

BEFORE THE  
OFFICE OF ADMINISTRATIVE HEARINGS  
STATE OF CALIFORNIA

In the Matter of:

PARENTS ON BEHALF OF STUDENT,

v.

ROSS VALLEY SCHOOL DISTRICT.

OAH Case No. 2014020175

DECISION

On February 4, 2014, Student filed a request for a due process hearing (complaint) with the Office of Administrative Hearings, naming the Ross Valley School District. OAH granted a continuance for good cause on March 21, 2014.

Administrative Law Judge Peter Paul Castillo heard this matter in San Anselmo, California, September 2 through 5, and 9, 2014.

Brett Smith Allen, Attorney at Law, represented Student. Father attended for the entire hearing, and Mother was present on September 2 and 5, 2014. Student was not present at the hearing.

Lenore Silverman, Attorney at Law, represented District. Teresia C. Louer, District's Director of Student Support Services, was present for the entire hearing.

At the conclusion of the hearing, the matter was continued to September 29, 2014, at the parties' request to file written closing briefs. The record was closed on September 29, 2014, when the parties filed closing briefs and the matter was submitted for decision.

## ISSUES<sup>1</sup>

Issue 1: For the 2013-2014 school year to the present, did District deny Student a free appropriate public education by violating his and Parents' procedural rights, since it prevented Parents from meaningfully participating in Student's educational decision-making process and/or denied Student an educational benefit by failing to adequately assess him in the following areas of suspected disabilities:

- a. Neuropsychological;
- b. Behavior;
- c. Speech and language;
- d. Reading; and/or
- e. Occupational therapy?

Issue 2: From the 2013-2014 school year to the present, did District deny Student a FAPE by failing to offer him an appropriate educational program in the least restrictive environment by failing to offer:

- a. Appropriate goals;
- b. A one-to-one tutor;
- c. Therapy to address his dyslexia; and
- d. A placement and services that met Student's unique needs?

## SUMMARY OF DECISION

This Decision holds that while Student has behavioral and social-emotional deficits, he does not have any auditory or visual processing disorder that District needed to assess or address in his IEP. Further, Student does not have a reading disorder or speech and language impairment that District failed to assess. District established that Student's attention deficit manifests itself in conduct that makes it appear that he has a processing disorder due to his inability to maintain attention. Further, this inability to maintain attention exacerbates

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<sup>1</sup> The issues were framed in the August 22, 2014 Order Following Prehearing Conference. The issues have been rephrased and reorganized for clarity. The 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.)

Student's social communication and behavior deficits. District accurately assessed Student for this condition, and provided adequate goals and services to address it.

Due to Mother's serious, long-term illness, Student exhibits anxiety that interferes with his ability to access the curriculum and for which he requires counseling. Student did not establish that his educational struggles related to his attention deficits and anxiety require exclusively small class instruction to receive a FAPE, and that District's learning center classroom and in general education classes with aide support cannot meet his unique needs.

Student does require counseling and behavioral supports to address his attention deficits and anxiety. However, District's offer for the 2013-2014 year, failed to offer Student any counseling and adequate transition plan for him to make meaningful progress, especially since half his school day would be in a general education setting. As to the May 13, 2014 individualized education program, District addressed those deficits in the 2014-2015 school year with a detailed transition plan, counseling, and behavioral support, which provided Student with a FAPE.

## FACTUAL FINDINGS

### *Jurisdiction*

1. Student is 11 years old and eligible for special education and related services under the category of other health impaired related to his attention deficit hyperactivity disorder. He lives within the boundaries of District with his Parents. District found Student eligible for special education and related services at age six. At the May 14, 2013 IEP team meeting, the District changed Student's secondary special education eligibility from speech and language impairment to specific learning disability, and then changed it back to speech and language impairment at the May 13, 2014 IEP team meeting. Parents did not consent to the change in secondary eligibility category at either IEP team meeting.

### *May 14, 2013 IEP Team Meeting*

2. Student attended a District school during the first half of the 2011-2012 school year, third grade, when Parents removed him in February 2012. Parents unilaterally placed Student at STAR Academy,<sup>2</sup> a certified non-public school, in March 2012. Student continuously attended STAR through the end of fifth grade, the 2013-2014 school year. Student, at the time of the hearing, was not attending STAR or any public or private school.

3. The parties negotiated a settlement agreement on January 26, 2012, which they extended on August 9, 2012. District agreed to partially reimburse Parents for Student's attendance at STAR through the end of the 2012-2013 school year. Parties agreed that

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<sup>2</sup> STAR is not an acronym.

District could observe Student at STAR and assess him in preparation for making an IEP offer for the 2013-2014 school year in May 2013. Parents did not consent to the District's May 14, 2013 IEP offer.

4. Before the May 14, 2013 IEP team meeting, District conducted psychoeducational, academic, speech and language, and occupational therapy assessments at STAR, and observed Student. District IEP team members discussed draft goals, accommodations, services and placement before the IEP team meeting. The May 14, 2013 IEP offered Student goals in the areas of math, reading, writing, speech and language, and behavior with various classroom accommodations focused on his attention deficit, writing difficulties and anxiety. District offered a full-time one-to-one aide, occupational therapy and speech and language services, and to assist Student's transition back to a public school, behavior intervention services. For placement, District offered a combination of academic instruction in its learning center, which is a cross-categorical special day class, and general education instruction for physical education, science and social studies.

#### ASSESSMENTS

##### *PSYCHOEDUCATIONAL AND ACADEMIC ASSESSMENTS*

5. District school psychologist, Ann Butler, conducted the psychoeducational assessment, while Ana Amello, District special education teacher, conducted the academic assessment. Ms. Butler has a Bachelor's of Science in psychology, Masters of Arts in school psychology, and received her credential in 2008 to be a California school psychologist. Ms. Butler was a part-time school psychologist for two years, full-time since August 2009, and with the District since August 2010. Her duties include, in part, conducting assessments, school based counseling, and drafting IEP goals. Ms. Amello, at the time of her assessment, was a special education teacher in a District learning center.

6. Ms. Butler conducted Student's last psychoeducational assessment in 2011, which included formal testing to assess his cognitive abilities, executive functioning, and attention and processing deficits. Based on Ms. Butler's review of Student's educational records, including information from STAR, observing Student at STAR and interviewing him and his language arts teacher, Gail Hartwick, Ms. Butler determined that she did not need to administer any further formal assessments, other than the Behavior Assessment System for Children, Second Edition. Ms. Butler made that decision because no information existed that indicated that the prior assessment results were not accurate or needed updating.

7. Student contends that he has various processing and academic deficits, especially in the areas of central auditory processing, visual processing, dyslexia,<sup>3</sup> and

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<sup>3</sup> Dyslexia is a learning disability that hinders the development of reading skills. Individuals with dyslexia have difficulty with accurate and/or fluent word recognition, spelling and word decoding abilities. Dyslexia may affect an individual's reading

dysgraphia. He contends that District failed to assess him these areas, and needed to conduct a thorough neuropsychological assessment. Ms. Hartwick<sup>4</sup> attempted to demonstrate that Student has a central auditory processing disorder based on her classroom work with Student. She was Student's language arts teacher for his entire attendance at STAR. However, Ms. Hartwick failed to demonstrate that she understood what the alleged processing disorders entailed as she used layperson understanding of what encompasses central auditory processing or dyslexia, and not an educational definition. While Ms. Hartwick is an excellent teacher, based on all who observed her, her opinion as to areas of suspected disabilities that District needed to assess Student is afforded little weight due to her lack of understanding of what constitutes a suspected disability to be assessed.

8. Student's expert, Dr. Elea Bernou,<sup>5</sup> did not provide credible evidence that information existed at the time of the May 14, 2013 IEP team meeting, that should have led District to conduct a neuropsychological assessment, or further assess Student's purported processing deficits. Dr. Bernou reviewed Ms. Butler's 2011 and 2013 psychoeducational assessments, but could not point to anything in the assessment results that indicated that Student had a processing disorder that required further assessment. Further, Dr. Bernou did not administer any formalized testing that might show that Student had a processing disorder that required further assessment. Ms. Butler administered various assessment tools in 2011 that would indicate whether Student might have an auditory or visual processing deficit. The results did not indicate any such deficit. Also, Student did not present evidence that these deficits could appear between the 2011 and 2013 assessments. The results established more that Student had deficits related to his attention problems that were similar in appearance to a processing disorder, such as delay in responding to instructions, or difficulty in organizing his writing.

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comprehension abilities. Dyslexia has a neurobiological basis and is defined as a medical condition in the Diagnostic Standards Manual.

<sup>4</sup> Ms. Hartwick is a credentialed special education teacher and has taught at STAR for the past six years. Before that, she had extensive experience as a general education, elementary school teacher.

<sup>5</sup> Dr. Bernou is a licensed psychologist. She has a bachelor's degree in psychology, and a Psy.D., a doctorate, in psychology in 1997. She has worked with children since 1992, first as a child care and school counselor, then as a psychology intern and extern as she obtained her Psy.D., to now a licensed psychologist and neuropsychologist. Her present duties in private practice include conducting neuropsychological assessments, consulting with parents, students and school districts, attending IEP team meetings, providing testimony if needed. The disabilities of the children she assesses is broad and ranges from learning disabilities, developmental disabilities, such as autism spectrum disorder, emotional disturbance, and cognitive disabilities, to name a few.

9. District's expert, Pamela Mills, Ed.D., Ph.D.,<sup>6</sup> was convincing that Student's behavior that Student contends indicated an auditory processing deficit are in fact related to attention deficits. Dr. Mills reviewed all of the District assessments and Dr. Bernou's consultation report. She explained that it is easy to believe that Student has a central auditory processing disorder when, in fact, the behaviors Student exhibits are related to attention deficits and in fact the Diagnostic Statistical Manual, Fifth Edition, requires the practitioner to rule out attention deficits before making a finding of central auditory processing disorder.

10. In reviewing Ms. Butler's 2011 assessment, Dr. Mills clearly showed how the results on the Test of Auditory Processing did not indicate an auditory processing disorder as the average scores contraindicated such a finding. Further, no subsequent information existed between the 2011 and 2013 assessments that warranted further assessment of Student for a central auditory disorder because his inattention and problems following directions are explained by his attention deficits. In contrast, Dr. Bernou's analysis as to assessing Student for auditory processing deficits was simplistic by focusing on the symptoms that could indicate a processing disorder without first ruling out attention deficit.

11. Regarding whether Student may have a specific learning disability, Student did not present evidence that the cognitive testing that Ms. Butler administered in 2011 was not accurate in determining that Student's full-scale IQ was 89.<sup>7</sup> Ms. Hartwick was not credible that Student's reading level was not at grade level as her end of the year report card stated and her explanation that the progress notation reflected progress at a lower reading ability, not grade level, was not plausible based on Student's progress on his STAR reading goals, which Ms. Hartwick completed. Also, Student's scores on the Kauffman Test of Educational Achievement, Second Edition, and Grey Oral Reading Test, Fourth Edition, that STAR administered in the Spring of 2013 supported average reading ability.

12. Student's math teacher at STAR did not testify, and Student did not present credible evidence that his math abilities were not in the average range. Ms. Amello's

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<sup>6</sup> Dr. Mills has a master's degree in education, doctorates in clinical psychology and educational psychology, and a certification in neuropsychological assessment. She has life California credentials for teaching and counseling, and a school psychologist and administrative services credentials. She is licensed both as a clinical psychologist and an educational psychologist. Dr. Mills taught for about 15 years at elementary and middle schools. She worked as a school psychologist for San Francisco Unified School District, and for several years was the head of school psychologists in that district, supervising school psychologists. She has administered thousands of assessments and consulted on many more assessments. She is now a psychologist and educational consultant in private practice, working with school districts and parents. She has testified in due process hearings for both students and districts.

<sup>7</sup> The mean full-scale IQ score is 100.

academic testing with the Woodcock-Johnson Tests of Academic Achievement, Third Edition, the STAR Kauffman scores, and Student's report cards and progress on goals all established average math skills.

13. The parties do not dispute Student's academic weakness is writing as evidenced by his report card, goal progress, and testing by STAR and District. Student claims that the source of his writing difficulties is dyslexia and District failed to assess him in this area. However, Student did not establish why District needed to assess him as to dyslexia. District knew that Student had a significant writing deficit as established by the academic testing it and STAR conducted and his progress STAR writing goals. Even with Student's writing deficit, he made reasonable progress on his writing goals that STAR drafted with the direct instruction provided by Ms. Hartwick, with no special dyslexia instruction. Therefore, Student did not establish the need for further writing assessment.

14. Student also contends that he required a neuropsychological assessment to discover the source of his working memory deficits. However, Ms. Butler's 2011 and 2013 assessments showed that while he demonstrated some weakness in this area, his scores were still in the low average range. The source of the 'low' scores related to his attention deficit because his scores on various tests that required good working memory, like the digit-span test that required Student to remember number sequences in increasingly hard patterns, as Dr. Mills established. Additionally, any dip in Student's working memory is more likely related to performance anxiety and taking time to make sure that he has the correct answer, which Ms. Butler documented.

15. Regarding Student's behavior problems, Student did not establish that as of the May 14, 2013 IEP team meeting, District needed to conduct further assessment in this area, including a neuropsychological assessment. The Behavior Assessment System for Children, Second Edition, surveys that Ms. Butler had Ms. Hartwick and Student complete showed that he had attention difficulties. Ms. Hartwick noted that Student was at-risk for problems related to anxiety, internalizing problems, and learning problems, which have been consistent issues for Student, especially with him worrying about his Mother's health. Student's behavior rating scale showed deficits with his lack of self-reliance, which Ms. Butler observed at STAR as Student repeatedly sought reassurance from Ms. Hartwick regarding the assignment and his progress.

16. Accordingly, Student failed to establish that District needed to conduct any neuropsychological testing before the May 14, 2013 IEP team meeting as the testing District conducted documented accurately his strengths and weaknesses, and the causes for his difficulties.

#### *SPEECH AND LANGUAGE*

17. Caitlin O'Dea, District's speech and language pathologist during the 2012-2013 school year, conducted a speech and language assessment. Ms. O'Dea administered formal testing, along with reviewing Student's prior District speech and

language assessment and speech and language assessment conducted by Leah Proper, STAR's speech and language pathologist.<sup>8</sup> Regarding Student's contention that he had an auditory processing deficit, District's speech and language expert, Pamela Macy,<sup>9</sup> demonstrated how the testing Ms. O'Dea conducted with the Test of Problem Solving, Third Edition, and Clinical Evaluation of Language Fundamentals, Fourth Edition, showed that Student demonstrated auditory processing in the average range. Student did not have a speech and language expert testify to refute Ms. Macy's expert opinion. The Language Processing Test, Third Edition, and Comprehensive Assessment of Spoken Language, administered by STAR, gave no indication of any language processing deficit as Student's scores on both tests were in the average range. Further, Dr. Bernou, while she has general knowledge of speech and language services, is not an expert as to the tests speech and language pathologists administer to determine possible auditory processing deficits.

18. Student has had significant speech and language deficits involved social communication, which District found in its 2011 and 2013 speech and language assessments. While Student's overall score on the Social Language Development Test – Elementary, was in the low average range, Student demonstrated significant weakness with making inferences that involve nonverbal cues, assuming the perspective of the other speaker, and inferring what the other person is thinking, as his scores were below average. Although his scores were a bit higher, Student was in the below average range regarding interpersonal negotiations. Student attempted to demonstrate through the testimony of Ms. Hartwick and Father that his social communication deficits were more severe than what Ms. O'Dea documented. However, school observations by Ms. Butler and John Michael Gomez, another District school psychologist, corroborated Ms. O'Dea's findings regarding the severity of Student's social communication deficits. Student was able to generally communicate with his classmates, but did have some difficulties related to his attention deficits and not displaying patience with others. However, even with his social communication deficits, Student had friends at STAR and was able to express his needs to his teachers and fellow classmates, albeit slower.

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<sup>8</sup> Ms. Proper did not testify at the hearing and her educational and work experience is not known.

<sup>9</sup> Ms. Macy has a bachelor's degree in speech pathology and audiology, a master's in speech pathology, and a master's in education. She has a clinical certificate of competence from the American Speech and Hearing Association and is licensed by the State as a speech pathologist. She also has a rehabilitation credential in hearing and speech and an administrative services credential. Her experience in assessing students began in 1970. From 1997 to 2009 she was the supervisor and program administrator for related services in San Francisco, including speech and hearing services. Ms. Macy has personally assessed many students, including students with auditory processing difficulties, and has reviewed many other assessments. She is now a speech pathologist and educational consultant in private practice who serves both students and school districts.

19. Student did not establish that as of the May 14, 2013 IEP team meeting District needed to further assess Student in the area of speech and language. Information that District possessed at that time did not establish that he might have an auditory processing deficit that required further testing. District acknowledged that Student had social communication deficits that required goals and services, and Student failed to present sufficient evidence to establish that the severity of his deficits were much worse. Thus, District assessed Student in all areas of suspected disability related to speech and language.

#### *OCCUPATIONAL THERAPY*

20. Barbara Almquist<sup>10</sup> conducted an occupational therapy assessment for the May 14, 2013 IEP team meeting. In 2011, Ms. Almquist recommended that Student receive occupational therapy services for his fine motor skills and provided occupation therapy during part of the second grade. For her 2013 assessment, Ms. Almquist reviewed her prior assessment, plus information from STAR as to the occupational therapy services it provided Student. Ms. Almquist was not concerned about Student's gross motor skills based on her prior assessment and information from STAR. Ms. Almquist conducted brief gross motor testing that indicated no problems. Regarding fine motor development, she administered the Developmental Test of Visual Perception, Second Edition and Bruniniks-Oseretsky Test of Motor Proficiency, Second Edition, plus a handwriting exercise and had him draw a person.

21. Ms. Almquist's classroom observation of Student cutting paper with scissors showed that he cut precisely, even though Student did not believe so. Student demonstrated performance anxiety, as he did not believe that he was performing well when in fact he was. On the visual perception test, Student was given geometric shapes to copy that became increasingly more difficult and he was also asked to reproduce grid patterns, and he was in the high average range on both subtests. He showed average ability on the Bruniniks-Oseretsky in coloring shapes, drawing lines through narrow boundaries, connecting dots, paper folding on lines and cutting out a small circle. His ability to copy a written sentence was in the average range, and so was his ability to draw. This indicated that the occupational therapy services provided at STAR improved his fine motor skills so that he no longer required any.

22. Student attempted to demonstrate that his fine motor skills were worse than what Ms. Almquist reported. However, he did not present any expert evidence to support this contention such as his occupational therapist at STAR. Nor did Student present any copies of his written work. Additionally, although Ms. Hartwick described Student as slow when producing written work, this was not due to an inability to write correctly. Rather it was because Student did not trust his written work, so he would retrace what he had already

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<sup>10</sup> She had assessed Student in 2011 as part of his initial assessment. Ms. Almquist is a California licensed occupational therapist, and certified by the National Board in Occupational Therapy. She has worked as an occupational therapist for school districts or county offices of education since 1984, and with the District since 2002.

written, which corresponds to the performance anxiety Ms. Almquist noted in her report, and the anxiety noted by Ms. Butler.

23. Student also claimed that District failed to assess him for sensory processing deficits. Student contended that his behavioral problems in the District general education classroom were caused in part by sensory processing deficits that made it hard for him to focus with the sound and movement in the classroom. However, the information that Ms. Hartwick presented was more consistent with Student's attention deficit and anxiety. Ms. Almquist worked with Student during the 2011-2012 school year and saw no indication that Student had sensory processing issues that she needed to assess. The 2013 classroom observations of Mr. Gomez and Ms. Butler did not indicate any problems with sensory processing as movement in the classroom did not bother Student. This is explained in part, but not entirely, by Ms. Hartwick's smaller classroom that helped Student better focus even with his attention deficit and reducing his anxiety level. Finally, Dr. Bernou lacked sufficient expertise in this area to give an opinion about whether District needed to assess Student in this area. Therefore, Student failed to establish that District needed to assess Student further regarding occupational therapy, including sensory processing deficits.

*May 14, 2013 IEP Team Meeting*

24. District convened an IEP team meeting on May 14, 2013. Both Parents and their advocate attended, along with the District assessors, a general education teacher, and Toni Beal, then the District Director of Student Services. Parents invited representatives from STAR to attend, but none did. District reviewed its assessments and information from STAR as to Student's progress and his present levels of performance. According to documents from STAR prepared close to the time of the IEP team meeting, Student had met all his academic goals except one for reading. Student had met his pragmatic speech and language goals, and made significant progress on his occupational therapy goal.

GOALS

25. District proposed math, writing, reading comprehension, pragmatic language, and coping skills goals. District did not propose any occupational therapy or occupational therapy goals. The IEP team discussed the proposed goals. Parents and their advocate said little about the proposed goals as their focus at the IEP meeting was objecting to District's proposed placement.

26. Ms. Almquist's assessment established that Student did not need gross or fine motor or sensory processing goals, as he did not have deficits in these areas that prevented him from accessing the school curriculum. Student failed to present evidence that established that he had any gross motor needs as everyone said he is a good athlete, and no indication of sensory processing deficits. Further, his writing samples did not indicate a need for fine motor goals.

27. For math, the District's assessment and information from STAR had Student's abilities to be primarily in the average range, except for addition and subtraction of multi-digit numbers and word problems. District created goals for these two areas. Student failed to demonstrate that these two goals were not adequate to address his math needs, especially since his STAR report card and progress reports and District and STAR academic assessments indicated that he was working at or near grade level, except for these two areas.

28. Student had grade level reading ability, based on assessment information from District and STAR, plus his STAR report card, and progress on goals. Regarding his reading comprehension, Student did exhibit some difficulty with high-level comprehension questions. However, Student failed to establish that he needed further reading goals as the information from STAR undercut his contention that his deficits were greater than what District found. Ms. Hartwick was not believable as she provided no credible explanation why she referred to a child as "proficient" in a skill area on a report card when the child was not at grade level. Also STAR assessment information showed Student did not require a reading goal.

29. District had three speech and language goals that focused on social communication. The goals called for Student to understand social cues, identify multiple interpretations, and to improve interpersonal negotiations. Ms. Macy explained the adequacy of these goals based on her review of the assessment information from both District and STAR, and progress on his STAR speech and language goals. Student did not establish that the proposed goals were inadequate to meet his pragmatic language deficits, or even proffer evidence as to what additional speech and language goals he needed to make meaningful educational progress.

30. The only behavior goal drafted focused on coping skills as Student had a tendency to shut down when faced with a difficult assignment. District assessors observed this during their own testing, while observing Ms. Hartwick's classroom, and noting Ms. Hartwick's description of Student's conduct in these situations. District's proposed goal was built upon what Ms. Hartwick did in her class to reassure Student, and to get him to start work and stay on task. District's proposed goal adequately addressed his anxiety and concern that he was not adequately completing his schoolwork.

31. Missing from District's proposed goals is anything to deal with attention deficits and inability to stay on task. District asserts that many of Student's behaviors that Student's witnesses described at hearing as evidence of auditory processing, reading, or writing deficits, are in fact related to attention deficit. However, District failed to include a goal to address Student's inability to maintain focus, which is the primary reason why he qualifies for special education services. District had sufficient information from Ms. Butler's assessment, Mr. Gomez's observation, and Ms. Hartwick to develop a goal to work on Student's attention deficit, especially with the proposal that about half his school day be in a general education class. Further, Student's attention deficit problems were more likely to arise in a general education setting, based on District's previous experience, which led District to offer a one-to-one aide.

32. Therefore, Student failed to establish that District's proposed IEP did not contain adequate academic, speech and language or occupational therapy goals. However, Student established that District did not include an adequate goal to deal with his attention deficit. Student incorrectly believed that the behaviors identified as related to attention by District, were reflective of auditory processing deficits. However, the observed behaviors were still significant enough to prevent Student from accessing the curriculum, especially in a general education classroom with the added distractions. Therefore, District's failure to include a goal to focus on Student's lack of attention would prevent him from making meaningful educational progress.

#### SERVICES

33. The May 14, 2013 IEP offered Student a full-time aide for the entire school day, plus three hours a day of specialized academic instruction, both individual and group. District offered a half-hour a week of individual and a half-hour small group speech and language therapy, and occupational therapy consultation for an hour a week. For part of the school year, District offered behavior intervention services to assist in his transition from STAR, with 300 minutes of transition services and staff training lasting through October 31, 2013, and two hours a week of undefined behavior services through the end of the 2013 calendar year. Student asserted that District's offered services were inadequate to meet his unique needs, especially in the areas of social-emotional behavior.

34. Regarding speech and language services, Student did not present any credible evidence that the offered services were not adequate, especially in light of Ms. O'Dea's assessment. The hour a week of speech and language therapy, divided between individual and small group, was sufficient to meet his pragmatic language needs as he did not have auditory processing or any other speech and language needs.

35. The meeting notes for the IEP team meeting indicated that District was not going to offer any occupational therapy services. However, the services page of the IEP states an offer of an hour a week of occupational therapy consultation. The inclusion appears to be an oversight by copying over this service from Student's prior IEP. In any event, Student did not require occupational therapy services based on Ms. Almquist's assessment and Student failed to present sufficient evidence that he had gross or fine motor or sensory processing deficits that required such services.

36. Student contended that he required intensive academic support due to the severity of his academic deficits, especially in reading and writing, as well as auditory processing and behavioral deficits. Student's academic deficits were not as severe as Student contended based on District's and STAR's academic testing. District's 180 minutes a day of specialized academic services was adequate to meet his unique needs because of the small class size of 12 students, two special education teachers and Student having his own aide. Based on Student's present levels of performance, he did not require specialized academic instruction for more than three hours a day. Further, the proposed aide would accompany

Student to his general education classes and be there to keep him on-task, provide positive reinforcement, and assist if he needed any breaks.

37. However, the behavior supports District offered were not adequate to meet Student's unique needs. District contends that Student did not have as significant behavioral needs as he asserts, but then contends it is better able to meet his behavioral needs with its experienced school psychologists, who could create a behavior support plan. However, District proposed only 300 minutes of behavioral services at the start of the school year to address Student's transition, with an additional hour a week through the end of the calendar year with no mention what those behavior services would address. The meeting notes do not provide any assistance as to District's offer, other than the services were to assist with Student's transition to a general education campus. This failure is concerning based on District's contention that it could provide behavior services, while STAR did not. While Student did not display significant behavior problems at STAR, that is in part due to the small class size of four students, since he did not receive behavioral supports there. Because Student had not attended a District general education class, which have about 30 students, for over a year-and-a-half, behavior services were vital based on his past problems in general education classes before Parents removed him, as documented in Ms. Butler's assessment reports. Also, behavior intervention services would be necessary to work with Student's aide and general education teachers to address any problems that might arise for the entire school year.

38. Ms. Butler's 2013 assessment recommended that Student have access to mental health supports, such as counseling, to address his anxiety and self-esteem issues. Student established that his needs in these two areas were significant enough that he required school based counseling. District's assessments documented Student's poor self-esteem and his constant need for positive reinforcement. Additionally, Student had a significant level of anxiety caused by his Mother's health issues that no one disputed. Of special concern is the change to a larger classroom that could exacerbate Student's poor self-esteem and anxiety issues. Expecting a fifth grade Student to access counseling by himself is unrealistic, especially as the IEP does not discuss how Student would independently access counseling services. Therefore, District needed to offer Student, as a related service, school-based counseling to permit him to make meaningful educational progress.

39. Student did not establish that District's offer of three hours a day of specialized academic instruction was insufficient to meet his unique academic needs, which are not as severe as he contends. Also, District provided Student with a full-time one-to-one aide who could work with him on his academics, and keep him on task in both the learning center and general education classroom. Student did establish that District's behavior services were not adequate to meet his unique needs, especially since he would spend half his school day in a general education class. District should have offered school-based counseling to address his anxiety and lack of self-esteem, which one reasonably could expect to be worse in a larger class, based on his history. Also, the IEP only had behavior services go through the end of the 2013 calendar year, with no explanation why they would not extend through the entire school year. Accordingly, Student established that District's failure

to provide school based counseling and behavior services for the entire school year denied him a FAPE because he required those services to make meaningful educational progress.

#### PLACEMENT

40. District offered Student placement for half the school day in its learning center classroom for his core academic instruction, and the remainder in general education for social studies, science, and physical education. The learning center had approximately 12 students, from all elementary grades, with two special education teachers, two classroom aides, plus one-to-one aides if required by that student's IEP. Student asserted that the learning center was not adequate to meet his unique needs because it had too many students and was too noisy. Further, Student contends that with his significant processing deficits, attention deficit and academic deficits, he needs a full day small classroom, like at STAR.

41. As of the May 14, 2013 IEP team meeting, District had two learning center classrooms, kindergarten through second grade and third through fifth grade. Parents observed the third through fifth grade learning center. At the IEP team meeting, District discussed that it was going to combine the learning center classrooms. District talked about how the revamped learning center would be set up with workstations for small group instruction, opportunity for direct individual instruction, computer instruction, and the reading and math programs they would use with Student. For general education, District discussed how the one-to-one aide would work with Student to help him remain on task and to take breaks if needed, and how the learning center teachers would interact with the general education teachers.

42. William Hendson has taught in the learning center for the 2013-2014 and 2014-2015 school years. He was not teaching at Hidden Valley as of the May 14, 2013 IEP team meeting and did not attend the meeting. However, his testimony of how the learning center operated last school year and now, and its educational program, matches District's presentation at the May 14, 2013 IEP team meeting. Dr. Bernou and Father visited the learning center in May 2014,<sup>11</sup> and they contended that the room was too noisy and hectic with the 12 students. Regarding the noise, the learning center had movable sound walls. While they are only a few feet tall, they are of sufficient height for a sitting elementary student. Mr. Hendson was convincing that the walls blocked sound while students sat and worked, and stated that Dr. Bernou and Father never sat down to determine whether the sound walls worked. Dr. Mills spent two hours in the learning center and got below the sound wall and noted that it worked well, and further observed that the room was not noisy or hectic at all.

43. Mr. Hendson described the academic programs learning center used, which included those programs discussed in the May 14, 2013 IEP team meeting. While

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<sup>11</sup> While the visit was a year after the May 2013 IEP team meeting, the learning center observed was what District described during May 2013 IEP team meeting.

Slingerland worked in improving Student's reading at STAR, it is not an exclusive program. It is based on Orton-Gillingham, a multi-sensory, kinesthetic, and phonics based reading program, focusing on direct instruction. District had other researched based programs that followed the Orton-Gillingham model. As to Lindamood-Bell, Student did not present sufficient evidence that he requires further instruction in this methodology since he reads at grade level. Nor did he present sufficient evidence that the math program District used would not permit him to make meaningful educational progress. Finally, Dr. Mills was more convincing than Dr. Bernou and Student's other witnesses, based on her years of educational experience and knowledge of reading programs that the academic programs the learning center used are researched based programs designed to meet Student's needs.

44. District adequately addressed his attention deficits with modified assignments, extended time to complete assignments and tests, frequent breaks, repeating directions, continuous positive support and pre-teaching the upcoming work. Student, failed to establish that the offered accommodations and modifications would not address his attention deficits. District designed the accommodations and modifications to reduce the stress placed on Student, and the pre-teaching would be effective in reducing his performance anxiety.

45. For Student's reading comprehension and writing deficits, beyond the accommodations and modifications above, District proposed specific reading strategies to relate themes of his reading to his personal life so they would be easier for him to understand. Use of graphic organizers to assist in both reading and writing would keep him focused and allow him to start his writing assignments more easily since he would not get upset in trying to decide what he needed to write. Finally, District would use multi-sensory techniques in reading, which had been successful at STAR in the Slingerland and Lindamood-Bell reading programs.

46. As to Student attending about half of the school day in general education science, social studies, and physical education, Student failed to present sufficient evidence that his attention deficit and anxiety would prevent him from accessing the curriculum if he had a trained aide in these classes. However, District's failure to offer adequate counseling and behavior support to address his attention deficit and anxiety, would prevent Student from making meaningful educational progress in the general education classes.

47. Student's position that there was no way in which District could meet his unique needs at the Hidden Valley learning center was without sufficient support. The learning center had a low student to adult ratio, especially with Student having a one-to-one aide. The learning center used research-based academic programs that could meet his needs. Student's lack of significant behavior problems in Ms. Hartwick's classroom, along with assessment information that his deficits were not severe as Student contended, supported District's position that Student was ready, with sufficient supports to attend for about half the school day in a general education class for science, social studies and physical education. Dr. Bernou was not convincing that Student could not make meaningful educational progress with the mix of the learning center and general education classes based on her minimal analysis, compared to the thorough analyses of Dr. Mills, Ms. Butler, and Mr. Gomez.

## *Assessments for May 2014 IEP Team Meeting*

48. Parents did not accept District's May 14, 2013 IEP offer, and Student attended STAR for the 2013-2014 school year. Ms. Hartwick was his teacher for language arts, and he continued to receive separate reading instruction with Slingerland and Lindamood-Bell methodology, and separate math instruction. Student did not receive any other related services at STAR for fifth grade. To prepare for the May 2014 IEP team meeting, District proposed, which Parents agreed to, that District conduct a comprehensive triennial assessment before the IEP team meeting. District conducted psychoeducational, academic, speech and language, and occupational therapy assessments. As with the prior assessments, Student asserted that they failed to assess him in all areas of suspected disability.

### PSYCHOEDUCATIONAL AND ACADEMIC ASSESSMENTS

49. Mr. Gomez conducted District's psychoeducational assessment and Cara Chambers, learning center teacher at White Hill Middle School, the academic testing. Mr. Gomez reviewed Student's educational records, especially past assessments and documents from STAR as to Student's progress. Mr. Gomez also interviewed Ms. Hartwick and observed Student in his STAR math and art classes and on the school playground. Mr. Gomez also administered a variety of standardized assessment tools to look at cognitive ability, auditory processing, visual-motor integration, and behavior. Mr. Gomez did request information from Parents, but they did not respond.<sup>12</sup>

50. On the Wechsler Intelligence Scale for Children, Second Edition, Student had average subtest scores as to his verbal comprehension, perceptual reasoning and working memory. However, Student's score as to processing speed was 73, borderline range, where the average score is 100. The score was not unexpected as past assessments and information from Ms. Hartwick showed that Student was slow to get on task and to complete work due to his attention deficits and performance anxiety. Even with the low processing score, Student's full scale IQ was 86, in the low average range. However, the Wechsler manual states that if there is a large discrepancy with subtest scores, the assessor is to use the general ability index, which uses the verbal comprehension and perceptual reasoning scores. With that, Student had a score of 93, which placed him in the average range. Mr. Gomez's finding is consistent with Ms. Butler's 2011 assessment.

51. Mr. Gomez administered the Test of Auditory Processing Skills, Third Edition, and Student's overall score was in the average range, with a score of 90, with 100 being the median score. Student's lowest score in the three subtests comprising this test was 83, low average, for the memory index subtest, which measures how well Student could listen, hear, and repeat sequenced auditory information. Similar to Student's performance on the Wechsler Intelligence working memory subtest, Student required extra effort to complete

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<sup>12</sup> From the time of the assessment through the May 13, 2014 IEP team meeting, Mother was not living with Student due to her illness.

the questions due to problems with remaining focused and not being motivated. Mr. Gomez properly concluded, based on Student's Wechsler and Test of Auditory Processing scores, that Student did not have an auditory processing disorder, consistent with Ms. Butler's 2011 assessment findings. Student's low memory scores are related to his attention deficit and anxiety, which lowers his motivation to complete the questions in those subtests.

52. Dr. Mills was more convincing than Dr. Bernou as to analyzing Mr. Gomez's conclusions. While Dr. Bernou observed Student, and Dr. Mills did not, Dr. Bernou did not conduct any formal testing that would have given her additional information to assist her in giving her opinion. Dr. Mills reviewed the same documents as Dr. Bernou, and Dr. Mills' opinion is given more weight as she is more qualified than Dr. Bernou based on her education and experience, especially in assessing the educational needs of students. Dr. Mills explained based on the test results that Ms. Butler obtained in 2011, and Mr. Gomez's Spring 2014 scores, Student could not have an auditory processing disorder. In contrast, Dr. Bernou appeared to have reached a conclusion by default without any analysis of the assessments. The proper conclusion is that Student's low working memory scores were the result of his attention deficits and performance anxiety.

53. Regarding Student's social-emotional strengths and weaknesses, Mr. Gomez had Ms. Hartwick and Student complete a behavior rating scale questionnaire. Mr. Gomez also used the Conners, Third Edition, which is a questionnaire that looks at behaviors found with children with attention deficit disorders. Ms. Hartwick completed the Conners questionnaire. Mr. Gomez gave Parents both questionnaires to complete, but they were not returned until after he completed his report.

54. Regarding the behavior rating scale, Ms. Hartwick rated Student's anxiety and depression higher than the year before, which fell into the clinically significant range, and at-risk for internalizing problems. Ms. Hartwick's scores evidenced hyperactivity compared to Student's same age peers. Student rated himself, compared to same age peers, in the average range, which is not surprising based on comments made by Parents that Student consciously tries to behave as if he is not having any problems, and tells people what he thinks they want to hear. This was confirmed on the Sentence Completion Task and Student interview. On the Conner's rating scale, Student had elevated scores related to hyperactivity, defiance and aggression. Student demonstrated defiance and aggression by being argumentative at times with Ms. Hartwick, or acting out when frustrated. Student's hyperactivity was expected, and the increase in anxiety and depression was reflective of Student's worries as to his Mother's worsening health and absence from the home.

55. During Mr. Gomez's observations, 15 minutes each with two on April 28, 2014, and one on May 5, 2014, he collected data as to Student's ability to stay on task. In contrast, Dr. Bernou collected no such data during her observation at STAR. Mr. Gomez's data collection showed that Student was on task about 80 percent of the time, and his off task behavior was primarily fidgeting and inattention. During group games in math instruction, Student got overly excited, blurted out answers, and required a reminder to raise his hand, indicative of hyperactivity.

56. Ms. Chambers has taught special education at the White Hill Learning Center since August 2012. Before then, she worked for almost a decade as a special education teacher for private schools. She has master's degrees in special education and education administration, and special education teaching credential. Before going to STAR, Ms. Chambers reviewed prior assessments. Ms. Chambers went to STAR to test Student on May 2, 2014, and planned to administer the Kauffman to measure Student's academic skills since District used Woodcock-Johnson less than a year before. Ms. Chambers discovered when she arrived at STAR that it had just administered the Kauffman and was given a copy of the results. Ms. Chambers appropriately determined that no further academic testing was required as nothing indicated that STAR did not administer the Kauffman properly.

57. Student's Kauffman scores showed slightly above average reading abilities and average math abilities. As with other academic testing, Student showed weakness in the area of writing with a standard score of 83 in written language, 100 being the median score. The STAR assessor noted Student has some difficulty with capitalization and punctuation, and expressing in writing what he can express well orally. Student's STAR report cards and progress on goals also showed grade level reading and math skills, with the weakness in writing.

58. Ms. Chambers observed Student for about two hours at recess and in Ms. Hartwick's class. During recess, Student and his classmates were playing a computer game. There were four students in the class. Student transitioned easily to class instruction from recess. However, Ms. Hartwick compromised Ms. Chambers' observation. After being asked why the class was not going to have an extra physical education period, as typically occurs, Ms. Hartwick told the class that it was because Ms. Chambers was there to observe Student. Student was much more withdrawn for the rest of the observation, and it was obvious that he was embarrassed. After that, it took a while for him to reengage in the instruction. Eventually he participated in instruction, asked questions, and answered multiple-choice questions independently when Ms. Chambers left the classroom.

59. Dr. Bernou tried to show that District's assessments failed to grasp the full picture of Student that a neuropsychological assessment would give. Dr. Mills convincingly demonstrated through her analysis of the test results that Student's assessment scores and academic progress at STAR was consistent with the scores and progress of a child with an attention deficit and social-emotional issues due to poor self-confidence, and worry about Mother's health. However, Student's attention and social-emotional deficits were not so severe that he did not make meaningful academic progress at STAR, nor so severe that they could not be addressed at a District learning center. Student did not establish that he required a neuropsychological assessment in 2014 for same reasons that he did not establish a need for such an assessment the year before. In fact, the assessment data from the District's May 2014 psychoeducational and academic assessments bolstered District's position in this regard.

## SPEECH AND LANGUAGE

60. Diane Vannucci conducted Student's speech and language assessment in May 2014. Ms. Vannucci has a bachelor's degree in education and master's degree in communication disorders. She possesses a California speech pathology license, and is a member of the American Speech Hearing Association. Ms. Vannucci has worked as speech and language pathologist for California public schools since 1986, the last 12 years with District.

61. Ms. Vannucci reviewed Student's educational records before beginning her assessment, focusing on the prior year's assessments conducted by District and STAR, and spoke with Ms. Hartwick and Ms. Proper. Both reported to her that Student likes helping his peers, was likeable and humorous, and has made good progress on his goals. Ms. Hartwick noted that at times Student could be bossy and would direct other children on the playground. However, he improved in considering the feelings of others and taking turns. Ms. Proper also reported that Student was better at considering the feelings of others. Student does have problems understanding subtle non-verbal cues, and considering the perspectives of others, which makes it appear that he is bossy. When Student is not in control, he can become unregulated, and at times in Ms. Proper's small language group he would overact by using loud utterances and silly behavior to get the attention of his peers when feeling challenged.

62. Ms. Vannucci administered the Clinical Evaluation of Language Fundamentals, Fifth Edition, which assesses a student's language and communication strengths and weaknesses. The test evaluates a student's ability to understand the relationships between words, formulate sentences, recall sentences, interpret sentences that make comparisons, give location or directions, and the use of passive voice. Student's overall score was in the average range, and all subtest scores were in the average range, which indicate average ability to understand and communicate with others.

63. Ms. Vannucci also gave out the Pragmatic Language questionnaire from the Clinical Evaluation assessment to eight staff at STAR who worked with Student. Ms. Vannucci gave Parents a questionnaire, but they did not return it in time to be included in the report. The survey results indicated that Student had pragmatic language deficits in the areas Ms. Hartwick and Ms. Proper discussed during Ms. Vannucci's interview.

64. Ms. Vannucci administered the Social Language Development Test, Elementary, to look at Student's social communication skills, including nonverbal communication. The making inferences subtest looks at ability to detect nonverbal clues, assume the perspectives of others, infer what others are thinking, and express what the other person is thinking. On this subtest, Student scored 90, a score in the average range. Regarding interpersonal negotiations, which focuses on understanding another's perspective and working towards a good solution for both, Student had a score of 77, which was below average and matched concerns raised by Ms. Hartwick and Ms. Proper. Student demonstrated the ability to understand multiple interpretations with a score of 95 on this

subtest, and on the support peers subtest, he scored 100. These scores corresponded with Student being a leader in his class and trying to help others.

65. The last test Ms. Vannucci administered was the Test of Pragmatic Language, Second Edition. This assessment tool measures the subject's ability to understand physical context, topics, audience, and the purpose of the communication, along with visual cues, in abstract contexts, and understanding how effective one's message is. Student had a below average score of 83 on this assessment. Student did not have any particular area of weakness, but his skills were emerging in all areas.

66. Student could not establish that Ms. Vannucci failed to test Student in all areas of suspected disability related to speech and language. Dr. Bernou attempted to show that Ms. Vannucci failed to assess auditory processing, and underestimated his pragmatic language deficits. However, Dr. Bernou did not establish that she had sufficient expertise to give an opinion as to what Ms. Vannucci should have assessed. In contrast, Ms. Macy has the experience and education to give an expert opinion in this regard, and she established that Ms. Vannucci assessed Student in all areas of suspected disability. Student did not have an auditory processing deficit based on his Clinical Evaluation of Language Fundamentals scores, which were average, and this was substantiated by the results of the testing Mr. Gomez conducted. Also, Student's scores on the various assessments, observations and information provided by STAR personnel establish a moderate pragmatic language deficit, but not the severe deficit Student alleged. Therefore, Student failed to establish that Ms. Vannucci failed to adequately assess Student, or her findings were erroneous.

#### OCCUPATIONAL THERAPY

67. Ms. Almquist conducted the triennial occupational therapy assessment. Ms. Almquist spoke with Ms. Hartwick, who stated that Student did not receive occupational therapy services at STAR. Student's physical education teacher at STAR also stated that Student displays exceptional athleticism. Ms. Almquist administered standardized testing to look at Student's fine and gross motor skills, plus observed Student in his classroom.

68. As to Student's contention that he has sensory processing deficits, Ms. Almquist did not observe any signs of this, since Student was able to work independently, even with movement and noise from others in his classroom. Ms. Hartwick did not report anything that would indicate sensory processing deficits, like extreme sensitivity to light and sound, or lack of ability to play with his classmates.

69. On the Developmental Test of Visual Perception, Second Edition, which measures fine motor skills and the ability to copy geometric and dot-to-dot designs, Student's scores were all above average. On the Bruniniks-Oseretsky Test of Motor Proficiency, Second Edition, which assesses gross and fine motor skills, Student had above average scores for both gross and fine motor abilities. On the Gardner Test of Visual Perceptual Skills, which measures visual perception without a motor skill component, Student had a perfect score in a section that measured his ability to match two forms, picking out a

different form out of five similar forms, and the ability to perceive a form visually and pick it out among five forms. Student's handwriting was legible in writing samples. Student had bilateral motor control, using left and right side of his body when skipping and doing jumping jacks, plus he participated in sports that required this skill.

70. Student attempted to demonstrate that District failed to assess him in all areas of suspected disability related to occupational therapy. However, Student did not have an occupational therapist testify that Ms. Almquist's assessment failed to assess Student in all areas of suspected disability, especially sensory processing, visual motor integration and handwriting. Dr. Bernou did not establish any qualifications to give an opinion regarding Ms. Almquist's assessment. Ms. Hartwick's information about Student's classroom performance and Father's observations of Student during sporting activities all confirmed Ms. Almquist's findings. Accordingly, Student failed to establish that District failed to assess him in all areas of suspected disability as to occupational therapy.

#### *May 13, 2014 IEP Team Meeting*

71. District convened an IEP team meeting on May 13, 2014. Father attended, as did Ms. Hartwick. District attendees included the assessors, Ms. Butler, a general education teacher, and Dennis Riley, the then District Director of Student Services. District reviewed its assessments and information from STAR as to Student's progress and his present levels of performance. According to STAR documents at the time of this IEP team meeting, Student was making sufficient progress to meet his annual goals in reading, math, and speech and language. Student was having difficulty with his writing goal. Student's report card also indicated that he was performing at grade level in reading and math.

#### GOALS

72. District proposed writing, math, pragmatic language, self-advocacy, and coping skills goals. District did not propose an occupational therapy goal because this was not an area of need, based on Ms. Almquist's assessment. District did not propose a reading goal because Student was reading at grade level based on information from STAR, and assessment results. The IEP team discussed the proposed goals. Father said little about the proposed goals as his focus at the IEP meeting was objecting to District's proposed placement.

73. As to the lack of an occupation therapy goal, Ms. Almquist's assessment established that Student did not need any gross or fine motor or sensory processing goals as he did not have deficits in these areas that prevented him from accessing the school curriculum. Student failed to present evidence that established that he had any fine motor needs as his handwriting was legible, and his problems with writing were related to his attention deficit and performance anxiety. Student could not explain how he is a very good athlete, but has gross motor deficits. Finally, Student did not establish the need for any sensory processing goals.

74. Regarding reading goals, District did not propose any because Student was reading at grade level. Ms. Hartwick's explanation that he was not reading at grade level is belied by STAR's own reading testing and academic assessment. Therefore, Student did not establish the need for a reading goal.

75. In the area of math, District's assessment and information from STAR showed Student's abilities primarily in the average range for his age and grade level. However, he had difficulty with two-step word problems. District's proposed goal addressed this weakness by requiring Student to solve two-step word problems with 80 percent accuracy in two out of three trials, measured by work samples. Student failed to establish that he required additional math goals.

76. The IEP contained two written expression goals based on information Ms. Hartwick provided as to Student's deficits in this area and the results of academic testing. The first writing goal focused on Student writing a coherent paragraph with a topic sentence, detailed sentences, and a conclusion with relevant facts and information. The second goal focused on Student revising his own work to have proper capitalization, sentence-ending punctuation, and that sentences have a cohesive thought. Student did not prove he needed more or different writing goals based on information from STAR and District's assessments.

77. The IEP had three pragmatic language goals. These focused on Student identifying both parties' perspective to a problem or conflict, conflict and problem resolution, and Student explaining his resolution of a problem or conflict that would lead to supporting a long-term relationship. District developed these goals based on Ms. Vannucci's assessment and observation, his progress on his STAR speech and language goals, and information from Ms. Hartwick and Ms. Proper. Student did not have an expert testify to contradict Ms. Vannucci's and Ms. Macy's opinion as to the appropriateness of the goals. As to Student requiring any other speech and language goals, Ms. Vannucci and Ms. Macy were convincing that he did not require any additional speech and language goals to make meaningful educational progress, while Dr. Bernou was not, based on her lack of speech and language expertise.

78. The May 2014 IEP contains two behavior goals. One calls for Student to advocate for himself by seeking assistance, especially during difficult assignments to prevent him from either acting impulsively to avoid the task, or completing tuning out. The second goal focuses on self-regulation so that Student could identify a specific emotion and properly respond to that emotion, instead of engaging in improper behavior. The goals were developed based on Mr. Gomez's observations, data collection, and the assessment results, along with information from STAR personnel.

79. Unlike the May 14, 2013 IEP proposed behavior goals, the May 13, 2014 IEP behavior goals do focus on Student's inability to stay on task. The IEP has a goal for when Student is faced with a situation that may cause him to go off-task, which is primarily handling difficult situations and emotion regulation. Student's attention deficits could

typically be handled by redirecting Student in class based on information from Ms. Hartwick. More serious inattention and task avoidance occurred when the task was difficult or Student had trouble regulating his emotions. Mr. Gomez and Dr. Mills were convincing about the appropriateness of the two goals based on their comprehensiveness of their respective analyses of the goals when testifying, while Dr. Bernou was not due to the scarcity of information in her report and testimony.

80. The May 2014 IEP contains adequate academic, speech and language, and behavior goals to meet his unique needs. Student does not require reading or occupational therapy goals as he has no needs in these areas. Student does not have auditory or sensory processing deficits, so he needs no goals for this. Therefore, Student failed to establish that District's proposed goals would not allow him to make meaningful educational progress.

#### SERVICES

81. The May 13, 2014 IEP offered Student a full-time aide for the entire school year when he is in a general education science or history class. It also offered 14 weekly class sessions of specialized academic instruction for Math, English and intervention classes,<sup>13</sup> with individual and group instruction in the learning center.<sup>14</sup> Also, for the entire school year, District offered a weekly half-hour of individual speech and language therapy, and a weekly half-hour small group for speech and language therapy. District did not offer occupational therapy services. For the entire school year, Student would receive 30 minutes a week of school based counseling. For the entire school year, District offers 120 minutes a month of behavior intervention services, which includes behavior management, data collection, goal reporting, and team collaboration. District created a transition plan for Student to transition into White Hill, plus an IEP team meeting within 30-days of the start of the school year to review a proposed functional behavior assessment results and determine if Student required a behavior support plan. Student asserts that District's offered services are inadequate to meet his unique needs.

82. Regarding speech and language services, Student did not present credible evidence that the offered services were not adequate in light of the adequacy of Ms. Vannucci's assessment. The hour a week, divided between individual and small group was sufficient to meet Student's pragmatic language needs, as he does not have auditory processing deficits, or any other speech and language needs. Ms. Vannucci and Ms. Macy were persuasive as to the adequacy of the speech and language service level based on accurate present levels of perform and assessment information.

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<sup>13</sup> Intervention classes are available to all students at White Hill who need additional assistance. For Student, he would receive this support in the White Hill learning center.

<sup>14</sup> White Hill is on a block schedule so the periods of academic instruction and intervention that may occur in the learning center may vary per school day.

83. As with the year prior, Ms. Almquist did not recommend occupational therapy services for Student, and District did not mistakenly offer any. Student failed to establish that he had any gross motor deficits based on his athletic endeavors. As to fine motor skills, Student did not present credible evidence that he required occupational therapy services as his handwriting samples were legible. Student did not establish visual motor integration problems that required occupational therapy services as he could not counter the findings of Ms. Almquist and Mr. Gomez. Finally, Student did not establish any sensory processing deficits.

84. Student continues to contend that he required intensive academic support due to the severity of his academic deficits, especially reading and writing, and auditory processing and behavioral deficits. Again, the assessment information, Student's progress at STAR, and his report card establish that his academic deficits were not as severe as he contends. The IEP offers Student 14 weekly class periods, 58 minutes on average, in the learning center. These specialized academic services were adequate to meet Student's unique needs because the learning center has a small class size of 10 to 12 students, and two special education teachers. Student did not require a full-time aide in the learning center as his behaviors had improved in a small class setting with a high student to teacher/para-educator ratio. Based on Student's present levels of performance, he did not require specialized academic instruction for more than three hours a day in the District's offer. Further, Student would have an aide accompany him to his general education classes and provide positive reinforcement, and be there to keep him on-task and assist if he needed any breaks. Finally, Mr. Gomez would conduct a functional behavior assessment once Student began attending school to determine what further behavioral supports Student might require to ensure that he remains on-task during academic instruction in both the learning center and general education classes.

85. The behavior supports District offered were adequate to meet his unique needs. District first specified 120 minutes a month of behaviorist services, which was sufficient to meet Student's needs based on Mr. Gomez's psychoeducational assessment, Dr. Mills' analysis, and information from Ms. Hartwick as to Student's improved classroom behavior. Additionally, District would conduct a functional behavior assessment and hold an IEP team meeting within the first 30 days of school to determine if Student required a behavior support plan or other services based on the behavior data and observations. Dr. Bernou did not establish from her cursory report and minimal analysis that District's behavior services were not adequate to meet his unique needs. Ms. Hartwick did not demonstrate that Student was hard to handle if you listened to him and provided positive reinforcement, which District took into consideration in developing the May 2014 IEP.

86. District's May 2014 IEP acknowledged that Student needed mental health supports to succeed to address his anxiety and self-esteem issues. Student's needs in these two areas were significant enough that he required school based counseling. District's assessments documented Student's poor self-esteem and his constant need for positive reinforcement. Additionally, Student has a significant level of anxiety caused by his Mother's health that no one disputes. However, Student failed to present sufficient evidence

to counter information in District assessments and information provided by STAR to establish that requires a more robust offer of counseling by District, such as counseling provided by an outside agency.

87. Unlike the May 2013 IEP transition plan, the May 2014 IEP contained a comprehensive transition plan. District proposed that Student visit White Hill and tour the campus, including the learning center and general education classrooms, and meet school personnel, especially those involved in providing services to him. White Hill staff would go over Student's schedule with him and how the block scheduling works. White Hill would assign a peer buddy, who is an older student, to help Student. White Hill would give Student a preview of the academic curriculum for all his classes so he knew what was expected. Within 30 days of the start of the 2014-2015 school year, District would hold an IEP team meeting to see how Student was adjusting and if any changes were required to his IEP. Student did not establish that District's transition plan would not permit Student to successfully transition to White Hill, especially since Student's academic, behavioral and emotional issues were not as severe as Student contends based on District's assessment information. District's plan was reasonable to permit Student to finish the school year at STAR, but to visit and meet staff at White Hill so he knew what to expect when he begins attending White Hill, and then to monitor him and adjust his IEP as needed.

88. For the reasons set forth above, Student did not establish that District's offer of related services was not adequate to meet his unique needs as District has correct assessment information and offer adequate related services to permit Student to access the curriculum. District corrected the errors in the May 14, 2013 IEP as it offered an appropriate transition plan and counseling and behavior intervention services. Therefore, Student did not establish that the related services offered by District are not adequate to meet his unique needs and not reasonably calculated to permit him to make meaningful educational progress.

#### PLACEMENT

89. District's offer of the learning center for White Hill was substantially similar to the May 2013 IEP for the Hidden Valley learning center program, including the inclusion of sound walls. The White Hill learning center has one special education teacher, two classroom aides, plus some students have a one-to-one aide. At the time of the hearing, the White Hill learning center had 10 students and two of those students had their own one-to-one aide. The class provides differential instruction to the students based on the student's IEP and present levels with direct instruction, computer instruction and individualized instruction in reading, in math, and in English language arts. Students also have an advisory class in the learning center, which is for homework completion, and intervention, which is discussed above.

90. Like with the Hidden Valley learning center, Student criticizes White Hill for being too noisy and busy, not providing the type of instruction Student required, and not having the small class structure he had at STAR. Father and Dr. Bernou did tour the White Hill learning center briefly. Their testimony indicated that they had bias against the

learning center before entering the classroom because of the belief that District cannot meet Student's needs. In contrast, Dr. Mills' and Ms. Macy's observation of the White Hill learning center came from a more open-minded position as to whether White Hill could meet Student's unique needs, and both were convincing that they would tell District if the learning center could not meet his needs. Both Dr. Mills and Ms. Macy opined that White Hill learning center had a proper student to staff ratio to meet Student's needs, especially since his needs were not as significant as he contends.

91. Further, Ms. Chambers explained at the IEP team meeting the various instructional methods used, which focus on direct instruction, multi-sensory instruction, combined with computer instruction, if appropriate. Dr. Mills was convincing that District could meet Student's needs in the small learning center environment, because in math and reading he was at grade level. Regarding the instructional methods, District uses similar instructional methods, although not the same, like Slingerland or Lindamood-Bell, that had worked at STAR. District employed techniques to help Student organize his written work. Like with Hidden Valley, Father and Dr. Bernou failed to sit at the tables to see how the sound barriers worked. The fact that students moved around to different learning stations did not mean that the room was too busy. The aides in the learning center were highly qualified as one was a credentialed teacher and the other getting a master's degree in education.

92. District's proposed accommodations and modifications in the May 2014 IEP were basically the same as those offered in the May 2013 IEP, and they were adequate to meet Student's unique needs. The one significant addition in the May 2014 IEP, however, is the inclusion of permitting Student access to various technology, including use of computers, to assist him in writing. This is important as Student would be expected to write more in sixth grade. Ms. Almquist explained how this would permit Student to complete his writing assignments. Student asserts that he needs accommodations and modifications to deal with Student's alleged visual motor integration deficits, which he claims to need for note taking requirements that arise in middle school, especially copying from the board. However, Mr. Gomez's and Ms. Almquist's assessments established that he did not have such a deficit regarding copying from the board.

93. As to Student attending about half the school day in general education science and social studies classes, Student failed to present sufficient evidence that his attention deficit and anxiety prevents him from accessing the curriculum, if he had a trained aide for these classes. While these classrooms are larger with 30 students, the aide would ensure that Student would stay on task and would implement strategies, like taking a break, if Student started showing signs of anxiety. Student did not establish that he required an aide for physical education as no one from STAR reported any problems in physical education. Further, Mr. Gomez would conduct a functional behavior assessment to determine if Student requires a behavior support plan. While Student succeeded in the small learning environment at STAR, Student did not present sufficient evidence that his behavior and anxiety deficits were so significant that he cannot succeed in general education class with appropriate supports.

## *Remedies*

94. During 2013-2014 school year, STAR permitted Student to attend for the entire school year after paying a \$3,000 deposit. However, STAR did not waive the full tuition and has threatened Parents for the remainder of monies owed. Student demonstrated that STAR addressed his unique needs, and the evidence showed the progress he made during the 2013-2014 school year, both academically and emotionally.

## LEGAL CONCLUSIONS

### *Introduction – Legal Framework under the IDEA<sup>15</sup>*

1. This hearing was held under the Individuals with Disabilities Education Act, 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>16</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, further education, 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).)

2. A FAPE means special education and related services that are available to an eligible child at no charge to the parent or guardian, meet state educational standards, and conform to the child's 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 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 that describes the child's needs and academic and functional goals related to those needs. It contains a statement of the special education, related services, and program modifications and accommodations that will be provided for the child to advance in attaining goals, making progress in the general education curriculum, and participating in education with disabled and non-disabled peers. (20 U.S.C. §§ 1401(14), 1414(d); Ed. Code, § 56032.)

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<sup>15</sup> Unless otherwise indicated, the legal citations in the Introduction section are incorporated by reference into the analysis of each issue decided below.

<sup>16</sup> All subsequent references to the Code of Federal Regulations are to the 2006 version.

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

4. At the hearing, the party filing the complaint has the burden of persuasion by a preponderance of the evidence. (*Schaffer v. Weast* (2005) 546 U.S. 56-62 [126 S.Ct. 528, 163 L.Ed.2d 387].) Here, Student bears the burden of persuasion by a preponderance of the evidence.

#### *Issues 1: Assessments*

5. A student must be assessed in all areas related to his or her suspected disability, and no single procedure may be used as the sole criterion for determining whether the student has a disability or determining an appropriate educational program for the student. (20 U.S.C. § 1414(b)(2); 34 C.F.R. § 300.304(b)(2), (c)(4); Ed. Code, § 56320, subds. (e), (f).) A school district’s failure to adequately assess a student is a procedural violation that may result in a substantive denial of FAPE. (*Orange Unified School Dist. v. C.K.* (C.D.Cal. June 4, 2012, No. SACV 11–1253 JVS(MLGx)) 2012 WL 2478389, \*8; 20 U.S.C. § 1415(f)(3)(E)(ii); see, Ed. Code, § 56505, subd. (f)(2).)

6. In the case of a child whose behavior impedes his learning or that of others, the IEP team must consider, when appropriate, “the use of positive behavioral interventions, and supports and other strategies to address that behavior.” (20 U.S.C. § 1414(d)(3)(B)(i); 34 C.F.R. § 300.324(a)(2)(i); Ed. Code, § 56341.1, subd. (b)(1).) An IEP that does not appropriately address behavior that impedes a child’s learning denies a student a FAPE. (*Neosho R-V School Dist. v. Clark* (8th Cir. 2003) 315 F.3d 1022, 1028; *County of San Diego v. California Special Educ. Hearing Office* (9th Cir. 1996) 93 F.3d 1458, 1467-68.)

7. Student requested a neuropsychological assessment because he contends that District’s psychoeducational assessments are not sufficiently thorough and did not assess his

auditory processing deficits. Student's contention is in error as first he does not have an auditory processing deficit. Dr. Mills explained that the assessment results on the Test of Auditory that District administered in 2011 and 2014, plus other assessment tools that have auditory processing components, all established that Student does not have an auditory processing deficit and that the behaviors that Dr. Bernou noted were actually related to Student's attention deficit. Dr. Bernou was not convincing as she failed to adequately analyze the test results, plus she did not perform any testing of her own that would indicate that Student had an auditory processing deficit.

8. Student's attention, social-emotional and behavioral deficits were properly assessed by District and not as severe as Student contends. District does not claim that he had no deficits in these areas in May 2013 or May 2014. However, Mr. Gomez's and other District assessor's observations in 2013 and 2014, plus information from Ms. Hartwick, all establish that Student's ability to make friends, pay attention in class, and not shut down in class when work became harder, has improved since March 2012, when he began attending STAR. Dr. Bernou's observation was not sufficient to counter the weight of all the information to the contrary from District assessments and observations, and information provided by STAR.

9. The same is true for Student's academic functioning as all the information from STAR, such as academic testing, report cards, and progress Student made on goals, establish that he was at grade level for reading and math. As to dyslexia, Student did not establish that any further testing was required to address his reading and writing as District had accurate information as to these areas. Student read at grade level in 2013 and 2014, which is contrary to the idea that he has dyslexia. Also, his writing problems were symptomatic of performance anxiety, rather than dyslexia, especially since Student did not present any credible testimony to the contrary from Dr. Bernou and Ms. Hartwick, as neither could adequately describe the effects of any dyslexia that Student might have.

10. Student does have some weakness in writing, which District acknowledges. However, Student's contention that his writing deficit is due in part, or in combination, with auditory processing, fine motor or visual processing deficits is disproved by information in Ms. Butler's and Mr. Gomez' psychoeducational assessments and Ms. Almquist's occupational therapy assessment. Further, Ms. Almquist's assessments in 2013 and 2014, plus information she obtained from STAR personnel, established that Student did not have any sensory processing or gross motor deficits, and Dr. Bernou was not qualified to give an opinion to the contrary.

11. Regarding speech and language, Student's deficit, which District does not dispute, is with his pragmatic language. However, the severity of this deficit is not as severe as Student asserts, plus he does not have deficits in other areas of speech and language. District's speech and language assessments, are corroborated by information from STAR by its speech and language therapist. District's expert, Ms. Macy, went over all the assessment information and educational records regarding Student's speech and language needs and

convincingly explained why District's assessment of Student was thorough and correct, while Student did not have a speech and language expert testify to the contrary.

12. Student failed to establish that District did not assess him in all areas of suspected disability as District's assessments in 2013 and 2014 were thorough, and based on areas of suspected disability obtained in the 2011 triennial assessment and information from Parents and STAR personnel. Dr. Bernou could not establish the inadequacy of any District assessment or where the District failed to assess, and information from Parents and Ms. Hartwick corroborated District's evaluation of Student. Accordingly, Student did not prove by a preponderance of the evidence that District failed to assess Student in all areas of suspected disability and that he is entitled to independent evaluations.

#### *Issues 2A: Goals*

13. Federal and state law require that parents of a child with a disability must be afforded an opportunity to participate in meetings with respect to the identification, assessment, educational placement, and provision of a FAPE to their child. (20 U.S.C. § 1414(d)(1)(B)(i); Ed. Code, §§ 56304, 56342.5.) A district must ensure that the parent of a student who is eligible for special education and related services is a member of any group that makes decisions on the educational placement of the student. (Ed. Code, § 56342.5.) Among the most important procedural safeguards are those that protect the parents' right to be involved in the development of their child's educational plan. (*Amanda J. v. Clark County Sch. Dist.* (9th Cir. 2001) 267 F.3d 877, 882.) The IEP shall also include a statement of the program modifications or supports for school personnel that will be provided to the pupil to allow him or her to advance appropriately toward attaining the annual goals to be involved and make progress in the general education curriculum, and to participate in extracurricular activities and other nonacademic activities. (34 C.F.R. § 300.320(a)(4)(i), (ii); Ed. Code, § 56345, subds. (a)(4)(A), (B).)

14. A school district has the right to select a program for a special education student, as long as the program is able to meet the student's needs; the IDEA does not empower parents to make unilateral decisions about programs funded by the public. (See, *N.R. v. San Ramon Valley Unified Sch. Dist.* (N.D. Cal. January 25, 2007, No. C 06-1987 MHP) 2007 WL 216323, \*7; *O'Dell v. Special Sch. Dist. of St. Louis* (E.D. Mo. 2007) 503 F.Supp.2d 1206, 1216.; *Slama v. Indep. Sch. Dist. No. 2580* (D. Minn. 2003) 259 F.Supp.2d 880, 885.) Nor must an IEP conform to a parent's wishes to be sufficient or appropriate. (*Shaw v. Dist. of Columbia* (D.D.C. 2002) 238 F.Supp.2d 127, 139 [the IDEA does not provide for an "education . . . designed according to the parents' desires."], citing *Rowley, supra*, 458 U.S. at p. 207.)

15. An IEP must contain a statement of measurable annual goals related to "meeting the child's needs that result from the child's disability to enable the child to be involved in and progress in the general curriculum" and "meeting each of the child's other educational needs that result from the child's disability." (20 U.S.C. § 1414(d)(1)(A)(ii); Ed. Code, § 56345, subd. (a)(2).) The IEP must show a direct relationship between the

present levels of performance, the goals, and the educational services to be provided. (Cal. Code Regs., tit. 5, § 3040, subd. (c).)

16. The IEP shall include “a description of the manner in which the progress of the pupil toward meeting the annual goals . . . will be measured and when periodic reports on the progress the pupil is making toward meeting the annual goals, such as through the use of quarterly or other periodic reports, concurrent with the issuance of report cards, will be provided.” (Ed. Code § 56345, subd. (a)(3); see 20 U.S.C. § 1414(d)(1)(A)(III); 34 C.F.R. § 300.320(a)(3)(ii).)

17. As to both IEP’s, Student did not establish that he needs occupational therapy goals. The only credible evidence regarding his needs in this area was Ms. Almquist’s assessments, which established no need for occupational therapy goals, including goals in the area of sensory processing. District provided Student with adequate speech and language goals that focused on his pragmatic language based on Ms. O’Dea’s and Ms. Vanucci’s assessments, and Student’s progress on his STAR speech and language goals. Student’s academic goals were also adequate to meet his unique needs. He did not need a reading goal since he was reading at grade level, and the math and writing goals were tailored to meet his unique needs based on the academic testing STAR did with Student, progress on STAR goals, report card information, and information from Ms. Hartwick.

18. However, as to Student’s behavioral needs in the May 14, 2013 IEP, Student did establish that District failed to offer adequate goals to meet his unique needs. While Student’s behavioral issues are not as severe as he contends, District’s own psychoeducational assessment indicates Student does have trouble following directions due to his attention deficit. The May 2013 IEP fails to have a goal to address Student’s need to stay on task. As to Student’s social-emotional needs, the biggest issue involved performance anxiety as he would shut down if a task became too hard, which he demonstrated during the assessment testing. District did not draft an adequate goal to address this need. However, District remedied this issue in the May 13, 2014 IEP as the behavior goals addressed Student shutting down when classwork became too hard for him, plus to improve his on-task behaviors related to attention deficits.

#### *Issue 2B, 2C and 2D: Adequate Services*

19. The methodology used to implement an IEP is left to the school district’s discretion so long as it meets a student’s needs and is reasonably calculated to provide some educational benefit to the child. (See *Rowley*, 458 U.S. at p. 208; *Adams v. State of Oregon* (9th Cir. 1999) 195 F.2d 1141, 1149; *Pitchford v. Salem-Keizer Sch. Dist.* (D. Or. 2001) 155 F.Supp.2d 1213, 1230-32; *T.B. v. Warwick Sch. Comm.* (1st Cir. 2004) 361 F.3d 80, 84.)

20. As to Student’s claim that he needed a one-to-one aide, District provided Student with a full-time aide in the May 14, 2013 IEP, and the learning center special education teachers would train the aide. For the May 13, 2014 IEP, Student had a one-to-one aide for general education science and social studies, but not for physical education or when

Student was in the learning center. Student did not establish that he requires an aide for physical education, especially since he was a very good athlete and shown to be a leader during physical activities. As to special education instruction in the learning center at both Hidden Valley and White Hill, both had a high staff to student ratio that meets his unique needs, and appropriate instructional methodology. Additionally, District offered adequate accommodations in the May 2013 and May 2014 IEP's that would keep Student on task either with the aide in general education classes and large teacher to student ratio in the learning center.

21. As to dyslexia, Student did not establish that he had dyslexia or that he required any special instructional services to address his unique needs beyond the time specified in the learning center in the May 2013 and May 2014 IEP's. Student's reading and math were at grade level, and the District's learning centers at Hidden Valley and White Hill both used a variety direct and multi-sensory instruction with California Department of Education learning programs. Student did not establish that he could only make meaningful educational progress with the combination of reading and math instructional programs used at STAR. District was aware of these programs' success and had available other programs that employed similar instructional methodology that had proven successful for Student.

22. As to speech and language services in the May 2013 and May 2014 IEP's, Student did not provide any evidence that the offered weekly half hour of individual service and half hour of small group service was not adequate to meet his unique needs. As to occupational therapy, Ms. Almquist's assessment established that Student did not require this service Student did not demonstrate that he had any fine or gross motor or sensory processing needs that require any direct or consultative occupation therapy services.

23. The services that were lacking in the May 14, 2013 IEP, were behavior services and counseling. Ms. Butler's assessment and Mr. Gomez's observation both indicated that Student had attention deficits that needed to be addressed with specific behavior goals and accommodations. The behavior services offered as transitional services through the end of the 2013 calendar year were not adequate to meet Student's unique needs for the entire school year, due to the severity of his unique needs. He required behavioral service through the entire 2013-2014 school year, especially in general education classes. District's psychoeducational assessment did not indicate that Student's behaviors stemming from attention deficit and anxiety would subside halfway through the school year, especially with the transition back to a public, general education campus.

24. Further, Ms. Butler's assessment report recommended counseling due to Student's anxiety issues. While counseling was discussed at the IEP team meeting, the District's offer was to make counseling available for Student to access if he felt that he needed it. The idea that a fifth grade Student would actively seek out a counselor for support is not reasonable, considering that District had information from the assessment that Student was reluctant to ask for help when faced with a difficult situation.

25. However, District remedied the deficient behavioral and counseling services in the May 2014 IEP. District would provide behavior consultation services, which would include observation and data collection, and a functional behavior analysis within the first 30 days of school to determine if Student required a behavior support plan. District also offered direct school-based counseling to address Student's mental health needs dealing with his anxiety and depression related to his Mother's illness that was affecting his educational progress, and for problems he might have at White Hill returning to a larger campus. Student failed to present sufficient evidence that District's offer of behavioral and counseling services for the 2014-2015 school year was not adequate to meet his unique needs.

26. For the May 14, 2013 IEP, District's did not offer a FAPE to Student because District did not offer adequate behavior and counseling services to meet Student's unique needs identified by District in its own assessments, observations, and information provided by Parents and STAR personnel. Student needed these services to make meaningful educational progress. For the May 13, 2014 IEP, District offered adequate behavior and counseling services to meet his unique needs. In addition, District would schedule an IEP team meeting within 30 days of the start of the school year to determine if Student required additional services after seeing how his transition to White Hill went. As to the remainder of District services in both IEP's, Student failed to demonstrate that the offered services were inadequate as his deficits were not as complex or severe as Student contended.

#### *Issue 2D: Placement*

27. A specific educational placement means that unique combination of facilities, personnel, location or equipment necessary to provide instructional services to an individual with exceptional needs, as specified in the student's IEP, in any one or a combination of public, private, home and hospital, or residential settings. (Cal. Code Regs., tit. 5, § 3042.) The continuum of program options includes, but is not limited to: regular education; resource specialist programs; designated instruction and services; special classes; nonpublic, nonsectarian schools; state special schools; specially designed instruction in settings other than classrooms; itinerant instruction in settings other than classrooms; and instruction using telecommunication instruction in the home or instructions in hospitals or institutions. (Ed. Code, § 56361.)

28. If a child is being moved from a nonpublic school to a general education classroom in a public school, there must be a plan to transition the student from the more restrictive placement to the less restrictive placement in a general education classroom. (Ed. Code, § 56345, subd. (b)(4).)

29. Student contends that District could not meet his unique needs at the learning center at both Hidden Valley and White Hill because both classrooms had too many students and too high of a ratio of students to staff. Additionally the classrooms were too loud with too much activity for Student to remain on-task. Finally, Student asserts that District's offer of Student spending about half his school day in general education classes would not permit him to make meaningful progress because Student could not focus in a class of 30 students

with the noise and distractions in such a class, which would also most likely trigger his performance anxiety.

30. However, Student failed to demonstrate that District could not meet his unique needs with its proposed placement offers in both the May 2013 and May 2014 IEP with the provision of adequate goals, accommodations and modifications, and services. The problem with District's May 14, 2013 IEP offer, was that District failed to offer an appropriate behavior goal to remain on-task and follow directions, and the proposed IEP had an inadequate transition plan and behavior and counseling services to address needs that were documented needs in District's psychoeducational assessment. Without such a goal and services, Student would not be able to successfully transfer from a small school campus and classroom at STAR to a larger campus, even with the full time aide District offered. Based on the assessment information from the District, even though Student's deficits were not as significant as Student contended, they still interfered with his ability to access the curriculum, and without the adequate goal and services discussed above Student would not be able to make meaningful educational progress with the District's May 14, 2013 placement offer.

31. However in the May 13, 2014 IEP, District corrected the errors in the prior IEP by having a detailed transition plan, adequate behavior goals, and appropriate behavior and counseling services to meet his unique needs. As to the White Hill learning center, Student did not demonstrate that the classroom had too many students and not enough teaching staff or was too loud and busy to meet his needs. Father and Dr. Bernou had already predetermined that the White Hill learning center would not meet Student's needs before their observation, so during that observation they saw what they wanted to. In contrast, Dr. Mills and Ms. Macy went to the learning center with an open mind, and providing convincing evidence that showed the classroom would meet Student's needs.

32. As to Student's ability to make meaningful progress in general education physical education, science and social studies, Student did not establish that he could not make meaningful educational progress with the District's offers. For the 2014-2015 school year, Student does not need an aide to succeed at physical education since he was a very good athlete and leader in sports. As to the two academic classes, both IEP's provided an aide to assist Student to remain on task, and observe and react to any signs of stress or anxiety. Further, the aide would implement goal strategies with Student or implement the break accommodation, if needed. Student's work was modified and he was given more time to complete work, plus he had the additional assistance in the learning center. District and STAR assessments, Student's present levels of performance, especially his STAR report cards and progress on STAR goals, and observations conducted by District and STAR personnel all supported that Student could make meaningful progress with District's May 13, 2014 IEP placement offer.

## REMEDIES

33. Student requested that District reimburse Parents and pay any contingent liabilities for all educationally related expenses caused by its denial of FAPE for the 2013-2014 and 2014-2015 school years, including, but not limited to, tuition, fees, and transportation for Student's placement at STAR Academy and any educationally related expenses. Student also requests prospective placement at STAR academy and related costs. District shall fund independent assessments, neuropsychological, speech and language, occupational therapy, reading and/or behavior. As compensatory education, District shall provide one-to-one tutoring, educational therapy, school based counseling and/or Lindamood-Bell therapy.

34. ALJ's have broad latitude to fashion appropriate equitable remedies for the denial of a FAPE. (*School Comm. of Burlington v. Department of Educ.* (1985) 471 U.S. 359, 370 [85 L.Ed.2d 385]; *Parents of Student W. v. Puyallup School Dist., No. 3* (9th Cir. 1994) 31 F.3d 1489, 1496 (*Puyallup*).

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

36. Student established that District's May 14, 2013 IEP failed to provide him with a FAPE, and District did not offer any other education program until the May 13, 2014 IEP, which offered placement and services that would have commenced at the start of the 2014-2015 school year. Therefore, Parents are entitled to reimbursement of their out-of-pocket costs for Student to attend STAR for the 2013-2014 school year, including the extended school year, in the amount of \$3,000, which Student established through invoices showing proof of payment. During the 2013-2014 school year, STAR permitted Student to attend even though Parents only paid the \$3,000 deposit. However, STAR did not excuse Parents from paying the entire cost for the 2013-2014 school year and have threatened to institute legal action, for the amount of \$42,380. Therefore, Student is entitled to have District pay STAR the outstanding balance as the owed amount is an actual debt Parents incurred due to District's denial of a FAPE .

37. Parents are not entitled to any reimbursement for Dr. Bernou as District assessed Student in all areas of suspected disability and he did not require an independent neuropsychological assessment.

#### ORDER

1. Within 45 days of this decision, District shall reimburse Parents for \$3,000, for educational services for the 2013-2014 school year. Documents submitted in this hearing constitute adequate proof of payment by Parents to STAR.

2. Within 45 days of this Decision, District shall pay directly to STAR Academy the amount of \$42,380. Documents submitted at hearing constitute adequate proof of monies owed to STAR Academy for Student's attendance during the 2013-2014 school year.

#### PREVAILING PARTY

Education Code section 56507, subdivision (d), requires that the hearing decision indicate the extent to which each party has prevailed on each issue heard and decided. Student partially prevailed on Issues 2a and 2d. District prevailed on Issues 1, 2b and 2c, and partially prevailed on Issues 2a and 2d.

#### RIGHT TO APPEAL THIS DECISION

This is a final administrative Decision, and all parties are bound by this Decision. The parties to this case have the right to appeal this Decision to a court of competent jurisdiction. If an appeal is made, it must be made within 90 days of receipt of this Decision. A party may also bring a civil action in the United States District Court. (Ed. Code, § 56505, subd. (k).)

DATE: November 7, 2014

/s/

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PETER PAUL CASTILLO  
Presiding Administrative Law Judge  
Office of Administrative Hearings