.) “First, has the State complied with the procedures set forth in the Act? And, second, is the individualized education program developed through the Act’s procedures reasonably calculated to enable the child to receive educational benefits?” (*Rowley, supra*, 458 U.S. at pp. 206-207.) “If these requirements are met, the State has complied with the obligations imposed by Congress and the courts can require no more.” (*Id.* at p. 207.)

#### Student’s Issues

##### *Issue 1: Student Failed to Prove an Exception to the Statute of Limitations*

8. Student contends that Ms. Aguilera made misrepresentations to Mother and withheld information after Mother asked Capistrano to assess Student for special education eligibility before school started in September 2013. Student contends that Capistrano should have assessed him immediately after the start of the 2013-2014 school year based on Mother’s request, and that the failure to do so denied him a FAPE. Districts reply that Student failed to prove an exception to the statute of limitations and that Student was not eligible for special education at the time.

9. A request for a due process hearing “shall be filed within two years from the date the party initiating the request knew or had reason to know of the facts underlying the basis for the request.” (Ed. Code, § 56505, sub. (l).) The two-year limitations period does not apply to a parent if the parent was prevented from requesting the due process hearing due to either: 1) Specific misrepresentations by the local educational agency that it had solved the problem forming the basis of the due process hearing request; or 2) The withholding of information by the local educational agency from the parent that was required to be provided to the parent under special education law. (*Ibid.*, see 20 U.S.C. § 1415(f)(3)(D).) Common law or equitable exceptions to the statute of limitations do not apply to IDEA cases. (*P.P. ex rel. Michael P. v. West Chester Area School Dist.* (E.D. Pa. 2008) 557 F.Supp.2d 648, 661, 662.) A claim accrues for purposes of the statute of limitations when a parent learns of the injury that is a basis for the action, i.e., when the parent knows that the education provided is inadequate. (*M.D. v. Southington Board of Education* (2d Cir. 2003) 334 F.3d 217, 221.) In other words, the statute of limitations begins to run when a party is aware of the facts that would support a legal claim, not when a party learns that it has a legal claim. (See *El Pollo Loco, Inc. v. Hashim* (9th Cir. 2003) 316 F.3d 1016, 1039.)

10. Congress intended to obtain timely and appropriate education for special needs children. Congress did not intend to authorize the filing of claims under the IDEA many years after the alleged wrongdoing occurred. (*Student v. Vacaville Unified Sch. Dist.* (SEA Calif. 2004) S.E.H.O Case SN 04-1026, 43 IDELR 210, p. 4, 105 LRP 2671, quoting *Alexopoulos v. San Francisco Unified Sch. Dist.* (9th Cir. 1987) 817 F.2d 551, 555.) “[A] cause of action accrues, and the statute of limitations begins to run, when a plaintiff knows or

has reason to know of the injury which is the basis of his action.” (*Miller v. San Mateo-Foster City Unified School Dist.* (N.D. Cal. 2004) 318 F.Supp.2d 851, 861(quoting *Alexopoulos, supra*, 817 F.2d at p. 554).)

11. Mother met with Ms. Aguilera, Hankey Elementary School’s principal, upon enrolling Student at Capistrano before school started for the 2013-2014 school year. Mother requested an assessment. Ms. Aguilera advised against assessing Student immediately to permit Student to acclimate to his new school and permit his teachers to get to know him. Ms. Aguilera also informed Mother that the assessment process could take up to 60 days, which was the statutory amount of time permitted. Mother agreed with Ms. Aguilera’s suggestion.

12. Mother misinterpreted the 60-day timeline to mean that Student himself would be assessed throughout the 60 days. She wanted to avoid Student missing so much school, and therefore thought it better to postpone the assessment process. Ms. Aguilera gave Mother no reason to believe this, and Mother never asked for any clarification. Ms. Aguilera did not misrepresent any information to Mother, either with regard to Student’s progress or lack thereof or with regard to the assessment process. Nor did Ms. Aguilera withhold any information from Mother. Additionally, from the time Districts first began the assessment process with Student in November 2013, through the last IEP team meeting in evidence at this hearing, Districts have offered Mother a copy of the procedural safeguards. Mother has been aware of her rights since at least November 2013, but voluntarily chose not to file for due process on any issue involving Student’s education with Districts until February 2016. Student has failed to prove an exception to the statute of limitations. Any issue as to his education prior to February 3, 2014, is therefore not cognizable in this case.

13. A failure to assess is a procedural violation. States must establish and maintain certain procedural safeguards to ensure that each student with a disability receives the FAPE to which the student is entitled, and that parents are involved in the formulation of the student’s educational program. (*W.G., et al. v. Board of Trustees of Target Range School Dist., etc.* (9th Cir. 1992) 960 F.2d 1479, 1483.) (*Target Range.*) Citing *Rowley, supra*, the court in *Target Range* also recognized the importance of adherence to the procedural requirements of the IDEA, but determined that procedural flaws do not automatically require a finding of a denial of a FAPE. (*Target Range, supra*, at 1484.) This principle was subsequently codified in the IDEA and Education Code, both of which provide that a procedural violation only constitutes a denial of FAPE if the violation (1) impeded the child’s right to a FAPE; (2) significantly impeded the parent’s opportunity to participate in the decision making process regarding the provision of a FAPE to the child; or (3) caused a deprivation of educational benefits. (20 U.S.C. §1415(f)(3)(E)(ii); Ed. Code, § 56505, subd. (f)(2).) The Ninth Circuit Court of Appeals has confirmed that not all procedural violations deny the child a FAPE. (*Park v. Anaheim Union High School Dist.* (9th Cir. 2006) 464 F.3d 1025, 1033, fn.3; *Ford v. Long Beach Unified School Dist.* (9th Cir. 2002) 291 F.3d 1086, 1089.) The Ninth Circuit has also found that IDEA procedural error may be held harmless. (*M.L. v. Fed. Way School Dist.* (9th Cir. 2005) 394 F.3d 634, 652.)

14. As discussed below, Student has failed to prove by a preponderance of evidence that Districts should have found him eligible for special education in February 2014. Student put on no evidence that an assessment started in September 2013, when he enrolled at Capistrano, would have resulted in a different finding on eligibility. There is no evidence that his right to a FAPE was impeded or that he lost educational benefit by Capistrano's failure to assess him two months before it did. Nor did he put on any evidence that Mother's right to participate in the IEP process was significantly impeded by a two-month delay in assessment. There is no evidence that Mother would have received any different information about Student than what she received in Districts' February 2014 assessment, which was commenced some two months after Mother first requested assessment. Therefore, even if the statute of limitations were extended to include allegations from August 2013 to February 2, 2014, Student has not met his burden of persuasion that the delay in assessment denied him a FAPE.

*Issue 2: Failure to Assess in All Areas of Suspected Disability*

15. Student contends that Districts should have administered occupational therapy and speech and language therapy assessments to him prior to the February 19, 2015 multidisciplinary assessment, which included assessments in those areas. Student particularly stresses the fact that Districts found him eligible for special education as speech or language impaired at the February 20, 2015 IEP team meeting. Therefore, they should have known the previous year that he had speech deficits that needed to be addressed through an IEP. Districts contend that, prior to approximately February 2015 there was no indication that Student had deficits in either area that warranted assessment.

16. A school district must assess a student in all areas of suspected disability, including, if appropriate, health and development, vision, hearing, motor abilities, language function, general intelligence, academic performance, communicative status, self-help, orientation and mobility skills, career and vocational abilities and interests, and social and emotional status. (20 U.S.C. § 1414(b)(3)(B); 34 C.F.R. § 300.304 (c)(4); Ed. Code, § 56320, subd. (f).)

17. Student claims that Districts had sufficient notice that he might have a unique need in the area of speech and language simply because such a need was determined to exist the following year, when Districts found that he an articulation deficit because he mispronounced "z" and "s" sounds. However, Student provided no evidence that his speech was interfering with his ability to access his education in February 2014. There is no indication of a speech problem in any of Student's records from his parochial school, there is no evidence of an issue in his records from third grade at Hankey Elementary, and there is no evidence that either Student's teacher or Mother believed Student's speech was negatively affecting his education. Neither Ms. Chambers nor Mother testified to any type of problem, and Student presented no evidence from a speech and language pathologist to support this position. Student did not meet his burden of proof that Districts should have administered a speech assessment to him as part of its February 2014 assessment.

18. Student did not put on any evidence that Districts should have administered an occupational therapy assessment to him earlier than February 2015. The referral for the later assessment was based on concerns of Mother and Ms. Johnston, Student's fourth grade teacher. They both believed that Student's handwriting and poor written work might have been the result of a fine motor deficit. However, Student did not demonstrate those deficits to any significant extent prior to the February 2014 assessment. He was progressing on grade level standards. His performance in class did not stand out from those of his peers. Once Student transferred to Community Roots in January 2014, he continued to make progress in school. At the end of the 2013-2014 school year, Mother commented favorably to Student's third grade teacher at Community Roots about the progress he had made.

19. Student's expert, Dr. Passaro did not state in his assessment, assessment report, or testimony that Student had any needs that required occupational therapy intervention. Dr. Passaro's report and testimony are notable for the fact that he specifically did not find that Student had dysgraphia that required assessment or services.

20. Student relies on the occupational therapy report from Kaiser Permanente that suggested Student request an educational assessment from his school. No one from Kaiser Permanente testified at hearing and the report failed to find any deficit that might be affecting Student's access to his education. Kaiser found that Student did not demonstrate clinical indications warranting ongoing occupational therapy. The only deficits Kaiser found were some difficulty that Student had in dressing himself and that he was below average in bilateral coordination. There is no evidence that these issues impacted Student's education. Significantly, Kaiser tested Student's fine motor coordination and found that Student's handwriting was appropriate.

21. Student did not provide any evidence that he had occupational therapy needs or speech and language needs that were impeding his access to his education as of February 3, 2014. Student has not demonstrated by a preponderance of the evidence that Districts should have assessed him in the areas of speech and language and/or occupational therapy prior to February 2015, when they assessed him for the first time in those areas.

#### *Issues 3 and 4: Eligibility Under Specific Learning Disability*

22. Student contends Districts denied him a FAPE by failing to find him eligible for special education as a student with specific learning disability and develop an IEP for him at the February 3, 2014 IEP team meeting. Districts maintain that Student was not eligible for special education under a specific learning disability classification at any time.

23. A specific learning disability is a disorder in one or more of the basic psychological processes involved in understanding or using spoken or written language that may have manifested itself in the imperfect ability to listen, think, speak, read, write, spell, or do mathematical calculations, including conditions such as dyslexia. (20 U.S.C. § 1401(30)(B); 34 C.F.R. § 300.8(c)(10); Ed. Code, § 56337, subd. (a).; Cal. Code Regs., tit. 5, § 3030, subd. (b)(10).) Basic psychological processes include attention, visual

processing, auditory processing, sensory-motor skills, and cognitive abilities, including association, conceptualization, and expression. (Cal. Code Regs., tit. 5, § 3030, subd. (b)(10).) A specific learning disability does not include a learning problem that is primarily the result of visual, hearing, or motor disabilities, intellectual disabilities, emotional disturbance, or environmental, cultural, or economic disadvantage. (20 U.S.C. §1401(30)(C); 34 C.F.R. §§ 300.8(c)(10)(ii), 300.309(a)(3); Ed. Code, § 56337, subd. (a).) A child is only eligible if assessment determines that he has an eligible handicapping disability, and, because of the disability, exhibits a need for special education. (34 C.F.R. § 300.8(a)(1).)

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

25. There are two methods a school district may use to determine if a child has a specific learning disability. One is the severe discrepancy method. The other is called response to intervention.<sup>15</sup> (20 U.S.C. § 1414(b)(6); 34 C.F.R. § 300.307; Ed Code, § 56337, subds. (b), (c).) The severe discrepancy method requires that a student has a severe discrepancy between intellectual ability and achievement in oral expression, listening comprehension, written expression, basic reading skills, reading comprehension, mathematical calculation, or mathematical reasoning. (20 U.S.C. § 1414(b)(6)(A); Ed. Code, § 56337, subd. (b)[authorizes the continued use of a discrepancy method to determine eligibility for specific learning disability]; Cal. Code Regs., tit. 5, § 3030, subd. (b)(10)(B).) A severe discrepancy is defined as 1.5 standard deviations (22.5 points), adjusted for the standard error of measurement between intellectual ability test score and academic achievement test score. (*Ibid.*) When faced with discrepant testing data, “a school district, considering all relevant material available on a pupil, must make a reasonable choice between valid but conflicting test results in determining whether a ‘severe discrepancy’ exists.” (*E.M. v. Pajaro Valley Unified School Dist.* (9th Cir. 2011) 652 F. 3d 999, 1004 (*Pajaro Valley*)). No single measure, such as a single intelligence quotient, shall be used to determine eligibility or services. (Ed. Code, § 56320, subds. (c) and (e).)

26. In deciding whether a student needs special education, courts apply the *Rowley* standard to determine whether the student can receive some educational benefit from the general education classroom. (*Hood v. Encinitas Union School Dist.* (9th Cir. 2007) 486 F.3d 1099, 1106-1107 (*Hood*) [decided under former Ed. Code, § 56337].) A child may have a specific learning disability, yet not be found eligible for special education, because the child’s needs are able to be met with modification of the general education classroom. (*Id.*)

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<sup>15</sup> Neither of the parties presented as an issue whether Districts should have used a response to intervention methodology in determining Student’s eligibility for special education under a specific learning disability.

Therefore, a school district only need refer a child for special education instruction and services after the resources of the regular education program have been considered and, where appropriate, utilized. (Ed. Code, § 56303.) Concomitantly, failing grades alone do not necessarily establish that a district has failed in its child find obligation or that it failed to provide an educational benefit to a student. (*Sherman v. Mamaroneck Union Free Sch. Dist.* (2nd Cir. 2003) 340 F.3d 87, 93; *Mather v. Hartford Sch. Dist.* (D. Vt. 1996) 928 F.Supp. 437, 446.)

#### FEBRUARY 3, 2014 ASSESSMENT

27. Districts' February 3, 2014 psychoeducational assessment encompassed standardized testing, including the Wechsler Intelligence Scales to assess Student's cognitive abilities and the Woodcock-Johnson to test Student's academic achievement. Student's full scale intelligence quotient on the Wechsler was 119. His lowest cluster score on the Woodcock-Johnson was a 102 in written expression. The difference between the two was 17 points, well below the 22.5 point discrepancy for finding the existence of a specific learning disability.

28. In his closing brief, Student argued that his academic testing scores were invalid because it appeared that an educator other than Ms. Sabina either administered the test or scored it. It is unnecessary to resolve that issue. Student provided no persuasive evidence that the academic achievement testing was selected improperly, that the test was improperly administered, that the test was improperly scored, or that Student's performance on the test was impacted by who administered it or scored it.

29. Student also contends that Districts should have used the general ability index to determine his intelligence quotient score because his combined processing speed score of 88 was so much lower than his verbal comprehension and perceptual reasoning scores. The general ability index is calculated by removing the processing speed and working memory scores on the Wechsler and using only the verbal comprehension and perceptual reasoning scores.

30. Student asserts his general ability index score would have been 126. This is based on Dr. Palmer's finding stated in his April 12, 2014 assessment report. Using that score, Student would have a discrepancy of 24 points between his cognitive ability and academic achievement. Student failed to establish the validity of Dr. Palmer's calculation. Student's highest score on the Wechsler was 123 in the perceptual reasoning cluster. Dr. Palmer did not testify and his report does not explain how he arrived at a general ability index score of 126. Dr. Passaro testified that he had no reason to question Dr. Palmer's calculation, but was unable to explain how a score of 126 was possible given that all of Student's scores on the different sections of the Wechsler were lower than that.

31. Dr. Palmer's assessment found a discrepancy as well. However, his testing was unreliable because he assessed Student using the same edition of the Wechsler Intelligence Scales that Districts had used less than three months earlier. Repeating the test

was not permitted because of the “practice effect;” test takers are likely to have illusory high scores on the second administration of the test if they take it less than a year after taking it the first time. (See, e.g., *E.M. v. Pajaro Valley School District, et al.* (9th Cir. 2014) 758 F.3d 1162, 1171 (*Pajaro Valley II*)). It is perplexing why Dr. Palmer used this testing instrument, as he was aware that Districts had the Wechsler since he reviewed their testing as part of his assessment. As demonstrated by Districts’ testing in February 2015, and by Dr. Passaro’s testing, there are several different intelligence tests available that Dr. Palmer could have used. Dr. Palmer’s determination that Student demonstrated a discrepancy between ability and achievement is not persuasive.

32. Dr. Palmer’s finding that Student had a specific learning disability also is not persuasive because he did not conduct a full assessment and appears to base his determination solely on the results of his administration of the Wechsler and Districts’ academic testing. There is no indication in his report that he reviewed Student’s school records, that he interviewed Student’s teachers, or that he observed Student in class. Dr. Palmer’s report fails to address the fact that Student’s lowest score on the Woodcock-Johnson academic testing was a 102 in written expression, well in the average range and an indication that Student was overcoming his processing deficits sufficiently enough to make expected academic progress.

33. Dr. Palmer’s finding of a specific learning disability likewise failed to consider the progress that Student was making as of February 2014 in class. There is no evidence that Student was failing to make meaningful progress. To the contrary, evidence from Student’s teacher and his report cards demonstrates that, at least in third grade, Student had a successful year and was making meaningful progress in his education.

34. For these reasons, Dr. Palmer’s opinion was given little weight. Student failed to prove by a preponderance of evidence that he qualified for special education as a child with a specific learning disability in February 2014.

#### FEBRUARY 19, 2015 ASSESSMENT

35. Districts reassessed Student in February 2015 at Mother’s request. Mother contends that Districts should have found Student eligible for special education under the category of specific learning disability in its February 19, 2015 assessment. Districts contend that although Student had a processing deficit in the area of attention, and Districts found a discrepancy between his intellectual ability and his academic achievement, Student did not qualify as specific learning disabled. Districts contend that Student was accessing his education without special education interventions, still scored in the average range for written expression in spite of the processing deficit, and therefore did not qualify under the category of specific learning disability. Districts did find that Student qualified for special education as speech or language impaired based upon the results of their speech and language assessment.

36. Student contends that he qualified under specific learning disability based upon the results of Districts' psychoeducational assessment. Ms. Brown and Ms. Carucci conducted a thorough assessment that looked at all aspects of Student's intellect, behavior, and academic achievement. Their testing demonstrated that Student had a deficit in the processing area of attention. The testing also indicated that Student had a 30 point discrepancy between his intellectual capacity and his achievement.

37. However, Student's low score on the academic testing in written expression was 100, exactly average. This indicated that Student, in spite of his deficit, Student made expected progress in written expression. Based on this testing, and Student's ability to retain information and score at an expected level for his age, any difficulties Student was having in producing written work in class were not attributable to a specific learning disability.

38. Student's expert Dr. Passaro assessed Student in March 2016, a year after Districts completed their February 19, 2015 assessment. He administered a comprehensive assessment to Student. His testing also found that Student had significant discrepancy between ability and achievement; on the testing instruments Dr. Passaro used, the discrepancy was 26 points. Dr. Passaro's report found that Student qualified for special education as a child with a specific learning disability based upon that discrepancy.

39. Districts contended that Dr. Passaro's assessment should not be considered because it was administered far after Districts made their determination that Student did not have a specific learning disability. They point to the large body of law holding that an IEP is supposed to be evaluated in light of information available at the time it was developed; it is not judged in hindsight. (*Adams v. State of Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149 (*Adams*)). An IEP is considered "a snapshot, not a retrospective." (*Ibid.* citing *Fuhrmann v. East Hanover Board of Education* (3d Cir. 1993) 993 F.2d 1031, 1041.)

40. Although IEP's are generally viewed as a snapshot, and not in hindsight per the decision in *Adams, supra*, later acquired information is properly considered under the "snapshot rule" for the limited purpose of determining the reasonableness of an IEP offer. (*Pajaro Valley, supra*, 652 F.3d 999, 1006 ("[A]dditional data, discovered late in the evaluation process, may provide significant insight into the child's condition, and the reasonableness of the school district's action, at the earlier date.")) For this reason, Dr. Passaro's findings are admissible in this hearing as they shed light on the objective reasonableness of Districts' decision denying Student eligibility as other health impaired.

41. In any case, Dr. Passaro's assessment findings did not contradict Districts' findings. Rather, it is his recommendations and expert opinion, based both on his testing results and on the Districts, which are salient to the analysis of the issues in this case. Dr. Passaro's findings mirrored those of Districts. The results of his testing were similar, his staff's observations of Student were similar, the information he obtained from interviews with Mother and Student's teacher was similar, and the information he reviewed was similar. The difference between his assessment and Districts' assessment was in the conclusions regarding how the information obtained about Student through the assessment process should

be interpreted. His expert opinion regarding Districts' assessment, and the conclusions Districts reached are therefore relevant and admissible irrespective of when he conducted his assessment.

42. Nonetheless, Dr. Passaro's finding that Student qualified for special education under specific learning disability is not substantiated by the record or by his testimony at hearing. Dr. Passaro acknowledged during his testimony that Student's written expression scores on Districts' assessment, and in broad written language on his assessment, were both in the average range. He acknowledged that scores in the average range indicated that Student was able to make expected progress at school and therefore did not support a finding of a specific learning disability. Dr. Passaro then stated, contrary to what his assessment report summaries concluded, that he had not used Student's discrepancy between ability and achievement to determine that Student had a specific learning disability. Rather, he made the determination that Student had a specific learning disability based on Student's difficulties with writing.

43. As stated above, there are two methods for determining the existence of a specific learning disability: the discrepancy model and the use of response to intervention. Neither Districts nor Dr. Passaro utilized a response to intervention, which requires several levels of academic intervention over a significant time. Since Dr. Passaro acknowledged that Student's average spelling and written language scores did not support a finding of a specific learning disability, no other basis exist for him to arrive at that conclusion.

44. The majority of Dr. Passaro's assessment report is dedicated to discussion of Student's ADHD, and how his ADHD affected his behavior and performance in school. There is very little discussion of how Student's test results support a finding of a specific learning disability; that finding appears almost in passing, as if it was an afterthought. Neither Dr. Passaro's report nor his testimony support a finding that Student had a specific learning disability that prevented him from accessing his education.

45. Student further argues that his low written expression scores support a finding of a specific learning disability given his above average intelligence. Student asserts that Districts should have recognized that, based on his intelligence, Student should have been able to score as high in written expression as he did in other academic areas, and should have been able to obtain above average grades in school subjects as well.

46. Student's argument does not acknowledge the Supreme Court's determination in *Rowley*, that school districts are not required to maximize or to optimize a child's potential. As stated in *Rowley, supra*, and confirmed in *Mercer Island, supra*, a district must only provide a student with a floor of opportunity that allows the student to make meaningful progress. Rather, in deciding whether a student needs special education, courts apply the *Rowley* standard to determine whether the student can receive educational benefit from the general education classroom. (*Hood, supra*, 486 F.3d at pp. 1106-1107.) *Hood* demonstrates that a child may have a disability (in the case of the child in *Hood*, a specific learning disability), yet not be found eligible for special education, because the child's needs could be

met with modification of the general education classroom. The Ninth Circuit held, “In essence, the Hoods assert that the law guarantees a learning-disabled child of superior ability enough individualized attention and services ... to elicit optimum performance from the child, when clearly no such requirement exists for children without disabilities, gifted or not.” (*Id.* at 1108.)

47. Given the lack of support in Dr. Passaro’s assessment and his testimony at hearing, as well as the results of Districts’ assessment indicating the lack of a specific learning disability, there is no persuasive evidence that Districts should have found Student eligible under the category of specific learning disability at the February 20, 2015 IEP team meeting.

*Issues 3 and 4: Eligibility Under Other Health Impaired*

48. Student argues Districts should have found him eligible for special education under the category of other health impairment due to his diagnosis of ADHD after they assessed him in February 2014. Districts contend that Student did not prove that he met the eligibility criteria of other health impairment because any deficits he presented could be and were addressed in a general education classroom with accommodations.

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

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

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

52. There is no dispute that Student was properly diagnosed with ADHD. The point of contention is whether Student’s ADHD affected his access to his education in a way that was not amenable to general education accommodations.

#### FEBRUARY 3, 2014 IEP

53. The evidence does not support Student's contention that he qualified under other health impaired as of the February 3, 2014 IEP team meeting. Although Mother noted significant maladaptive behaviors at home, few were manifesting at school. Those that did were not affecting his educational progress. Student was generally prepared for class, completed his in-class and homework assignments, and participated in the classroom instruction. He was not any more talkative than his classmates, was easily re-directed when off-task, and followed school rules. He was meeting third grade expectations academically as well, except in written expression, where, like many of his classmates, he was progressing toward expectations as of the IEP meeting. His written work was fairly legible. His teacher, who had referred other children for assessment, did not have any concerns about Student academically or behaviorally that warranted special education intervention.

54. On the rating scales Ms. Chambers completed as part of Districts' February 3, 2014 assessment, she did indicate a concern about Student's tendency toward somatization. Dr. Passaro testified that Districts should have explored further whether Student was suffering from anxiety based on the elevated score for somatization. But, in spite of the score, there is no evidence that Student suffered from overall anxiety or that anxiety was impacting his school performance. Student occasionally said he felt ill and asked to go see the school nurse. Ms. Chambers was aware of Student's propensity to exaggerate his illness and she responded appropriately to his needs by giving him time to rest. There is no evidence that Student's symptoms, real or imagined, impacted his education. Dr. Passaro acknowledged that a diagnosis of anxiety alone does not automatically result in special education eligibility. There is no persuasive evidence that Student's ADHD or possible anxiety were impacting his education at the time of his February 3, 2014 IEP team meeting.

#### FEBRUARY 20, 2015 IEP

55. Student contends that Districts should have found him eligible under other health impaired at the February 20, 2015 IEP team meeting, in addition to finding him eligible under speech or language impaired. Districts contend that Student's behaviors and academic success were similar to the previous year, and, like the previous year, did not support a finding that he qualified for special education as other health impaired at the time.

56. The evidence supports Student's contention that his ADHD symptoms had increased during the year between the two assessments to the extent that his ability to access his education was negatively impacted and that Student's behavior were no longer responding to general education interventions. Although Student had been fairly organized in Ms. Chambers's class and had no difficulty completing assignments or turning in homework, he was not as successful after transferring to Community Roots. He began to decline during the spring 2014 semester. Student was inattentive, did not timely complete or turn in assignments, and was disorganized. His teacher had to repeatedly conference with

him during all steps of a writing assignment to ensure that he was doing the assignment correctly. He needed repetitive encouragement to begin and complete writing tasks. Nonetheless, throughout third grade, Student did continue to make progress.

57. Student's attention deficit began negatively impacting him more when he started fourth grade in the fall of 2014. Almost immediately after starting the school year, he began having difficulties. He was distracted when asked to do writing assignments and had difficulty completing them. He was often wound up, was full of excessive energy, and appeared to be bouncing off the walls at times. Even when Student took medication, it would wear off by lunch time, and he would be unable to remain quiet in class. His teacher, Ms. Johnston, contacted Mother because of her concerns about Student's behaviors. Mother's recommendation was for Ms. Johnston to permit him to go running to release energy. Ms. Johnston began providing Student with opportunities to leave class so that he could release this pent up energy and stop disrupting class. The fact that his teacher had to address Student's behavior in class by having him go outside demonstrated the negative effect the behaviors were having on both Student's ability to access his education and that of his classmates to access their education.

58. Student also was unable to complete assignments in class or complete and turn in homework. Even after Ms. Johnston began texting the homework assignments to Mother so that she could make sure Student did them at home, he somehow managed to misplace the work between leaving home with it and arriving at school.

59. Student's ability to prepare written assignments also suffered due to his inattention. His handwriting was illegible. He could not write more than a paragraph for a writing assignment unless he was able to use a laptop or other similar assistive technology. He had difficulty putting sentences together and using proper writing conventions.

60. Along with Mother, Ms. Johnston referred Student for another assessment to see if he would qualify for special education. Ms. Johnston was especially concerned by Student's inability to write legibly or to produce a coherent written product when handwriting an assignment.

61. Ms. Brown, Districts' school psychologist, administered several behavioral tests as part of the multidisciplinary assessment. The tests consisted of rating scales completed by Mother and Ms. Johnston. Ms. Johnston rated Student as elevated or very elevated in the areas of hyperactivity, impulsivity, and inattention. She indicated that Student had difficulty in school with focus, attention, organization skills, writing, penmanship, and in putting his ideas and thoughts coherently into written form.

62. Ms. Johnston's assessment of Student's behavior corresponded to Ms. Brown's observations of Student in class. He was off-task or engaging in disruptive behavior during each of Ms. Brown's three observations. He was distracted and did not work on his assignment. He wandered around the room attempting to talk to classmates who were attempting to do their work, even after being asked to stop by his teacher or the other

students. He did not complete the assignment, although his classmates did. These were the same behaviors witnessed by occupational therapist Ms. Morris when she conducted her observation of Student for her occupational therapy assessment. The behaviors consistently interfered with Student's ability to access his education, disrupted his classmates, and interfered with his teacher's ability to teach her class because she constantly had to re-direct him. They were the same type of behaviors that Dr. Passaro's assessment team witnessed a year later during the observations of Student done as part of Dr. Passaro's assessment.

63. Ms. Morris's occupational therapy assessment included testing to determine if Student had a fine motor deficit that was hindering the legibility of his written work. Her testing results were similar to those on Kaiser Permanente's independent evaluation: Student did not have a fine motor deficit. He was able to write legibly when given sufficient time in a one-on-one situation, when he was not distracted, and did not have to produce high-level work. The fact that Student did not have a fine motor deficit that required occupational therapy remediation emphasized the fact that his attention deficits were the reason his writing was not legible and that he had difficulty producing a grade-appropriate written assignment.

64. There were thus several indications that Student's ADHD symptoms were interfering with his access to his education. He could not write legibly except under one-on-one testing conditions. He could not complete written assignments in class. He failed to turn in homework either because he did not complete it, because he misplaced it, or a combination of both. He was constantly disrupting class by blurting out answers, talking to classmates at inappropriate times, and wandering around the classroom. To address his disruptive behavior and his excess energy, his teacher had to send him out of the classroom to either run, or simply have him do busy work so that the other children could do their work.

65. Dr. Passaro's assessment results mirrored the Districts' results. He persuasively testified that the behaviors Student engaged in at the time of Districts' assessment interfered with his ability to access his education and should have indicated to Districts that Student qualified for special education under other health impaired. Student's behaviors and class disruptions persisted in spite of interventions his teachers implemented. Given the level of Student's inability to attend, his disruption of class, and inability to produce written work in February 2015, it was not objectively reasonable for Districts to determine that Student's ADHD did not form the basis for finding him eligible for special education as other health impaired. Dr. Passaro's opinion that Student should have been found eligible under other health impaired in February 2015, is more persuasive than Districts' opinion to the contrary.

66. Also shedding light on the overall impact of Student's behavior and the fact that Districts' failure to find Student eligible under other health impairment in February 2015 was not reasonably objective given the information they had at the time, was Districts' finding that Student was eligible under that category in May 2016, after reviewing Dr. Passaro's report and recommendations. Student's behaviors did not change at all between February 2015 and May 2016. Student had not responded effectively to Ms. Johnston's attempts to redirect him and use of general education strategies prior to

February 2015. His writing did not improve even with those strategies. Nor did he show improvement after Ms. Johnston, and later Ms. Beaty, instituted the accommodations and interventions recommended by Ms. Morris in her occupational therapy report. Student's inattentive and disruptive behavior, failure to do assignments, illegible handwriting, and poor written work product continued at the same pace.

67. Districts' reliance on the Ninth Circuit's findings in the *Hood* case that a student making average to better than average progress on her education is not eligible for special education even if she has a disability is misplaced. The child in *Hood*, who, like Student, had above-average intelligence, was receiving average or better than average grades. Her district had also provided her accommodations under a Section 504 plan, which was successful in assisting her to make meaningful progress on her education.

68. In contrast, Student was not able to meet grade level expectations in written expression during the period covered by this case despite his teachers' use of general education strategies in the classroom. Nor was he provided with any formal accommodations until Districts developed his January 6, 2016 IEP, in spite of Ms. Morris having recommended them, and in spite of Ms. Brown's finding that Student's attention deficit interfered with his learning and he therefore needed a Section 504 accommodations plan.

69. A student's failure to perform at grade level is not necessarily indicative of a denial of a FAPE, as long as the student is making progress commensurate with his abilities. (*Walczak v. Florida Union Free School District* (2d Cir. 1998) 142 F.3d 119, 130; *E.S. v. Independent School Dist., No. 196* (8th Cir. 1998) 135 F.3d 566, 569; *In re Conklin* (4th Cir. 1991) 946 F.2d 306, 313; *T.B. ex rel. Brenneise v. San Diego Unified School Dist.* (S.D.Cal, March 30, 2011, No. 08CV28–MMA (WMc)) 2011 WL 1212711, \*5.) Whether a student has received more than de minimis benefit from his or her IEP must be measured in relation to the student's potential. (*Mrs. B. v. Milford Bd. of Educ.* (2d Cir. 1997) 103 F.3d 1114, 1121; *Polk v. Central Susquehanna Intermediate Unit 16* (3d Cir. 1988) 853 F.2d 171, 185.)

70. Here, Student's failure to meet grade level standards in written expression was not commensurate with his abilities and was not in line with his potential. Student had above average-to-superior intelligence. He should have been able to, at minimum, meet grade level standards in written expression by the time Districts' assessed him in February 2015. His achievement scores in written expression were consistently in the mid-average range. Yet, Student was unable to meet those standards in written expression at school and failed to do so even after Districts informally began implementing accommodations for him. His failure to meet grade level standards was evidence his ADHD was affecting his ability to make more than de minimis progress in written expression.

71. The preponderance of the evidence thus supports Student's contention that his ADHD impacted his alertness in class, affected his ability to access his education, and qualified him for special education eligibility under other health impaired as of the February 20, 2015 IEP team meeting.

*Issues 5(a), (b), (c), and (d): Failure of the February 20, 2015 IEP to Offer Student a FAPE*

REQUIRED IEP TEAM MEMBERS

72. Student contends that no special education teacher was present at the February 20, 2015 IEP team meeting. Districts contend that all required IEP team members were in attendance.

73. An IEP team must include the following: At least one parent; a representative of the local educational agency; a regular education teacher of the child if the child is, or may be, participating in the regular education environment; a special education teacher or provider of the child; an individual who can interpret the instructional implications of assessment results; and other individuals who have knowledge or special expertise regarding the pupil, as invited at the discretion of the district; and when appropriate, the student. (20 U.S.C. § 1414(d)(1)(B); Ed. Code, § 56341, subd. (b).)

74. Student maintains that special education teacher Ms. Candalario did not actually attend the IEP team meeting. He believes that Community Roots director Jeremy Cavallaro signed the IEP document in the space above Ms. Candelario's printed name, and that she was never there. Both Ms. Candelario and Mr. Cavallaro testified that Ms. Candalario was indeed there, and that Mr. Cavallaro did not attend the meeting.

75. It is unnecessary to resolve this dispute because education specialist, Ms. Carucci, the special education teacher who had administered the academic testing to Student, attended the entire meeting. Therefore, irrespective of whether Ms. Candalario was also present, a special education teacher participated in Student's February 20, 2015 IEP team meeting. All required IEP team members were in attendance.

GOALS, SERVICES, AND PLACEMENT

76. Student contends that the February 20, 2015 IEP failed to offer him an appropriate placement, services, and goals because it only addressed his speech deficit. Student contends that the IEP should have also addressed his attention deficit and alleged specific learning disability. He contends that it should have specifically offered him goals and services in the areas of writing, working independently, penmanship, focus, and verbal expression/communication. Districts contend that the IEP addressed all of Student's known unique needs.

77. To determine whether a school district offered a student a FAPE the focus must be on the adequacy of the district's proposed program. (*Gregory K. v. Longview School Dist.* (9th Cir. 1987) 811 F.2d 1307, 1314.) If the school district's program was designed to address the student's unique educational needs, was reasonably calculated to provide the student with some educational benefit, and comported with the student's IEP, then the school district provided a FAPE, even if the student's parents preferred another program and even if the parents' preferred program would have resulted in greater educational benefit. (*Ibid.*)

78. As stated above, an IEP is evaluated in light of information available at the time it was developed. It must be evaluated in terms of what was objectively reasonable when the IEP was developed, by looking at the IEP's goals and goal achieving methods at the time the plan was implemented and determining whether the methods were reasonably calculated to confer an educational benefit. (*Adams, supra*, 195 F.3d at p.1149.)

79. The "educational benefit" to be provided to a child requiring special education is not limited to addressing the child's academic needs, but also social and emotional needs that affect academic progress, school behavior, and socialization. (*County of San Diego, supra*, 93 F.3d at p. 1467.) A child's unique needs are to be broadly construed to include the child's academic, social, health, emotional, communicative, physical and vocational needs. (*Seattle School Dist. No. 1 v. B.S.* (9th Cir. 1996) 82 F.3d 1493, 1500, citing H.R. Rep. No. 410, 1983 U.S.C.C.A.N. 2088, 2106.)

80. At the February 20, 2015 IEP team meeting, Districts found Student eligible for special education only under the category of speech or language impairment based upon his articulation disorder. They developed a goal and offered Student speech and language therapy to address the speech deficit. Student provided no evidence that either the speech goal or speech therapy services were not sufficient to address Student's articulation needs. Nor did he provide any evidence that he had verbal expression and/or communication needs that were not addressed by the goal or speech therapy.

81. Districts did not find Student eligible under any other category. This decision has found that Student has failed to demonstrate that he had specific learning disability that required special education intervention. Student has demonstrated that he was other health impaired by reason of his ADHD. Districts failed to find him eligible under other health impaired because they did not acknowledge that Student's ADHD symptoms resulted in him disrupting class and being generally unable to focus, attend, or complete work; that the ADHD negatively impacted Student's ability to write legibly or produce written work at grade level; and that the ADHD generally was interfering with Student's ability to make meaningful progress in written expression such that he required special education services. As discussed below, Districts provided Student with accommodations and specialized academic instruction in January 2016. After they did so, Student's attention issues remained, but his ability to progress in the area of written expression increased significantly.

82. Importantly, Districts failed to address Student's attention deficit, which resulted in his written expression difficulties, in his IEP in any way. Districts' psychoeducational assessment specifically stated that Student had an attention processing deficit that was interfering with his learning, which needed to be addressed through classroom accommodations. Ms. Morris also recommended several accommodations that might have addressed Student's attention deficits, help him to make meaningful progress in writing, and stop him from disrupting class. However, although Districts recognized that Student had an attention deficit that was interfering with his learning, no goals were developed to address the deficits, and none of the accommodations recommended by Ms. Brown or Ms. Morris were included in Student's IEP.

83. Irrespective of whether Districts found Student eligible as other health impaired, it was required to address all of his deficits affecting his education. A child's placement and related services are determined by his or her unique needs, not the eligibility category assigned to the child. (See, e.g., 20 U.S.C. § 1412(a)(3)(B) [Nothing in this chapter requires that children be classified by their disability so long as each child who has a disability . . . is regarded as a child with a disability under this subchapter]; *Heather S. v. State of Wis.* (7th Cir. 1997) 125 F.3d 1045, 1055 [“The IDEA concerns itself not with labels, but with whether a student is receiving a free and appropriate education . . . tailored to the unique needs of that particular child.”].)<sup>16</sup>

84. Districts failed to institute any intervention to address Student's difficulties with written expression. By the time of the February 20, 2015 IEP team meeting, Student had been enrolled with Districts for a year-and-a-half. Districts were not under notice the previous year that Student's difficulties and delays in writing were related to his attention deficit. However, by the time of the February 20 meeting, particularly given the results of the latest assessment, including Ms. Morris's determination that a fine motor disorder was not causing Student's written expression difficulties, Districts should have recognized and addressed how Student's attention was hindering his educational progress. Districts should have developed goals to address Student's attention, should have provided Student with some sort of intervention, as they did the following year, to address his written expression difficulties, and should have provided him with the accommodations recommended by Ms. Brown and Ms. Morris.

85. An annual IEP must contain a statement of measurable annual goals designed to: (1) meet the individual's needs that result from the individual's disability to enable the pupil to be involved in and make progress in the general curriculum; and (2) meet each of the pupil's other educational needs that result from the individual's disability. (20 U.S.C. § 1414(d)(1)(A)(i)(II); 34 C.F.R. § 300.320(a)(2)(i); Ed. Code, § 56345, subd. (a)(2).)

86. The purpose of goals is to permit the IEP team to determine whether the pupil is making progress in an area of need. (Ed. Code, § 56345.) In developing the IEP, the IEP team shall consider the strengths of the child, the concerns of the parents for enhancing the education of their child, the results of the initial evaluation or most recent evaluation of the child and the academic, functional, and developmental needs of the child. (20 U.S.C. § 1414(d)(3)(A).) For each area in which a special education student has an identified need, the IEP team must develop measurable annual goals that are based upon the child's present levels of academic achievement and functional performance, and which the child has a reasonable chance of attaining within a year. (Ed. Code, § 56345; *Letter to Butler*, 213 IDELR 118 (OSERS 1998).) There is no requirement that an IEP include baselines for the

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<sup>16</sup> Even if Student did not have ADHD that was affecting his ability to access his education, his recognized processing disorder might also have qualified him for special education eligibility as other health impaired if the processing disorder resulted in Student having limited strength, vitality or alertness to environmental stimuli. (*Pajaro Valley II*, *supra*, 758 F.3d at pp. 1172-1176.)

goals, other than addressing a student's present level of performance. (*Student v. San Diego Unified School District* (2011) Cal.Offc.Admin.Hrngs Case No. 2011080459, at pp. 10-11.)

87. A failure to offer an appropriate goal is a procedural violation of the IDEA. As stated above, a procedural violation results in a denial of a FAPE only if the violation: (1) impeded the child's right to a FAPE; (2) significantly impeded the parent's opportunity to participate in the decision making process; or (3) caused a deprivation of educational benefits. (*Target Range, supra*, 960 F.2d at p. 1484.) In this case, Districts' failure to develop goals for Student to address his writing issues and to address his attention problems prevented Student from making progress in either area. Student's handwriting worsened. During fifth grade, it was generally illegible. His written expression difficulties continued. At his annual IEP team meeting the following year, Student could barely write one paragraph, and that paragraph was not at grade level. His attention issues continued to cause him to disrupt class and interfered with his ability to complete and turn in assignments. The lack of goals denied Student a FAPE and caused him a deprivation of educational benefit.

88. Districts likewise should have included the recommended accommodations in Student's IEP. Districts contend that it was unnecessary to include the accommodations or goals in the areas of written expression and attention because Student's teachers, first Ms. Johnston and then Ms. Beaty, were informally addressing Student's needs through their general teaching strategies.

89. These interventions did not address the problem because Student's written expression and attention deficits continued unabated until eventually addressed by Districts in Student's January 6, 2016 IEP. Ms. Johnston and Ms. Beaty were extraordinary educators, but they were not trained in special education techniques or methodologies and were not behaviorists. Importantly, they had a classroom of other students to whose needs they had to attend. They simply were not equipped, on their own, to address Student's significant attention and writing issues.

90. Districts' position that it was not necessary to include the accommodations or goals on the IEP because Ms. Johnston began informally implementing them in her classroom is not persuasive for a number of reasons. First, it prevented Mother from knowing what Districts were actually doing to address Student's deficits, and prevented her from offering suggestions to modify or supplement what Districts decided to do. Second, the lack of inclusion of accommodations in the IEP document meant that Districts were not required to implement them. It also meant that no other teacher, either a substitute at Community Roots or a teacher at a different school if he transferred elsewhere, would have any idea of what accommodations Student required and what needed to be implemented. The lack of goals to address Student's ADHD meant that no data was taken on the efficacy of the accommodations so it was impossible to know to what extent any given intervention was successful. The lack of an accommodation saying that Student required the use of a laptop or similar assistive technology meant that he was often still required to handwrite assignments. The lack of intervention to address Student's written expression deficit, caused by his ADHD, resulted in a lack of progress in that area.

91. To the extent that Districts informally implemented goals and accommodations, the failure to develop them through the IEP process and include them in Student's IEP excluded Mother from being involved in that process. It also prevented her from knowing if and how Districts were going to address Student's known deficits. In *Union School Dist. v. Smith* (1994) 15 F.3d 1519, cert. denied, 513 U.S. 965 (*Union*), the Ninth Circuit held that a school district is required by the IDEA to make a clear written IEP offer that parents can understand. The Court emphasized the need for rigorous compliance with this requirement:

We find that this formal requirement has an important purpose that is not merely technical, and we therefore believe it should be enforced rigorously. The requirement of a formal, written offer creates a clear record that will do much to eliminate troublesome factual disputes many years later about when placements were offered, what placements were offered, and what additional educational assistance was offered to supplement a placement, if any. Furthermore, a formal, specific offer from a school district will greatly assist parents in "present[ing] complaints with respect to any matter relating to the ... educational placement of the child." (*Union, supra*, 15 F.3d at p. 1526, quoting 20 U.S.C. § 1415(b)(1)(E).)

92. Districts' failure to include goals and accommodations in Student's IEP to address Student's known and acknowledged deficits therefore also impeded Mother's opportunity to participate in Student's IEP process, resulting in a denial of FAPE to Student.

93. Student has met his burden of persuasion, by a preponderance of the evidence, that Districts' failure to offer him goals, accommodations, and/or services to address his ADHD and resultant written expression deficit denied him a FAPE.

*Issues 6(a), (b), and (c): Failure of the January 6, 2016 IEP to Offer Student a FAPE*

94. Student similarly contends that his January 6, 2016 IEP failed to offer him appropriate goals, services to address all his needs, or an appropriate placement. Districts contend that the IEP met all statutory requirements.

#### GOALS

95. Districts found that Student continued to have an articulation deficit although he had made progress on his previous goal. Districts developed a goal to address Student's continuing mispronunciation of certain sounds and continued to offer him speech and language therapy. Student provided absolutely no evidence that the speech goal and/or services failed to adequately address his needs.

96. Districts recognized that Student's writing was suffering as a result of his inattention. They developed a goal that specifically addressed his written expression needs,

with an objective of increasing Student's ability to independently write paragraphs when given writing assignments. Student presented no evidence that the goal was not measurable, was inappropriate, or failed to meet his needs.

97. Districts recognized that Student's ADHD was interfering with his learning and, as discussed below, appropriately created accommodations to help Student access his education in spite of the attention deficits. However, Districts failed to develop any goals in any area related to extinguishing the behaviors that were interfering with Student's education. As discussed above in context of the failure to develop such goals in the February 20, 2015 IEP, the purpose of goals is to permit the IEP team to determine whether the pupil is making progress in an area of need. (Ed. Code, § 56345.) The failure to develop goals to address Student's attention issues, other than in written expression, meant that Districts had no way of knowing whether, or to what extent, any of the accommodations or services in Student's IEP were successful in addressing the deficits.

98. Student continued to have the same challenges with attention and behavior in class from January to May 2016. Based upon Student's continued lack of attention in class, his continued disruption of class, and continued failure to complete assignments, Districts developed goals in Student's May 10, 2016 IEP addendum. They developed goals in homework completion, organization, following directions, remaining on-task, and completion of in-class assignments. Districts had recognized Student's deficits in these areas as far back as February 2015, but failed to address them through goals until reviewing Dr. Passaro's assessment at the May 10, 2016 IEP team meeting.

99. The lack of specific goals in Student's January 6, 2016 IEP meant that there was no consistent implementation of interventions in these areas of need and no data kept to determine if accommodations and interventions were working. The lack of the goals impeded Student's educational progress. The lack also prevented Mother from knowing if and how Student's IEP was successful in meeting his needs. Student has thus demonstrated that Districts' failure to develop goals in the area of attention and behavior in his January 6, 2016 IEP denied him a FAPE.

#### SERVICES/ACCOMMODATIONS

100. Student demonstrated that he continued to fail to progress in written expression and continued to have attention challenges in class after Districts developed provided him with an IEP in February 2015. His handwriting continued to be generally illegible. His writing process was hindered by his attention issues resulting in incomplete sentences and thoughts. By the January 6, 2016 annual IEP team meeting, when Student was in the middle of fifth grade, he was only able to compose one paragraph as part of a writing assignment when grade level standards mandated a student be able to complete at least three. Student continued to disrupt class with his talking and outbursts, and his lack of attention continued to require significant redirection and prompting from his teacher.

101. At this IEP team meeting, Districts recognized that Student's attention deficits interfered with his learning, and impacted his ability to write legibly. Districts codified in this IEP accommodations previously recommended by Ms. Morris and Ms. Brown. The IEP specified that Student could type assignments or dictate them when possible, recognizing that he was able to produce a much more coherent work product when not hampered by his poor handwriting. The IEP addressed Student's inattention and hyperactivity by providing him with movement breaks throughout the school day. The IEP included a provision for giving Student hard copies of classroom notes. Other accommodations called for the teacher to have Student repeat instructions; to break assignments into smaller tasks; to create a checklist of steps for completing assignments; and to collaborate with Student on how to complete assignments. Student contends that these accommodations were insufficient because they did not correspond exactly to recommendations made by Dr. Passaro in his assessment, completed several months after this IEP team meeting.

102. Student failed to demonstrate by a preponderance of the evidence that Districts should have been aware in January 2016, that he required additional accommodations. The accommodations Districts developed for this IEP considered and addressed all of Student's known deficits. To the extent that Dr. Passaro's recommendations were more extensive and would have served to optimize Student's progress, Districts were not required to offer an IEP that optimized Student's potential. They were required to develop an IEP that would permit Student to make meaningful progress. Based on the information it had at the time, the accommodations proposed by Districts met that standard.

103. Student also contends that Districts should have provided him with a one-to-one aide, as Dr. Passaro later recommended in his assessment report, to address Student's inattentive and disruptive classroom behavior. There is no evidence that Districts should have been aware at the time of the January 6, 2016 IEP team meeting that Student required an aide. Student was not aggressive, he could be redirected, although it took many prompts to do so, he was not oppositional or argumentative. Districts developed accommodations to address Student's behavior and offered him specialized academic instruction to work on his writing, which was generally the only area of academics that was suffering because of Student's inattention. During specialized academic instruction, Student would be taken to another classroom and taught by a special education teacher with only a few other students in the room to lesson distractions and give him more individualized attention. Given the scope of the accommodations and the small-group instruction, there is no evidence to support a finding that Student required a one-on-one aide.

#### PLACEMENT

104. Student contends that Districts should have provided the specialized academic instruction offered in the January 6, 2016 IEP in his classroom rather than removing him to a separate location. Student argues that removing him from his general education classroom for instruction violated his right to be educated in the least restrictive environment. Districts assert that at the time it developed this IEP, removing Student to a separate classroom was necessary to address his educational needs.

105. Both federal and state law require a school district to provide special education in the least restrictive environment appropriate to meet the child's needs. (20 U.S.C. § 1412(a)(5); 34 C.F.R. § 300.114(a); Ed. Code, § 56040.1.) This means that a school district must educate a special needs pupil with nondisabled peers "to the maximum extent appropriate," and the pupil may be removed from the general education environment only when the nature or severity of the student's disabilities is such that education in general classes with the use of supplementary aids and services "cannot be achieved satisfactorily." (20 U.S.C. § 1412(a)(5)(A); 34 C.F.R. § 300.114(a)(2)(ii); Ed. Code, § 56040.1; see *Ms. S. v. Vashon Island Sch. Dist.* (9th Cir. 2003) 337 F.3d 1115, 1136-1137; *Sacramento City Unified Sch. Dist. v. Rachel H.* (1994) 14 F.3d 1398, 1403.)

106. When determining whether a placement is the least restrictive environment for a child with a disability, four factors must be evaluated and balanced: (1) the educational benefits of full-time placement in a regular classroom; (2) the non-academic benefits of full-time placement in a regular classroom; (3) the effects the presence of the child with a disability has on the teacher and children in a regular classroom; and (4) the cost of placing the child with a disability full-time in a regular classroom. (*Sacramento City Unified Sch. Dist. v. Rachel H.*, *supra*, 14 F.3d at p. 1404.)<sup>17</sup>

107. The evidence in this case showed that, at the time of the January 6, 2016 IEP team meeting, Student would not have benefitted from having his specialized academic instruction provided in his general education classroom. Student needed to be in a distraction-free environment to be able to concentrate. He needed to be in a smaller group so that the teacher could give him individualized attention. The pull-out model was in accord with Dr. Passaro's recommendations that Student required to be free of distractions. It also addressed Student's constant disruption of his class, particularly during writing assignments, by placing Student in a classroom where he would be able to receive more individualized instruction. In having the attention of his teacher, Student's propensity to wander around the class or talk to his classmates would be diverted.

108. To the extent that Student argues that his self-esteem was undermined by the removals from class, he has failed to provide sufficient evidence that Districts were aware of this at the time, or were aware that issues with his self-esteem would prevent Student from benefiting from the specialized academic instruction. The only indication that Districts had of this possibility was a communication to Ms. Lanners from Mother about one session of Student's speech and language therapy. There is no indication that such complaints were communicated to Districts on other occasions. In any case, the evidence indicates that Student had attended speech and language therapy sessions for a year at the time of the January 6, 2016 IEP team meeting without incident, and that he had benefitted from the therapy in spite of being pulled out for it.

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<sup>17</sup> Neither party presented any evidence, or makes any argument, relating to the cost of educating student in regular education, so that criterion is not further addressed here.

109. Districts proposed removing Student from class only 45 minutes a day, three days a week. This was a minimal decrease of Student's time in general education with his peers. The benefits of removing Student from class for the instruction outweighed any social benefit he might receive by remaining in the general education classroom for the additional time. Removing Student to a separate classroom was the least restrictive way of addressing Student's need for specialized academic instruction in a distraction-free environment. Student has failed to prove that his right to an education in the least restrictive environment was violated.<sup>18</sup>

### Capistrano's Issues

#### *Issue 7: Validity of Districts' February 19, 2015 Psychoeducational and Occupational Therapy Assessments*

110. Capistrano contends that its psychoeducational and occupational assessment, which comprised part of its February 19, 2015 multidisciplinary assessment, were valid and met all statutory requirements and that it therefore does not have to fund at public expense the independent educational assessments Student requested. Student contends that the assessments did not meet statutory requirements.

111. Much of Student's arguments regarding the validity of the assessments stemmed from his dispute with the recommendations made by the assessors. Disagreement with an assessor's recommendations as to a student's eligibility for special education, even if the recommendation proves to be incorrect, does not invalidate an assessment. The determination of special education eligibility falls to the IEP team, not solely to the assessor. (20 U.S.C. § 1414(b)(4)(A).) The viability of Districts' decisions regarding eligibility have been discussed above.

112. Student also contends that the assessments are not valid due to errors in reporting scores and other editorial mistakes found in the assessment reports.

#### *Standards for Assessments*

113. In conducting an evaluation, a school district must follow three basic principles. First, the district must use a variety of assessment tools and strategies to gather relevant functional, developmental and academic information about the pupil, including information provided by the parent that may assist the district in determining whether the pupil is a child with a disability. (20 U.S.C. § 1414(b)(2)(A)(i); 34 C.F.R. § 300.304(b)(1); Ed. Code, § 56320, subd. (f).)

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<sup>18</sup> As Districts have pointed out in their reply brief, Student's insistence that removal from class for a few hours a week violates his right to be educated in the least restrictive environment is in direct contradiction to his argument that he requires placement in a non-public school serving solely special education students.

114. Second, the district must not use any single measure or assessment as the sole criterion for determining whether the pupil is a child with a disability. (20 U.S.C. § 1414(b)(2)(B); 34 C.F.R. § 300.304(b)(2); Ed. Code, § 56320, subd. (e); Cal. Code Regs., tit. 5, § 3030.)

115. Third, the district must use technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors. (20 U.S.C. § 1414(b)(2)(C); 34 C.F.R. § 300.304(b)(3); Ed. Code, § 56320, subd. (f).)

116. In addition, in performing an assessment, a school district must follow procedures that ensure the fairness and accuracy of the assessment. The district must ensure that assessments and other evaluation materials used to assess a pupil are selected and administered so as not to be discriminatory on a racial or cultural basis. (20 U.S.C. § 1414(b)(3)(A)(i); 34 C.F.R. § 300.304(c)(1)(i); Ed. Code, § 56320, subd. (a).)

117. The district must ensure that assessments and other evaluation materials used to assess a pupil are provided in the child's native language and in the form most likely to yield accurate information on what the pupil knows and can do academically, developmentally and functionally, unless it is clearly not feasible to do so. (20 U.S.C. § 1414(b)(3)(A)(ii); 34 C.F.R. § 300.304(c)(1)(ii); Ed. Code, § 56320, subd. (a), (b)(1).)

118. The district must ensure that assessments and other evaluation materials used to assess a pupil are used for the purposes for which the assessments or measures are valid and reliable. (20 U.S.C. § 1414(b)(3)(A)(iii); 34 C.F.R. § 300.304(c)(1)(iii); Ed. Code, § 56320, subd. (b)(2).)

119. The district must ensure that assessments and other evaluation materials used to assess a pupil are administered by trained and knowledgeable personnel. (20 U.S.C. § 1414(b)(3)(A)(iv); 34 C.F.R. § 300.304(c)(1)(iv); Ed. Code, § 56320, subd. (b)(3).) In California, the assessment of a disability must be performed by a person who is knowledgeable of that disability. (Ed. Code, § 56320, subd. (g).)

120. In California, a credentialed school psychologist must administer individually administered tests of intellectual or emotional functioning. (Ed. Code, § 56320, subd. (b)(3).) The credentialed school psychologist must be trained and prepared to assess cultural and ethnic factors appropriate to the pupil being assessed. (Ed. Code, § 56324, subd. (a).)

121. The district must ensure that assessments and other evaluation materials used to assess a pupil are administered in accordance with any instructions provided by the producer of the assessments. (20 U.S.C. § 1414(b)(3)(A)(v); 34 C.F.R. § 300.304(c)(1)(v); Ed. Code, § 56320, subd. (b)(3).)

122. In conducting an evaluation, a school district must ensure that assessments and other evaluation materials include measures tailored to assess specific areas of educational need and not merely tests designed to provide a single intelligence quotient. (34 C.F.R. § 300.304(c)(2); Ed. Code, § 56320, subd. (c).)

123. In conducting an evaluation, a district must ensure that assessments are selected and administered so as best to ensure that, if an assessment is administered to a pupil with impaired sensory, manual or speaking skills, the assessment results accurately reflect the pupil's aptitude or achievement level, or whatever other factors the test purports to measure, rather than reflecting the child's impaired sensory, manual or speaking skills, unless such skills are the factors that the test purports to measure. (34 C.F.R. § 300.304(c)(3); Ed. Code, § 56320, subd. (d).)

124. In conducting an evaluation, a district must ensure that the pupil is assessed in all areas related to the suspected disability, including, if appropriate, health, vision, hearing, social and emotional status, general intelligence, academic performance, communicative status, and motor abilities. (20 U.S.C. § 1414(b)(3)(B); 34 C.F.R. § 300.304(c)(4); Ed. Code, § 56320, subd. (f).)

125. In conducting an evaluation, a district must utilize assessment tools and strategies that provide relevant information that directly assists persons in determining the educational needs of the pupil. (20 U.S.C. § 1414(b)(3)(C); 34 C.F.R. § 300.304(c)(7); Ed. Code, § 56320, subd. (f).)

126. As part of the assessment, the IEP team and other qualified professionals must review existing evaluation data on the child, including evaluations and information provided by the parent, classroom observations, State assessments, and teacher/provider observations. (20 U.S.C. § 1414(c)(1)(A)(i)-(iii); 34 C.F.R. § 300.305(a)(1)(i)-(iii); Ed. Code, § 56320, subd. (f), (h).)

127. Finally, in California, the assessment process requires the personnel who perform a district evaluation to prepare a written report. (Ed. Code, § 56327.) The report must contain the following content: (a) whether the pupil needs special education and related services; (b) the basis for such determination; (c) behavioral observations of the pupil; (d) the relationship of the observed behavior to the pupil's academic and social functioning; (e) educationally relevant health and development, and medical findings; (f) for pupils with learning disabilities, whether there is a discrepancy between achievement and ability that requires special education; and (g) if appropriate, a determination of the effects of environmental, cultural or economic disadvantage. (Ed. Code, § 56327, subd. (a)-(g).)

#### *Standards for Independent Educational Evaluations at District Expense*

128. The procedural safeguards of the IDEA provide that under certain conditions a student is entitled to obtain an independent evaluation at public expense. (20 U.S.C. § 1415(b)(1); 34 C.F.R. § 300.502 (a)(1); Ed. Code, § 56329, subd. (b); Ed. Code, § 56506,

subd. (c).) “Independent educational evaluation means an evaluation conducted by a qualified examiner who is not employed by the public agency responsible for the education of the child in question....” (34 C.F.R. § 300.502(a)(3)(i).) To obtain an IEE, the student must disagree with an assessment obtained by the public agency and request an IEE. (34 C.F.R. § 300.502(b)(1), (2).)

129. The provision of an independent evaluation is not automatic. Code of Federal Regulations, title 34, part 300.502(b)(2), provides, in relevant part, that following the student’s request for an independent evaluation, the public agency must, without unnecessary delay, either: (i) File a due process complaint to request a hearing to show that its assessment is appropriate; or (ii) Ensure that an independent educational assessment is provided at public expense, unless the agency demonstrates in a hearing pursuant to parts 300.507 through 300.513 that the assessment obtained by the parent did not meet agency criteria. (See also Ed. Code, § 56329, subd. (c) [providing that a public agency may initiate a due process hearing to show that its assessment was appropriate].)

130. In late November 2014, Mother requested that Districts re-assess Student for eligibility for special education. Mother signed her consent to the assessments on December 8, 2014. Districts shortly thereafter began the assessment process. Districts timely completed the assessments and timely convened an IEP team meeting on February 20, 2016, to discuss them.

131. On November 9, 2015, Mother requested in writing that Districts fund an independent psychoeducational evaluation at Districts’ expense. Districts denied the request in a letter dated December 9, 2015. Capistrano timely filed for due process on January 6, 2016, to defend the validity of the assessment.

#### PSYCHOEDUCATIONAL ASSESSMENT

132. Ms. Brown was the school psychologist who administered the majority of the psychoeducational assessment to Student. Special education teacher Ms. Carucci administered the academic achievement portion of the assessment. Both educators had the appropriate training and experience to administer their portion of the assessment. Student presented no evidence that either assessor lacked the expertise, knowledge, or training to administer their assessments, or that they incorrectly administered any portion of their testing.

133. The psychoeducational assessment consisted of several parts. It included a review of Student’s records, including prior assessments; informal assessment procedures such as observations of Student in class and during the testing process; interviews with Mother and Ms. Johnston, Student’s fourth grade teacher; collection of information through rating scales completed by Mother and Ms. Johnston; information provided by Mother and Ms. Johnston on forms they completed for the assessment; and standardized testing. The testing instruments used by Ms. Brown and Ms. Carucci consisted of the Woodcock-

Johnson-Cognition; the Beery-Buktenica Test of Visual-Motor Integration; the Behavior Assessment System for Children; the Conners Rating Scales; the Piers-Harris Childrens' Self-Concept Scale; and the Woodcock-Johnson-Achievement.

134. Together, all components of the assessment looked at Student's intellectual capacity, phonological processing, behaviors, level of anxiety, attention deficits, emotional well-being, and academic achievement. The assessment did not rely on any one component to make determinations about Student's cognition, emotional well-being, or academic achievement. The assessment was done in English, which is Student's primary language.

135. Student contested the validity of the academic testing because Ms. Carucci chose not to administer an optional subtest in the area of spelling. Student put on no evidence that failure to administer the spelling subtest invalidated Capistrano's psychoeducational assessment.

136. Student suggested that the psychoeducational assessment was not valid because Districts did not do additional testing to assess Student in the area of written expression. Student's expert, Dr. Passaro, did not find any portion of the February 19, 2015 assessment to be invalid or inadequate, and did not state that Capistrano should have included the spelling subtest of the Woodcock-Johnson-Achievement test. Dr. Passaro did state that the only weakness in the psychoeducational assessment might be Districts' failure to further probe Student's scores in written expression, which were much lower than his scores in all other academic areas.

137. There is no evidence that further testing in written expression would have yielded any different result given that Student's written expression score was almost identical to his score the year before. Further weakening the persuasiveness of Dr. Passaro's observation was the results of his own academic assessment of Student. Student also scored in the average range on Dr. Passaro's administration of the Woodcock-Johnson-Achievement in March 2016. Dr. Passaro and his assessment team then tried to administer a further writing assessment called the Test of Written Language. The team had to terminate the test because Student refused to do it. Dr. Passaro did not attempt to administer the test at a later date and did not attempt to use another written language assessment instrument in its place. In light of how comprehensive Dr. Passaro's psychoeducational assessment was, the fact that he chose not to pursue further written language assessment indicates that additional written language testing was not a necessary element of the assessment process.

138. Student also contests the validity of the psychoeducational assessment because of some editorial errors Ms. Brown made in writing her report. For example, Ms. Brown mistakenly stated in her report that Student's score on the thinking ability cluster was 134, in the superior range. However, this was his score on the sound blending subtest. Student points to this mistake as a reason to invalidate Capistrano's psychoeducational assessment. However, the correct score is included in the multidisciplinary report on the chart for the scores Student earned on each aspect of the Woodcock-Johnson-Cognition test, and the correct score is indicated on the raw data testing protocols. The correct scores were later

discussed during the IEP team meeting on February 20, 2015. There is no evidence that Ms. Brown incorrectly administered or scored the test, and no evidence that the few editorial mistakes in the report impacted Student's scores on the test or the ultimate decisions of the IEP team. A few editorial mistakes in the report, where the correct information was plainly delineated and later discussed, did not invalidate the assessment.

139. Ms. Brown and Ms. Carucci were qualified to administer their respective portions of the February 19, 2015 psychoeducational assessment. The evidence demonstrates that they followed the publishers' instructions and protocols for tests; that they used valid and properly normed testing materials; that the assessments were not biased in any manner; and that they administered the tests in English, Student's primary language. They chose materials that were valid and reliable for the purposes used in the assessment. They assessed all of Student's known needs in the areas of cognition, emotional and adaptive behavior, and academic achievement. Ms. Brown and Ms. Carucci reviewed all existing data concerning Student of which they were aware. They used a variety of testing tools and not just standardized testing to complete the assessment. Once the testing was complete, their findings were memorialized in an assessment report, which met all statutory requirements. They presented their findings to Student's IEP team at the meeting held on February 20, 2015.

140. Capistrano has met its burden of proving by a preponderance of evidence that its February 19, 2015 met all statutory requirements. Student is not entitled to funding of an independent psychoeducational evaluation based upon contentions that Capistrano's assessment was invalid.

#### OCCUPATIONAL THERAPY ASSESSMENT

141. Ms. Morris administered Districts' occupational therapy assessment of Student. Ms. Morris was a licensed occupational therapist with a master's degree in occupational therapy. She had been an occupational therapist since 2009. She had extensive experience administering assessments and providing occupational therapy to students who were, or might be, eligible for special education and related services. Student presented no persuasive evidence to challenge the validity of Ms. Morris's credentials as an assessor or the validity of the assessment she administered.

142. Ms. Morris's assessment report indicated that she utilized a variety of assessment tools and instruments designed to gather relevant functional, developmental and academic information to assess Student's specific area of occupational therapy needs. She consulted with staff, reviewed Student's work samples, observed Student in his classroom, and conducted an observation of Student in therapeutic directed activities. Ms. Morris also administered standardized assessments to determine Student's OT needs: The Bruininks-Oseretsky Test of Motor Proficiency, the Developmental Test of Visual Perception, and the Sensory Processing Measure. Ms. Morris testified without contradiction that all test instruments she used were technically sound and that none of the testing instruments were biased in any way. She confirmed that the standardized testing she used was proper for

children in Student's age group. She tested Student in English, his only known language. The testing was in a form most likely to yield accurate information. The assessment was used for purposes for which the assessment was valid and reliable. Ms. Morris followed the test publishers' directions and protocols. Ms. Morris was trained to administer the testing and did so in accordance with testing instructions.

143. The evidence indicates that Ms. Morris was a qualified, trained and knowledgeable occupational therapy assessor. The evidence indicates that the assessment instruments were appropriate, valid and tailored to determine Student's performance on sensory processing and on fine motor and visual motor tasks in school.

144. Ms. Morris compiled her assessment results in a written report that included all observations, test results, consideration of Student's functional levels at school, and a reasoned determination that Student did not require occupational therapy services to access his educational curriculum. The report noted Student's relevant behavior during observation, and the relationship of that behavior to his academic functioning.

145. Student did not present the testimony of an occupational therapist to counter Ms. Morris's assessment, findings, or recommendations. Student failed to present any persuasive evidence which contradicted the validity of Ms. Morris's competency as an assessor, her assessment, or her assessment report. Student contended that Ms. Morris's assessment and report were invalid because she made an editorial error in the summary portion of her report by inadvertently reporting Student's visual motor integration score was in the 79th percentile, when, in fact, it was his standard score that was a 79, placing Student in the eighth percentile. However, the true scores are clearly delineated in the charts Ms. Morris included for the assessment in question, and the scores were clearly discussed at Student's IEP team meeting. Ms. Morris's summary acknowledged that Student scored very low in visual motor integration, explaining that the low score was due to Student raising his pencil off the page during the test rather than to any actual fine motor deficits he had. Student has not offered any persuasive evidence or argument that an editorial error should invalidate an otherwise adequate assessment.

146. Student also argued that Ms. Morris's assessment was invalid because she did not review Kaiser's occupational therapy assessment. However, the report was not in Student's educational file and Mother did not attach a copy of it to the input form she prepared at Ms. Morris's request. Ms. Morris did have occasion to review the report after completing her assessment. She testified that the report would not have altered her testing of Student and would not have changed her recommendation that Student did not qualify for educationally based occupational therapy services. Student presented no persuasive evidence that Ms. Morris's conclusions were incorrect.

147. Student also argued that he had dysgraphia and that Ms. Morris should have addressed that. Dysgraphia is a neurological disorder and can only be diagnosed by a psychologist. Although Dr. Palmer had found that there were signs Student suffered from dysgraphia, he did not make a concrete diagnosis because he did not test for it. More

significant is that Dr. Passaro did not make that diagnosis or even imply that Student had dysgraphia, either in his report or his testimony at hearing. There is no persuasive evidence that Student had dysgraphia.

148. Capistrano has demonstrated by a preponderance of the evidence that Ms. Morris's February 19, 2015 occupational therapy assessment was properly conducted and is appropriate. Student presented no persuasive evidence that contradicted Ms. Morris's findings or recommendations, or supported his contention that Ms. Morris's assessment was invalid, or that her report was legally insufficient. For these reasons, Capistrano is not required to provide Student an independent evaluation in the area of occupational therapy at public expense.

### *Remedies*

149. School districts may be ordered to provide compensatory education or additional services to a student who has been denied a FAPE. (*Parents of Student W. v. Puyallup Sch. Dist., No. 3* (9th Cir. 1994) 31 F.3d 1489, 1496.) The authority to order such relief extends to hearing officers. (*Forest Grove Sch. Dist. v. T.A.* (2009) 557 U.S. 230, 243-244, fn. 11 [129 S.Ct. 2484].) These are equitable remedies that courts and hearing officers may employ to craft "appropriate relief" for a party. (*Parents of Student W. v. Puyallup Sch. Dist., No. 3, supra*, 31 F.3d at p. 1496.) An award of compensatory education need not provide "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 v. District of Columbia* (D.C. Cir. 2005) 401 F.3d 516, 524.) The award must be fact-specific. (*Ibid.*)

150. Student requested reimbursement for Dr. Passaro's assessment. Dr. Passaro's assessment was vital to finding that Student qualified for special education under other health impairment, and for determining accommodations, goals and services for that disability. It is therefore equitable for Districts to fund Dr. Passaro's assessment. Mother provided uncontroverted testimony that she paid Dr. Passaro \$4,500.00 for his assessment. Districts shall therefore pay Mother \$4,500.00, as reimbursement for that assessment.

151. Districts denied Student a FAPE by failing to offer appropriate accommodations, goals and services in his February 20, 2015 IEP. It is therefore equitable to order Districts to provide Student some compensatory services. Evidence showed that Student benefited from the specialized academic instruction that was offered in his January 2016 IEP. Consequently, it is equitable for Districts to provide Student 30 hours of compensatory specialized academic instruction, representing one hour weekly of specialized academic instruction from February 2015, through the January 2016 IEP.

152. Student makes several other requests for relief in his written closing argument, including hundreds of hours of compensatory education. However, Student's requests for remedies have no evidentiary support in the record because Student presented no evidence

concerning appropriate relief, with the exception of testimony from Dr. Passaro about the University of California at Irvine's Child Development Center.

153. Dr. Passaro's assessment report recommended the Child Development Center as a possible placement for consideration by Student's IEP team. His report did not state that it is the only placement in which Student could receive a FAPE. Rather, it stated that individualized academic instruction in conjunction with a general education placement might be a more appropriate means of ensuring Student receives a FAPE.

154. At Student's IEP team meeting on May 10, 2016, Dr. Passaro clarified that he felt a general education placement with specialized academic instruction in a separate setting to address Student's written expression deficits should be utilized first. He agreed that Student should only be removed to a more restrictive setting if he did not make progress. Dr. Passaro confirmed at hearing that he was not stating that Student required placement in a non-public school. Student presented no evidence that he required a non-public school placement to receive a FAPE or that a non-public school placement was an appropriate remedy for Districts' failure to find him eligible for special education under other health impaired as of February 2015.

155. Additionally, the Child Development Center is not a certified non-public school. Administrative Law Judges are not permitted under the Education Code to order school districts to prospectively place students at private schools that are not certified as a non-public school by the Department of Education. (Ed. Code, § 56505.2, subd. (a).)

156. Student has failed to provide any persuasive evidence for the other remedies he has requested.

## ORDER

1. Within 45 calendar days of the date of this decision, Districts shall reimburse Mother for the full cost of Dr. Passaro's assessment, in the amount of \$4,500.00 as indicted in Dr. Passaro's invoice. Documents submitted in this hearing constitute adequate proof of payment by Parent to Dr. Passaro.

2. Districts shall provide Student with 30 hours of compensatory education in the area of English language arts, including but not limited to written expression, by either a certified special education teacher, or a non-public agency, at Districts' discretion. Mother may decide whether to use the hours before school, after school, during summer, or during other school breaks, except that if Districts select to have the services provided by one of their special education teachers, Districts will not be required to provide the instructional hours before 7 a.m. in the morning or after 6 p.m. at night or on weekends, unless the chosen teacher agrees otherwise. If Districts choose to provide the hours through a non-public agency, Mother shall arrange mutually agreeable hours with the agency, outside of Student's regular school hours.

3. Districts shall begin directly funding the compensatory hours within 45 calendar days of this Order. If the provider cancels a session, the time will be credited back to Student. If Student cancels a session with a least 48 hours' notice, the hours shall be credited back to Student. If Student cancels a session with less than 48 hours' notice, Student will forfeit the hour or hours for the session. Student shall have one calendar year from the date Districts notify him that they have arranged funding for the compensatory instruction to utilize the 30 hours. Any hours not used within the year shall be forfeited.

4. The hours of instruction are ordered as compensatory education to Student. Student is entitled to the hours whether he remains enrolled at Community Roots or remains enrolled in a Capistrano school, and remains entitled to them for the stated time period even if he is no longer a resident of Capistrano before the year available to use the services is up.

5. Districts' February 19, 2015 psychoeducational and occupational therapy assessments met all statutory requirements. Districts are not required to fund occupational therapy or psychoeducational independent educational evaluations except to the extent ordered in paragraph 1 of this Order as compensatory education for Districts' denial of FAPE to Student.

6. All other relief sought by either party is denied.

#### PREVAILING PARTY

Education Code section 56507, subdivision (d), requires that this Decision indicate the extent to which each party prevailed on each issue heard and decided in this due process matter. Student prevailed on that portion of Student's Issue 4 that pertained to the failure to find him eligible under other health impaired at the February 20, 2015 IEP team meeting. Student also partially prevailed on Student's Issue 5(b), (c), and (d) with regard to Districts' failure to develop goals or provide him with accommodations or services to address his ADHD in the February 20, 2015 IEP. Student partially prevailed on Student's Issue 6(c) only as to Districts' failure to develop goals to address his ADHD in the January 6, 2016 IEP. Districts prevailed on all other issues.

## RIGHT TO APPEAL

The parties in this case have the right to appeal this Decision by bringing a civil action in a court of competent jurisdiction. (20 U.S.C. § 1415(i)(2)(A); 34 C.F.R. § 300.516(a); Ed. Code, § 56505, subd. (k).) An appeal or civil action must be brought within 90 days of the receipt of this Decision. (20 U.S.C. § 1415(i)(2)(B); 34 C.F.R. § 300.516(b); Ed. Code, § 56505, subd. (k).)

DATED: August 26, 2016

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DARRELL LEPKOWSKY  
Administrative Law Judge  
Office of Administrative Hearings