

BEFORE THE  
OFFICE OF ADMINISTRATIVE HEARINGS  
STATE OF CALIFORNIA

In the Matter of:

PARENTS ON BEHALF STUDENT,

v.

CHINO VALLEY UNIFIED SCHOOL  
DISTRICT.

OAH Case No. 2016010832

**DECISION**

Student filed a due process hearing request (Complaint), with the Office of Administrative Hearings, State of California, on January 22, 2016, naming the Chino Valley Unified School District. On February 19, 2016, OAH continued the matter on joint motion of the parties, for good cause shown.

Administrative Law Judge Elsa H. Jones heard this matter in Rancho Cucamonga, California, on July 26, 27, and 28, and on August 24, 2016.

Parents and Student (collectively, Student), were represented by Bruce Bothwell, Attorney at Law. Mr. Bothwell and Parents were present on all days of hearing.

District was represented by Jonathan P. Read, and Maryam Rastegar, Attorneys at Law. Mr. Read was present on all days of hearing; Ms. Rastegar was not present on July 28. Anne Ingulsrud, District's Director of Special Education, and Royal Lord, Ed.D, Program Manager of the West End Special Education Local Plan Area, were present on all days of hearing.

Sworn testimony and documentary evidence were received at the hearing. A continuance was granted until September 19, 2016, at 5:00 p.m., for the parties to file written closing arguments. The parties timely filed their written closing arguments on September 19, 2016, at which time the record was closed and the matter was submitted for decision.

## ISSUES<sup>1</sup>

A. Did District deny Student a free appropriate public education by failing to conduct a legally appropriate triennial psychoeducational assessment of Student in fall 2014?

B. Did the October 16, 2014 individualized education program deny Student a FAPE during the 2014-2015 school year by failing to offer:

1. A sufficient amount of specialized academic instruction;
2. Educational therapy to address Student's deficits in processing and memory; and
3. Sufficient behavior therapy and support to address maladaptive behaviors that interfered with Student's education?

C. Did the October 6, 2015 IEP deny Student a FAPE during the 2015-2016 school year by failing to offer:

1. A sufficient amount of specialized academic instruction;
2. Education therapy to address Student's deficits in processing and memory; and
3. Sufficient behavior therapy and support to address maladaptive behaviors that interfered with Student's education?<sup>2</sup>

## SUMMARY OF DECISION

Student is a 10 year-old-boy who survived a traumatic birth experience which left him with a variety of disabilities. He has been eligible for special education in the categories of traumatic brain injury, and speech and language impairment, and he has phonological and auditory processing disorders. In addition, for years he has acted aggressively towards his classmates because he has difficulty with personal space. Student has had behavior plans which were intended to manage his maladaptive behaviors, but the behaviors have persisted.

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<sup>1</sup> On the first day of hearing, Student withdrew the following issues that were included in the prehearing conference order dated July 18, 2015: Issues A (2), A (6) through A (9); B (1); and B (4) through B (8).

<sup>2</sup> For the sake of clarity, the issues have been restated compared to how they appeared in the prehearing conference order dated July 18, 2016. 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.)

In fall 2014, District performed a psychoeducational assessment that was inappropriate for a variety of reasons. Also in fall 2014, District recognized that Student's reading ability, particularly his reading comprehension, had diminished considerably. As the school year proceeded, Student's scored at low levels on a variety of State and District academic assessments. Starting in fall 2014, District doubled Student's weekly minutes of specialized academic instruction, developed a reading goal, provided some additional accommodations, and some computerized programs, but did little else throughout the 2014-2015 and 2015-2016 school years to address Student's struggles, particularly with reading comprehension, and his deficits in memory and processing.

This Decision finds that District denied Student a free appropriate public education by failing to perform a functional behavioral assessment, provide appropriate behavior services in the October 2014 and 2015 IEP's, perform an appropriate psychoeducational assessment in fall 2014, and provide sufficient special education services in the October 2015 IEP.

## FINDINGS OF FACT

### *Jurisdiction and Background*

1. At the time of the hearing, Student was a 10-year-old boy who resided in District's boundaries with Parents at all relevant times. Student had completed fourth grade at Hidden Trails Elementary School in the District, which he had attended since first grade. At the time of hearing, Student was scheduled to enter fifth grade at Hidden Trails.

2. Student sustained a head injury at birth, along with other serious injuries. He was hospitalized for his first two months, during which time he underwent several surgeries, was maintained on a ventilator, and medicated to control seizures. Subsequent to his hospitalization, Student had no further seizures, and his seizure medication was discontinued when he was two years old. He received in-home services from the Inland Regional Center Early Start Program from the time he was 4 months to 36 months old. Student has been diagnosed with several disorders and deficits, including traumatic brain injury, attention deficit hyperactivity disorder, central auditory processing disorder, speech and language deficits, and phonological processing and memory deficits.

3. Student is a generally happy boy who is well-liked by his teachers. Despite all of his issues, Student has developed into a boy who is cognitively functional, physically able, and able to independently care for his personal needs.

### *Educational Background*

4. District found Student eligible for special education under the category of speech and language impairment in late 2008, when he was three years old. The IEP team noted then that due to delays in the areas of preacademics and expressive language skills, a specialized preschool program was important to improve Student's academic success.

Student attended preschool for two years in a preschool program operated by San Bernardino County Superintendent of Schools. He received specialized academic instruction in a special day class setting, and speech and language therapy. For kindergarten, Student attended the Level 2 Independent Study Program at a charter school within the District, with language and speech support and a behavior support plan. During kindergarten, he attended school three days per week and was home schooled the other two days. Student's behavior plan for kindergarten was not in evidence, but his social behavior goal in his November 2, 2011 IEP, which was held in this year, provided that, in social situations, Student would demonstrate the ability to recognize personal space of peers and adults, by keeping hands to self with one visual/verbal prompt, with 80 percent accuracy in four of five trials/opportunities.

5. Student entered first grade at Hidden Trails in fall 2012, when he was six years old. District placed him in a general education class with resource support. At his IEP team meeting of December 11, 2012, the IEP team agreed that Student would have a one-to-one aide, who was formally referred to in the IEP as a Temporary Special Needs Aide, for 900 minutes per week, to implement positive behavioral support, monitor behavior, and facilitate behaviors in class and on the playground. This IEP is the only one in evidence which specifically delineated the purpose of the one-to-one aide. No IEP in evidence, including this one, provided supervision for the aide. There was no specific evidence as to who was assigned to supervise the aide, and no evidence that any of Student's one-to-one aides had, or were required to have, any specific training.

6. At all relevant times through the time of hearing, District has placed Student in general education with additional supports, services, and accommodations, including a one-to-one aide for three hours per day. However, the purpose of Student's aide soon became unclear.

7. At the February 21, 2013, continuation session of Student's October 25, 2012, annual IEP team meeting, when Student was seven years old, the team completed Student's behavior support plan, for behavior interfering with Student's learning or the learning of his peers. The behavior that impeded learning was Student's difficulty with personal space of his peers on the playground and in the classroom. He sometimes touched students, put his arms around his classmates, and threw pebbles while on the playground. In addition, he only completed approximately 33 percent of his classwork. The behavior plan contained two goals. The first goal was that Student would demonstrate the ability to recognize the personal space of others in social interactions by keeping hands to self and not throwing things, with one visual/verbal prompt, at 80 percent accuracy. The second goal was that Student would demonstrate in a structured setting, on the playground, and in the classroom, three strategies/statements to express his needs appropriately, at 80 percent accuracy. Mother consented to the goals.

8. At his IEP team meeting on June 5, 2013, when Student was seven years old and completing first grade, the IEP team changed his primary eligibility category to traumatic brain injury and designated speech and language impairment as his secondary eligibility category. His eligibility in the category of traumatic brain injury was based on a

diagnosis of traumatic brain injury in February 2013. Those eligibilities did not change through the time of hearing. In addition, at that meeting the team discussed Student's central auditory processing disorder and attention deficit hyperactivity disorder. Student's central auditory processing disorder was diagnosed by Maria Abramson, Au.D., an audiologist, on January 21, 2013, and his attention deficit hyperactivity disorder diagnosed by Michael Plew, Psy.D., in a neuropsychological assessment report dated May 12, 2013. The team also reviewed an assistive technology evaluation that described the one-to-one aide as an instructional aide who was addressing Student's deficits in executive functioning by helping him break tasks down. The one-to-one aide's duties had thus expanded from just providing behavioral assistance, to assisting Student with performing academic tasks in the classroom. There was no evidence of any formal documentation by any of Student's IEP teams of this change in the aide's duties.

### *2013-2014 School Year*

9. District performed annual academic assessments of Student for several years prior to his 2014 triennial assessment, the most recent District special education assessment. In fall 2013, when Student was seven years old and in second grade, Rebecca Reger, Student's resource specialist teacher, performed an academic assessment using the Woodcock-Johnson III Tests of Educational Achievement, Form B. Ms. Reger holds a bachelor's degree in elementary and special education from the State University of New York, Genesco, and a master's degree in education from California State University, Fullerton. She has been a teacher since 2003, and a credentialed special education teacher in District since 2010. Part of her formal education included an undergraduate course in behavior management in special education, and a graduate level course in positive behavior support. She has also had some trainings and workshops in positive behavior support from school districts where she has worked.

10. Ms. Reger produced a report of her academic assessment dated October 24, 2013. Student obtained scores in the average range on Broad Reading (standard score of 95), Letter -Word Identification (standard score of 99), Reading Fluency (standard score of 94), and Comprehension (standard score of 92).

11. During the writing portion of the assessment, Student could create complete sentences with proper capitalization and subject-verb agreement. At times he left off ending punctuation. He phonetically spelled unknown words effectively. His writing samples and spelling skills fell in the average range, and his writing fluency was three points below the average range. (His writing fluency score improved from 2012.) He obtained standard scores of 100 in Broad Written Language, 100 in Spelling, 87 in Writing Fluency, and 110 in Writing Samples. In Math, Student could compute single-digit addition and subtraction problems. He struggled with applied problems. He obtained standard scores of 85 in Broad Math, 94 in Calculation, 83 in Math Fluency, and 83 in Applied Problems. His scores placed him in the average range in math calculation, and in the low average range in broad mathematics and brief mathematics. His overall level of achievement was average, his

academic skills were in the average range, his ability to apply academic skills was in the average range, and his fluency with academic tasks was in the low average range.

12. On October 24, 2013, District convened Student's annual IEP team meeting. The meeting was attended by all appropriate personnel. The team considered Student's scores on his academic assessments and formulated present levels of performance. At this time, his reading was not a concern; his needs were in writing and math. The team developed goals in writing and math, among other areas of need.

13. The team found that Student's behavior was interfering with his learning or the learning of his peers, and formulated a behavior plan. The behavior plan identified the behavior impeding learning as Student's difficulties with personal space of his peers on the playground and in the classroom. He sometimes touched students, put his arms around his classmates, and occasionally hit, kicked, bit, or spat. The behavior support plan contained two goals. One goal involved Student demonstrating the ability to recognize personal space of others in social interactions by keeping hands and body to himself with one visual/verbal prompt on the playground, with 80 percent accuracy for four out of five days. This goal was nearly identical to the goal in Student's behavior plan for 2012-2013. Another goal involved Student seeking support from an adult when needed instead of using physical contact to express his needs, at 100 percent accuracy for five consecutive days. Student's one-to-one aide was among those designated to implement the plan. The team agreed to place Student in the general education classroom at Hidden Trails, with the following services and supports: specialized academic instruction for four sessions per week, for 30 minutes each session, for a total of 120 minutes per week; a one-to-one aide for 60 minutes, 15 times per week, for a total of 900 minutes per week; occupational therapy services; individual and group speech and language services; and individual counseling services for 90 minutes per month. The team also offered instruction and services to occur during special education summer school. Mother consented to the IEP, but requested that the Fast ForWord program, which District had offered, and which Dr. Abramson had recommended, as well as Dr. Loretta Lee, another audiologist who examined Student in August 2013, be included in the IEP as proof that it was part of Student's education plan. Fast ForWord is a computerized program to address a variety of deficits, including attention, auditory processing, and memory.

14. During the school year, Student's one-to-one aide worked with him on reading comprehension. Student was unable to retain much of the information he read. His aide also helped him with his behaviors on the playground. As the school year progressed, he had more issues with maintaining personal space and aggressively touching other students, such as kicking, hitting, and pinching, and poking. At the end of the 2013-2014 school year, Student's report card reflected that he had obtained test scores of far below basic in math, basic in reading, below basic in the District writing prompt assessment, and below basic in listening/speaking. His grades, however, were all "Satisfactory." In his teachers' view, the difference was due to Student's accommodations, which were applied to his classwork, but not to tests. In particular, standardized testing did not permit redirecting or prompting.

*2014-2015 School Year*

15. Student entered third grade in fall 2014, when he was eight years old. Student was in a general education classroom taught by Susan Ramsey, and Ms. Reger continued to be his resource specialist teacher. He also had the services of a one-to-one aide for three hours per day, pursuant to his IEP.

TRIENNIAL PSYCHOEDUCATIONAL ASSESSMENT

16. In fall of 2014 Raymond Tan, District school psychologist, conducted a psychoeducational examination of Student. He produced a report of the multidisciplinary assessment dated October 16, 2014.

17. Mr. Tan received his bachelor of arts degree in psychology from California State University, and his master of science degree in school psychology (with distinction) from National University. As part of his graduate education he received training in developing behavior plans, but he had no training in applied behavior analysis. He holds a preliminary administrative services credential, and a pupil personnel services credential. He has been a school psychologist since 2005. He served as a school psychologist in District from 2007-2014, and as a program specialist for District since then.

18. Mr. Tan's report included Student's biographical information, educational history, and a summary of the school nurse's health and developmental assessment. The school nurse noted that Student's vision was within normal limits and he passed the hearing screening. The school nurse noted Student's history of traumatic brain injury.

19. Mr. Tan's report listed Student's test results from the previous triennial assessment in 2011, which Mr. Tan had not conducted, and the various instruments that comprised this assessment. Among the more relevant scores from that assessment were Student's scores on the Woodcock Johnson III Achievement tests, which showed that Student obtained standard scores of 105 in Letter-Word Identification, 93 in Applied Problems, and 97 in Writing Samples. On the Kaufman Tests of Educational Achievement II (Form A), Student obtained standard scores of 102 in Letter & Word Identification, 104 in Math Concepts and Application, 104 in Math Computation, 91 in Written Expression, and 88 in Phonological Awareness.

20. Mr. Tan's report contained his observations of Student during the testing. Student was friendly, cooperative, pleasant, and initiated spontaneous conversations. He had a tendency to repeat the same information he had shared with the examiner within a short interval of time, indicating that he did not remember he had already shared that information. From time to time he had difficulty following directions and required prompting. He was easily redirected and was satisfactorily motivated. His response rate on the test items was within expected levels, but in some instances he seemed to have responded impulsively. He sometimes requested that details be repeated. Student acted appropriately and had an adequate attention span, but was distracted occasionally. He was generally persistent with

difficult tasks, and occasionally fidgety or restless. His conversational proficiency, level of cooperation and level of self-confidence were typical for his age and grade level.

21. Student was assessed in English, his primary language. Mr. Tan was trained to conduct the assessments, and he conducted them in accordance with the test manuals. Mr. Tan was knowledgeable of Student's disability and competent to perform the assessment. The tests and assessment materials were validated for the specific purpose for which they are used, and selected and administered so as not to be racially, culturally, or sexually discriminatory. They were selected and administered to best ensure that the test results accurately reflected the factors the test purported to measure and not Student's impaired sensory, manual, or speaking skills, unless those skills were the factors the test purported to measure.

22. Mr. Tan assessed Student's cognitive ability by administering the Wechsler Intelligence Scale for Children-Fourth Edition, and the Naglieri Nonverbal Ability Test-Form B. On the Wechsler, a significant part of which required use of language, Student obtained a full-scale IQ score of 70, which placed Student in the below expected level of general intelligence. The full-scale IQ on the Wechsler was the average of Student's performance on the Verbal Comprehension Index, Perceptual Reasoning Index, Working Memory Index, and Processing Speed Index, and Mr. Tan reported the scores on each index.<sup>3</sup>

23. On the Naglieri, Student obtained a standard score of 98, which placed him in the average range. This was the same score he had obtained on the Naglieri at the last triennial assessment. The areas assessed by the test included serial reasoning, pattern completion, reasoning by analogy, and spatial visualization, but Mr. Tan reported only the total test score of 98.

24. Mr. Tan assessed Student's auditory processing and verbal memory skills. These skills involve understanding verbal instructions and remembering verbal instruction from rote and/or retrieval recall ability. Mr. Tan assessed Student in this area using the Test of Auditory Processing Skills-3 and the working and short term memory subtests of the

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<sup>3</sup> For all standardized tests that Mr. Tan administered, standard scores of 90-109 were in the average range, and scaled scores of 8-12 were in the average range. The tables in the report clearly state whether a score is a scaled score or a standard score. However, the text of Mr. Tan's report confused the standard scores and the scaled scores, in that sometimes he referred to a score as a standard score when the table listed it as a scaled score, or vice-versa. This confusion was compounded by the report's use of the same descriptor (SS) to denote both standard scores and scaled scores. In general, whenever Mr. Tan's report referred to both standard scores and scaled scores on assessments he administered, the report failed to consistently describe standard scores as standard scores and scaled scores as scaled scores. However, this lapse did not affect the reliability of Mr. Tan's reporting of Student's overall scores on the Wechsler and Naglieri, because, except for the Symbol Search score on the Wechsler (which was reported as 1 in the table and as 3 in the text) the numbers themselves are reported consistently. In context, one can understand the report in these areas.

Woodcock-Johnson Test of Cognitive Abilities-III. On the Auditory Processing Skills test, Student's performance was below the expected level of ability. He scored well below the expected level of ability on the phonologic subtests, which assess skills necessary for understanding language when learning, and the memory subtests, which assess basic memory processes. Student also scored well below the expected level of ability on the cohesion subtests of Auditory Comprehension and Auditory Reasoning, which not only required Student to understand exactly what was said, but also be able to use the information and to make inferences to obtain information that was not directly stated. Student's score on these subtests suggested that he had a weak ability to understand concrete and abstract verbal information that he heard.

25. Student scored well below the expected level on ability on the short term memory subtests of the Woodcock-Johnson. He also scored well below the expected level of ability on the working memory subtests.

26. Mr. Tan assessed Student's visual processing and visual memory, which involve the ability to recognize and interpret visual stimuli involving the use of visual memory and visual sequencing. Mr. Tan administered the Test of Visual-Perceptual Skills-3 and the Visual Perception subtest on the Beery Test of Visual-Motor Integration, Sixth Edition. Mr. Tan's report stated that Student's standard scores in all areas tested on the Test Visual-Perceptual Skills Test (Basic Process, Visual Sequencing, and Complex Processes) all fell below or well below the expected level of skills. However, in addition to the confusion in the text of the report as to whether the scores Mr. Tan reported were scaled scores or standard scores, the scores reported by Mr. Tan in the tables in the report for the Test of Visual-Perceptual Skills do not match the scores reported in the text. For example, the report stated that Student scored 75 SS "for Complex Processes." The table above the text showed that Student obtained a score of 55 in "Complex." Similarly, on the Beery Subtest, Mr. Tan's report stated that Student's score fell within the expected level of ability. However, the standard score of 96 contained in the table pertaining to this subtest does not match the standard score of 115 that Mr. Tan stated in the text of his report. Due to these discrepancies, Mr. Tan's report is not reliable with respect to the reporting of Student's scores and ability levels in the areas of visual processing and visual memory.

27. Mr. Tan assessed Student's sensory motor skills using the Beery-Buktenica Developmental Test of Visual-Motor Integration, 6th edition. Student scored within the expected level of ability.

28. Mr. Tan assessed Student's attention and focus by administering the rating scales of the Conners Rating Scales-3rd Edition, which he submitted to Mother and Ms. Reger. These scales evaluated the presence of behaviors typical of attention deficit disorder and attention deficit hyperactivity disorder. Mother's and Ms. Reger's response patterns indicated that the results were not overly positive, negative, or inconsistent. Mother rated Student within the very elevated range (many more concerns than were typically reported) in the areas of Inattention, Defiance/Aggression, and Peer Relations. Mother rated Student in the elevated range (more concerns than were typically reported) in the

Hyperactivity/Impulsivity and Learning Problems area. Mother rated Student within the high average range in the area of Executive Functioning, which indicated slightly more concerns than were typically reported.

29. Ms. Reger's ratings of Student were very elevated in the area of Inattention, and elevated in the areas of Learning Problems/Executive Functioning, including the Learning Problems subscale.

30. Mr. Tan assessed Student's conceptualization skills using the Wechsler and the Naglieri. Conceptualization skills include the ability to discern basic similarities and differences, draw conclusions, make inferences, and classify, categorize, summarize, and make judgments in multi-step operations. Student's score on the Wechsler Similarities subtest suggested weak ability in verbal reasoning and concept formation, as well as auditory comprehension, memory, distinction between nonessential and essential features, and verbal expression. Student scored within the average range in the area of abstract, categorical reasoning ability. His score on the Matrix Reasoning subtest suggested average ability as to fluid intelligence, and offered a reliable estimate of general intellectual ability. On the Naglieri, as set forth above, Student obtained a standard score of 98, which placed him at the expected level of nonverbal skills.

31. Mr. Tan assessed Student's cognitive expression skills, which encompassed abilities in reading comprehension, vocabulary, and basic writing skills, using the Wechsler. He also included Student's Writing Samples score on the Woodcock-Johnson III Tests of Achievement, which Ms. Reger administered during the academic portion of the assessment. Student's score on the Vocabulary subtest of the Wechsler suggested weak ability, and his score on the Comprehension subtest of the Wechsler suggested average ability. Student's standard score of 101 on the Writing Samples subtest of the Woodcock Achievement tests suggested average ability.

32. Mr. Tan reported Student's scores on the Woodcock-III Achievement academic testing Ms. Reger performed, and the Kaufman-II tests to Student in fall 2014 as part of the triennial assessments. Ms. Reger's report is discussed below. Mr. Tan's report did not directly compare Student's previous scores on his academic assessments to his current scores. Had Mr. Tan done so, he would have realized that Student's academic scores had declined, as is further explained below.

33. Mr. Tan evaluated Student's social-emotional functioning and adaptive behavior by administering the Piers-Harris Self Concept Scale 2 to Student, and the Conners Comprehensive Behavior Rating Scales to Ms. Reger and Mother.

34. On the Piers-Harris, Student's self-ratings fell within the average range on each of the six scales: Behavioral Adjustment, Intellectual/School Status, Physical Appearance/Attributes, Freedom from Anxiety, Popularity, and Happiness/Satisfaction.

35. On the Connors, Ms. Reger's responses were reliable. She reported that concerns in the areas of the separation fears, social anxiety, learning or language problems, and hyperactivity, seriously affected Student's functioning on occasion in the academic and social settings. Mother's responses on the Connors were also reliable. She reported that concerns in the areas of defiant/aggressive behaviors, academic difficulties, math, language and violence potential, seriously affected his functioning often in the academic and social settings, and occasionally in the home setting.

36. Mr. Tan considered Student's Wechsler and Naglieri scores to reveal significant scatter and they should be interpreted with caution. He believed it was difficult for Student to maintain focus during testing, which may have impacted his scores on the Wechsler. Further, attention can fluctuate between settings. At the same time, he considered the Wechsler results to be as good an indication of Student's cognition as his scores on the Naglieri, because so many factors could affect Student's learning, and one must consider all factors. Mr. Tan did not elaborate on the factors he considered with respect to Student. Mr. Tan also relied on the Wechsler because knowledge of Student's cognitive abilities on a language-based test provided information as to how Student's abilities translated to a classroom environment as classroom work involved verbal questions, verbal answers, and discussions and the Naglieri focus on nonverbal learning.

37. Turning to Student's strengths and weaknesses, Student performed better on tasks that required little or no language skills. Student demonstrated strength in nonverbal reasoning skills, spelling, and writing fluency. He demonstrated weakness in auditory processing and memory, visual processing, attention, math concepts and application, math fluency, and reading comprehension.

38. Mr. Tan reviewed the various special education eligibility categories, and suggested the IEP team consider Student eligible in the categories of language or speech disorders and traumatic brain injury. He found that Student had not met the requirements for eligibility in the category of specific learning disability. Student had attention, auditory processing, and visual processing deficits, but Student exhibited no severe discrepancy between cognitive ability and achievement, based on his Wechsler global cognitive ability standard score of 70. Mr. Tan suggested three general learning strategies to consider for Student: increase his physical proximity to the teacher, use auditory plus visual media to teach concepts, and seat Student where distractions were minimized.

39. The report did not list the records Mr. Tan reviewed for the assessment, but Mr. Tan acknowledged that it was normal protocol to review documents in Student's cumulative file before an assessment, and that it was important to review previous assessment reports. At hearing, he did not remember seeing or reviewing several IEP's since Student's last triennial, and did not recall several important observations of previous IEP teams, such as Student's history of aggression with other students. He did not note significant aspects of previous assessments of which District had documentation, such as a previous independent neurodevelopmental assessment performed by Christine Majors, Psy.D., in January 2009, that found Student's cognitive levels to be in the average to high

average range, and that the scores Student obtained on the academic testing performed by Ms. Reger as part of this triennial assessment were lower than they were in previous District academic testing. Mr. Tan was unaware that Student had been previously diagnosed with central auditory processing disorder, which, he admitted, would have been useful information. He was also unaware that Student had been previously diagnosed with attention deficit hyperactivity disorder. Further, with respect to observations of Student, he asserted that he had performed a classroom observation of Student in Ms. Reger's resource class as part of the triennial assessment, but no such observation was mentioned in the report. He could not recall the duration of the observation, or how many times he observed Student. Mr. Tan did not observe Student in the general education setting for this assessment.

#### TRIENNIAL ACADEMIC ASSESSMENT

40. Ms. Reger performed Student's triennial academic assessment in September and October 2014, and produced an assessment report dated October 9, 2014.

41. Student's conversational proficiency seemed typical for his age level, and he was cooperative throughout the assessment. He seemed to be at ease and comfortable during the assessment, but he often seemed distracted. Sometimes he was impulsive and careless in his responses, and he would give up easily after attempting difficult tasks. He would sometimes make careless or impulsive mistakes during testing, but then would immediately go to class and demonstrate proficiency with the same skills.

42. Ms. Reger administered the Kaufman Tests of Educational Achievement, Second Edition, Form A, the Woodcock-Johnson III Normative Update Tests of Achievement (Form A), and the Woodcock-Johnson III Normative Update Tests of Achievement (Form B), Calculation test. In reporting his scores, she included her observations of Student in class. She did not compare his scores to the scores he had obtained in previous academic testing.

43. In the area of Reading, Student's word identification skills fell in the average range, and his fluency and comprehension skills fell in the below average range. Specifically, his composite Reading standard score on the Kaufman was 81. He obtained a standard score of 87 in Letter and Word Recognition, and a standard score of 80 in Reading Comprehension. On the Woodcock-Johnson A he obtained standard scores of 86 in Broad Reading, 95 in Letter-Word Identification, 85 in Reading Fluency, and 81 in Comprehension.

44. While Student did well very well reading and following single step directives, at times he lacked focus when reading a paragraph. He would then be prompted to read the passages and/or questions aloud, which helped him stay on task, but it did not improve his comprehension of the material. Student was successful in the classroom using graphic organizers with teacher modeling. He benefitted from using a systematic approach to comprehension, which included highlighting key ideas and reading the questions before reading the passage.

45. In the area of Writing, Student could create complete sentences with proper capitalization and punctuation during the assessment. Most of his sentences had subject/verb agreement, and his printing was neat and legible. Student could independently generate a complete sentence and write it from memory without visual or verbal prompts. He could complete a graphic organizer with teacher support, and then use it to complete a paragraph. His spelling fell in the average range on the Kaufman. Specifically, he obtained standard scores of 86 on the Written Language Composite, a 92 in Spelling, and an 82 in Written Expression. On the Woodcock-Johnson III A, he obtained standard scores of 94 in Broad Written Language, 96 in Spelling, 90 in Writing Fluency, and 101 in Writing Samples.

46. In Math, Student knew how to compute single and multi-digit addition and subtraction problems. He could regroup with teacher guidance. He could independently solve single-step word problems using numbers up to 100, and, with prompting, two-step word problems. He often made careless mistakes on very simple calculations, which greatly impacted his scores on formal assessments. His score on the math Calculation subtest of the Woodcock-Johnson III A was greatly impacted by careless mistakes and impulsive responses. Therefore, Ms. Reger administered the Woodcock-Johnson III B Calculation subtest, on which he performed significantly better. However, he still made two careless errors, which prevented him from obtaining a score within the average range. On the Kaufman, Student obtained standard scores of 72 on the Math Composite, 69 in Math Concepts and Applications, and 82 in Math Computation. On the Woodcock-Johnson A, his standard scores were 76 in Broad Math, 78 in Calculation, 79 in Math Fluency, and 80 in Applied Problems. On the Woodcock-Johnson B Calculation subtest, Student obtained a standard score of 89.

47. Student's remaining standard scores on the Woodcock-Johnson A were a 91 in Academic Skills, an 82 in Academic Fluency, and an 82 in Academic Applications.

48. When compared to others at his age level, Student's overall level of achievement was low average on the Woodcock-Johnson A. Student's fluency with academic tasks and his ability to apply academic skills were both within the low average range. His scores in Broad Written Language, Written Expression, and Brief Writing were average. His Broad Reading and Brief Reading scores were in the low average range. His scores were low in Broad Mathematics, math calculation skills, and Brief Mathematics.

49. Turning to the Kaufman scores, when compared to others at his age level, Student's level of achievement was average in Letter and Word Recognition and Spelling. His scores were below average in Reading Comprehension, Math Computation, and Written Expression. His Math Concepts and Applications score was in the lower extreme.

50. Ms. Reger believed that Student's carelessness and impulsivity negatively affected his test scores. Ms. Reger recommended that the IEP team develop goals in the areas of reading comprehension, math, and written expression. She recommended the following strategies to address his weaknesses: (1) have Student highlight main ideas and supporting details in different colors, (2) continue to use graphic organizers to aid in reading

comprehension and written expression, and (3) in math, have Student explain aloud math procedures; use concrete examples as often as possible; and use graph paper when working with place values.

#### OCTOBER 16, 2014 IEP TEAM MEETING

51. On October 16, 2014, when Student was eight years old and in third grade, District convened an IEP team meeting to review the results of the triennial assessments. The team included Mother; a District administrator; Susan Ramsey (Student's general education third-grade teacher); Ms. Reger; Mr. Tan; a speech and language pathologist; an occupational therapist; and a behavior counselor.<sup>4</sup> The team noted Student's strengths in nonverbal reasoning skills, spelling, and writing fluency. He was eager to please and motivated. He responded positively to both praise and redirection from adults. He loved physical activities such as running and playing soccer. Mother expressed that Student was smart, but his many processing disorders impeded him. He had struggled emotionally and academically since the passing of his younger sister on his eighth birthday the previous December. She had been his best friend.

52. Mr. Tan presented his report on the psychoeducational assessment. Mr. Tan stated that Student's full-scale IQ was 70, and noted that Student's difficult in focusing during testing may have impacted his score. He said that the score must be interpreted with caution. Mother was concerned that the score did not accurately reflect Student's ability. She agreed with his score on the Naglieri. Mr. Tan also reported that student had processing deficits in the areas of attention, visual processing, and auditory processing.

53. The team discussed the triennial assessments, and incorporated much of Ms. Reger's assessment results and report into Student's present levels of performance as to reading, writing, and math. Mother agreed with the results. His present levels of performance in communication development and gross and fine motor development were based upon his triennial evaluations in those areas. In the social emotional/behavioral area, Student had an overall positive attitude about school. He had demonstrated success on his daily behavior chart. His behavior counselor shared that she had no concerns with defiance or aggression, and that Student did not demonstrate a need for services, but services would continue due to concerns Student would struggle with the anniversary of his sister's passing. The team intended that counseling services would be phased out. Regarding sensory processing, Student had been attending to tasks well through the use of verbal prompting when necessary. He was not using any sensory strategies in the classroom setting as he was attending to task without them, but they were available if needed. In the vocational area, Student had regular attendance, and had improved in his ability to maintain focus during

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<sup>4</sup> The counselor was a behavior health counselor, who provided counseling services to Student in a clinical or other one-to-one setting. She had no role in addressing Student's behavioral challenges that are at issue in this Decision. Her role was to develop and address the counseling goals in Student's IEP's.

directed lessons and in work completion. As to his adaptive/daily living skills, Student was able to care for his personal needs in the school environment. He had no health issues.

54. Student met his previous goals in areas of counseling, work completion, written language, and mathematics. Student had met one of his two annual speech goals; one of his behavior goals (to recognize the personal space of others by keeping hands and body to self); an executive functioning goal (to stay on task to complete seat work), a writing goal, a math goal, and counseling goal. He partially met his handwriting goal, and partially met his second behavior goal. More specifically, he demonstrated great improvement in his ability to not use physical contact to meet his needs, although he did not meet the 100 percent target of the goal and he seldom requested adult support.

55. The team developed two behavior goals in conjunction with Student's behavior plan, discussed below. The team developed a reading goal, to address Student's difficulty with reading comprehension. The goal involved Student reviewing a grade level text with his teacher, determining the main idea of the text, recounting two to three details, and explain how they support the text. The team also developed academic goals in written language and mathematics, as well as goals in other areas of need. The team also included an individual counseling goal regarding the use of coping strategies for Student to appropriately manage his emotions.

56. Student was to take the California Assessment of Student Performance and Progress in English Language Arts and Math (Smarter Balanced Assessments) with designated embedded supports of text to speech. If he took other statewide or district-wide assessments, the test questions would be read aloud.

57. Student's assistive technology services included visual supports for auditory presented information, visual highlighting to help focus on key ideas, visual structure (graphic organizers) to aid with written output, an oral fidget, and an air-filled seat cushion as needed.

58. The IEP team noted that Student's behavior impeded his learning or that of others, in that he had difficulty with recognizing the personal space of others, which isolated him from his classmates and resulted in him feeling less connected and focused. The team noted that that the behavior strategies and supports used were close monitoring and feedback/rewards for appropriate behavior. The IEP included a behavior plan developed by Ms. Reger, Ms. Ramsey, Mr. Tan, the assistant principal, and the speech and language pathologist. The behavior to be addressed was Student's difficulty with personal space of his peers when in close proximity with others or during unstructured time. He sometimes touched students, and occasionally hit, pushed, poked, or grabbed. On the playground, the targeted behaviors occurred at the rate of one or two incidents, one or two days per week, with regular and consistent verbal prompting or visual support to discourage the behaviors. The plan designated Student's one-to-one aide to assist in implementing the behavior plan, along with other staff members. There was no evidence that any behavior specialist was involved in the development of the plan or would supervise its implementation. Indeed,

there was no evidence that any behavior specialist was involved in the development of any of Student's previous behavior plans.

59. The predictors for the targeted behaviors were Student not getting peer attention, or when he wanted to gain access to preferred items, or when he felt fatigued in the afternoon. The behavior occurred when Student did not receive front-loading,<sup>5</sup> or when there were inconsistencies in his routine. To remove his need for the behavior, Student required close monitoring by adults during unstructured time so that appropriate behavior could be rewarded. He needed adults to prompt appropriate ways to obtain attention. He benefitted from visual displays of the rules in the classroom. He also needed visual reminders to focus his attention and to stay on task. He needed frequent check-ins from adults, and consistent reinforcement for replacement behaviors. Sensory tools were provided to Student, but he declined to use them and had some success in behaving appropriately without them. Sensory breaks would be allowed in the classroom, to include stretching, deep breathing, standing up, and fidget tools.

60. The plan suggested replacement behaviors. Instead of getting peer attention by touching them, he could verbally get a peer's attention by greeting them, asking them a question, or giving a compliment. When verbal means did not succeed in getting his needs met, he could demonstrate self-control by continuing to maintain personal space, such as waiting for his turn, and not grabbing an object from a peer without permission. Techniques for teaching appropriate behaviors included adult modeling, re-teaching correct social interactions with peers and adults, assisting him with social interactions, and use of social stories. Reinforcement procedures included verbal praise and tangible reinforcements. A daily checklist listing up to five of the most troublesome classroom behaviors would be completed daily and sent home for reinforcement by the parent. School staff would also send notes home when Student used appropriate social behaviors. Staff could also issue other forms of positive reinforcement, such as awards and classroom medals.

61. Should the behavior recur, staff would use visual and verbal prompts to help Student to switch to the replacement behavior. When the targeted behavior stopped, staff would verbally and visually discuss with Student the behavioral expectations of the playground and alternative ways of behaving that he had learned. In case of severe behavior, staff could interrupt Student's activities to review the behavioral expectations and/or engage in a sensory break. If staff interrupted recess, Student would engage in some form of physical activity while engaging in a discussion with staff about his behaviors and appropriate responses.

62. The plan included annual functionally equivalent replacement behavior goals to increase Student's use of replacement behaviors, reduce frequency of the target behavior,

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<sup>5</sup> Front-loading is a pre-teaching technique, by which a teacher prepares the student for the lesson or reading assignment by a variety of methods. For example, the teacher might give the student background information, or introduce new vocabulary, before the teacher formally presents the lesson or reading assignment.

and to develop new general skills to remove Student's need to use problem behavior. One goal required Student to demonstrate the ability to recognize the personal space of others in social interactions by keeping hands and body to self with one visual/verbal prompt, for the purpose of gaining the attention of peers and expressing his needs appropriately during unstructured times, with 80 percent accuracy for five out of five days. The goal would be measured by the daily behavior charts. Another goal required Student to demonstrate self-control by continuing to maintain personal space in a situation when he wanted to gain access to preferred objects on the playground, at 80 percent accuracy for five consecutive days. This goal would be measured by observation during recess and data recorded on the behavior chart.

63. The IEP team found Student eligible for special education in the primary category of traumatic brain injury and in the secondary category of speech and language impairment. Student's medical diagnosis of traumatic brain injury, the effects of which included behavior difficulties and processing deficits, affected Student's involvement and progress in the general curriculum. Student also displayed some deficits in language skills which could make it difficult for him to understand new concepts and relate adequate mastery of curriculum content.

64. The IEP team discussed the least restrictive environment and offered placement in the general education classroom at Hidden Trails, with resource specialist services to provide specialized academic instruction in a small group for 60 minutes, four times per week. This was double the level of 30 minutes, four times per week offered in the October 24, 2013 IEP. The services would be provided on a push-in basis in the general education classroom or on a pull-out basis in the school's Learning Center. Student was to spend 95 percent of his time in the general education setting. The IEP team also offered individual counseling twice per month, 30 minutes each time, and a one-to-one aide for 900 minutes per week. The team agreed that, since Student struggled in the afternoon, the aide's time would be adjusted to provide support in the latter part of the day. Additionally, the team also offered individual and group speech and language services, individual and group occupational therapy, and assistive technology services. The team also offered special education summer school.

65. The IEP also specified Student's accommodations and modifications. These included preferential seating, movement breaks, frequent repetitions, small group direct instruction, frequent checks for understanding, and short verbal instruction. The accommodations also included reduced spelling lists, and, if necessary, reduced assignments, having content area tests read aloud, use of graphic organizers to aid with written expression and comprehension of text; use of timers and behavior charts to improve work completions, use of visual feedback or visual aids, and frontloading of lessons and other classroom activities. The general education teacher would have the support of the resource teacher and could consult with specialists as needed. These accommodations were the same as those in Student's October 24, 2013 annual IEP, except for the accommodations of use of visual feedback or visual aids, new to this IEP.

66. Mother requested Cogmed therapy, which was a computer program for building memory, and took the IEP home to consider it. Mother signed partial consent to the IEP on October 17, 2014. The signature page referenced an attachment, signed by Mother, which contained Parents' concerns. Mother disagreed with the school psychologist's report that Student's IQ was 70, and criticized Mr. Tan's methodology. Mother requested independent educational evaluations in the areas of neuropsychology and speech and language.<sup>6</sup> Mother also wrote that Student had fallen far behind in math, and needed an additional goal in the area of regrouping, as Student was not able to perform that task. Mother noted that Student did not meet all nine of his previous goals, but only six. Mother was also concerned that the IEP did not address Student's memory deficits. She reiterated her request for Cogmed therapy. She consented to the reduction in occupational therapy services, but only because Student was receiving such services from another source.<sup>7</sup> Mother did not believe that the IEP constituted a FAPE.

67. On November 7, 2014, in response to Mother's concerns, the parties amended Student's October 16, 2014 IEP to add a math goal directed at regrouping skills.

#### EVENTS DURING THE 2014-2015 SCHOOL YEAR

68. Student's one-to-one aide during the 2014-2015 school year continued to perform a variety of functions. She helped Student with his academics, helped him stay organized, and stayed with him during recess, between classes, and at lunch to help him with his behaviors. His desk was separated from others in the classroom. Ms. Ramsey, Student's general education teacher, thought he could focus and work one-to-one with his aide better if his desk was separated from the others. Ms. Ramsey customarily kept a few desks separated from the others for students to use if they wanted to, but use of such desks was voluntary.

69. Student's behavior charts in December 2014 and early January 2015 reflected several instances of misbehavior, some of which generated citations or office referrals. Citations were classroom warnings, and a means of notifying parents of unacceptable behavior before the behavior escalated. Office referrals were used for more serious behaviors or for repeated behaviors. On December 4, 2014, Student was required to apologize to a female student with whom he had engaged in an inappropriate romantic conversation. On December 9 and 10, he took another child's Pokemon cards without the child's permission. On January 6, 2015, he received a citation for smearing Nutella on another child's shirt. On January 8, he received a citation for talking to another student after the bell to get a ball away from him.

70. In general, Ms. Reger believed Student made progress during the 2014-2015 school year, based upon his classwork. He needed teacher support, sometimes more often than others. At times he needed a lot of redirection, and a lot of verbal prompting to stay

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<sup>6</sup> Mother later withdrew these requests for independent evaluations.

<sup>7</sup> Occupational therapy services are not at issue in this matter.

engaged. He had memory problems, so she provided visual supports, and taught him how to use them as a tool or resource, that he could refer to later. She believed that he made a lot of growth in his ability to retain information, but some lengthier tasks required more support.

71. Ms. Reger also believed that his behaviors improved during the school year. This opinion was based upon her review of his behavior charts, as well as upon a social skills survey that the school gives to all students, which reflected that Student did not present as a child who needed behavior support.

72. Mother became concerned that District was not following Student's IEP. On February 25, 2015, Mother wrote to Ms. Ingulsrud, requesting that Student's aide hours be increased, because the negative comments on his behavior charts were increasing. She complained that Student's desk was apart from the other students' desks, that school personnel were finding fault with Student and yelling at him instead of providing positive reinforcement, and that Parents saw Student having increased behaviors and increased anger and frustration over school. Mother's letter requested that District advise by the following week how District intended to address this situation, or Mother would keep Student at home or place him in a nonpublic school.

73. Mother was particularly concerned about the location of Student's desk, because Student told her that his desk was separated from others because he was getting into trouble, and it humiliated him because it signaled to the other children that he had done something wrong. District convened an IEP team meeting on March 11, 2015, to address the results of an independent evaluation for vision therapy which occurred in the fall, and to address Parents' concerns. All appropriate members of the IEP team were present. The team agreed to provide vision therapy, as well as to modify Student's accommodations to include the use of large print and/or line tracker/window.

74. At the meeting, Mother expressed concerns regarding Student's emotional status. He was frustrated that school staff were focusing on his negative behavior, and Student had advised Mother that he hated school and hated his life. Mother also commented that she did not like that Student's desk was positioned away from the other desks, and that this should not occur since he had an aide. With respect to academics, Mother shared that the computer program Fast ForWord was helping Student, but that he still needed to master foundational skills. She requested District provide dichotic hearing therapy.<sup>8</sup>

75. Student's teachers, Ms. Ramsey and Ms. Reger, advised that Student was not getting into trouble at school. Ms. Reger suggested that Student might be focusing on only one negative mark. Both teachers expressed that Student had done well both academically and in his behavior. The team agreed that Student should put his own stars on the chart, so he could begin to internalize his positive behavior. The team also discussed that Student

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<sup>8</sup> Dichotic hearing therapy was recommended by Dr. Abramson to address Student's central auditory processing disorder. Whether District had an obligation to provide dichotic hearing therapy is not at issue in this matter, and will not be discussed in this Decision.

worked and focused so hard at school so that when he returned home he might need time to decompress. Mother was advised that Student's placement of his desk was his choice.

76. District convened an IEP team meeting on March 16, 2015, to discuss Student's counseling services. The team discussed why Student was losing stars on his behavior charts, and agreed that he should only lose stars when his behavior was out of the norm. Ms. Rodriguez, Student's counselor, explained that Student had made great progress and met all of his goals, and she had slowly tapered off her services. The team agreed to discontinue the counseling services. The team considered whether Student should receive educationally related mental health services as another option, and agreed that the team could reconvene to discuss such services if the need arose.

77. At some point during the school year, Student took over the task of filling in his behavior chart, based on feedback from staff regarding his behavior. The October 16, 2014, IEP was amended twice more during spring 2015. On April 13, 2015, the IEP was amended to correct a date pertaining to special education summer school. On May 13, 2015, the IEP was amended to include the vision therapy service which had been approved at the March 11, 2015 IEP team meeting.

78. On various occasions throughout the 2014-2015 school year, Student took District unit tests in English Language Arts for each unit completed. These tests were given during third grade on subject matter that was newly designed, to prepare Student for new common core testing. Student struggled with these tests, but some of Student's typical classmates struggled with this series of tests also, as this material was new to teachers and students. The tests were administered without accommodations. Student scored far below basic on each test.

79. In spring 2015 Student took the California Assessment of Student Performance and Progress (the Smarter Balanced Assessment), which were statewide standardized achievement tests. California had just begun administering these tests as part of the state's adoption of common core standards. Common core standards involved critical thinking skills, comparing and contrasting, having to write and support one's ideas Student's overall scores in English Language Arts/Literacy and Mathematics were below standard and his performance on all of the areas that comprised these overall scores were below standard. Parents did not receive the scores on this assessment until fall, 2015, and they were shocked that Student's performance was so poor, in view of the grades Student had received on his report card, as set forth below.

80. Student's progress report on his annual goals demonstrated that as of June 2015, Student had met his benchmarks on his reading goal (to read a grade level text, determine the main idea, recount two details, and explain how they support the main idea); on his math goal regarding rounding numbers; on his behavior goal to demonstrate self-control and maintain personal space; and on his behavioral goal to recognize personal space

and keep hands and body to self. He met one writing goal (regarding independently performing an informative/explanatory writing activity), and made progress on his math regrouping goal.

81. Student's report card for the 2014-2015 school year showed the following grades for the first trimester reporting period: Math, "C+"; English Language Arts, "C+"; Writing, "C-"; History, "C+"; and Science, "B-." Ms. Ramsey's comments on the report card noted that Student made steady progress, and his academic accommodations were beneficial. At the end of the second trimester, his Math grade dropped to a "C", English Language Arts dropped to a "C-", Writing improved to a "B-", and Science declined to a "C+." He received no mark for History/Social Science. His third trimester grades remained a "C" in Math and a "C-" in English Language Arts. He received a "C" in Writing, a "C+" in History/Social Science, and he raised his Science grade to a "B." Ms. Ramsey's end of the year report card comments stated that Student made "amazing progress" both academically and socially and that he always tried his best. She wrote that Student's grades reflected lots of academic support, District common core performance tests proved very difficult, and his language arts/reading grade was impacted by District assessments. In fact, Student's grades did not show much improvement from trimester to trimester during the 2014-2015 school year. Some grades went up slightly, and some grades went down slightly, but mostly his grades were in the "C" range. His highest grade was a "B" in Science in the third trimester.

#### INDEPENDENT NEUROPSYCHOLOGICAL ASSESSMENT BY DR. CHRISTINE MAJORS

82. Parents retained Christine Majors, Psy.D., a psychologist trained in neuropsychology, to perform a neuropsychological assessment of Student. She assessed Student during three separate sessions on April 6, 8, and 22, 2015. She produced a report of the assessment dated August 23, 2015.

83. Dr. Majors received her bachelor of arts degree in psychology in 1991 from the University of California, Irvine, Magna Cum Laude. She received her master of arts and Psy.D. degrees from the California School of Professional Psychology at Los Angeles. She was a postdoctoral fellow at the University of California, Los Angeles, Neuropsychiatric Institute and Hospital. She is a California licensed psychologist, who has been in private practice since July 1998.

84. The purpose of the assessment was to determine Student's current level of cognitive, academic, and behavioral functioning in relation to his difficulties with academics, processing, and peer relationships.

85. Parents were concerned with Student's difficulty in reading, spelling, written expression, and math. They believed his visual, sensory and central auditory processing deficits seemed to cause problems with his school work. Parents were also concerned about Student's difficulty in interacting and socializing with his same-age peers. Student preferred to be alone, overreacted to touch (on occasion) and loud noises, demonstrated impulsivity, a low frustration threshold, poor memory, and was slow to learn. He engaged in daredevil

behavior. In the classroom, he was easily distracted. He sought, but was not sought after, by peers for play. He became angry when peers did not do what he wanted, and had no real friends his age.

86. Dr. Majors' report summarized Student's special education services at school, and listed the instruments used in the assessment. The report also listed the records and reports Dr. Majors reviewed. Dr. Majors reviewed all of the records from pre-school to third grade that were available to her, as she considered a records review to be essential to an assessment. Dr. Majors summarized student's medical, developmental, and educational history. She referenced speech and language, occupational therapy, vision, auditory, and neuropsychological assessments Student had received. She also referenced Mr. Tan's psychoeducational assessment. She summarized the services offered in Student's IEP's. She included an appendix at the end of her report that contained more specific references to Student's records.

87. Dr. Majors observed Student's behavior during testing. He exhibited noticeable fluctuation in his level of attention, and overactive and impulsive behavior. He was easily distracted by stimuli inside and outside of the room. He did not exhibit aggressive, oppositional, or disorganized behaviors. His task perseverance was good, and responded well to verbal encouragement. His affect was appropriate to his mood. His eye contact was good. When interacting with Dr. Majors, he usually made comments about what he was asked to do and/or asked questions. His speech was normal for rate, volume, and prosody. Student consistently required repetition and/or simplification of directions and test questions. He required a check for comprehension every time he was given test directions. Overall, his behavior during testing suggested possible problems in the areas of inattentive, overactive, and impulsive behavior; auditory processing; and social communications skills. His testing performance was likely impacted by his fluctuations in attention, and probable that his scores on some cognitive tasks were adversely affected by his attention deficits.

88. Dr. Majors administered the Leiter International Performance Scale-3rd Edition to measure Student's intellectual functioning. The Leiter is a nonverbal measure of intellectual ability designed to assess people from three to 75-plus years of age, who cannot be reliably and validly assessed with traditional intelligence tests. Dr. Majors believed it was appropriate to administer the Leiter based upon Student's history of speech and language delays. Student obtained a nonverbal IQ on the Leiter of 113, which indicated that Student's current level of intellectual functioning was in the high average range. In her report, she noted that this score likely underestimated his ability, as his difficulty with attention adversely affected his performance.

89. Cognitively, Student's profile was variable across and within cognitive domains. He obtained scores within expectation on measures sensitive to visual attention, auditory processing (immediate repetition of lists of numbers in numerical order), learning and recall of visual information presented in a complex format only one time, and visual-motor integration. He had relative weaknesses on measures sensitive to phonological processing, auditory processing (auditory word discrimination and immediate repetition of

lists of numbers in reversed order), and learning and recall of visual information presented in a simple, structured format which was viewed three times. He obtained scores significantly below expectations in auditory attention, visual attention, receptive vocabulary, phonological awareness and memory, auditory processing (including auditory comprehension and auditory reasoning), and learning and recall of verbal information. Dr. Majors could not assess Student's complex auditory attention, because Student could not grasp the nature of the task. A complex task analysis revealed that Student exhibited serious difficulty learning verbal information, exhibited a problem in his auditory attention span, quickly reached a saturation point when learning new verbal information, and exhibited "below average" ability to encode new verbal information into memory.

90. Dr. Majors briefly summarized the findings from Ms. Segal's March 2015 independent speech and language assessment. Dr. Majors referenced Ms. Segal's findings to underscore that it was not appropriate to administer verbal intelligence tests to Student. Ms. Segal concluded that results of formal and informal evaluation revealed a moderate to severe language disorder characterized by significantly impaired auditory language processing skills, deficits in receptive and expressive abstract language skills, poor oral narration and comprehension, a lack of mastery of morpho-syntactic skills (i.e., subject-verb agreement, irregular past tense verbs, appropriate word use), and deficits in social/pragmatic skills. This disorder also presented as a language-based learning disability. Ms. Segal diagnosed a Mixed Receptive/Expressive Language Disorder and Abnormal Auditory Perception.

91. Overall, Student's scores indicated fluctuation in attention, and relative weakness in certain areas of language functioning and simple visual memory. Student's scores reflected deficits in other areas of language functioning (receptive vocabulary, phonological awareness and memory, and certain areas of auditory processing); memory for verbal information paired with visual information; verbal memory for paragraph-length information; and rote verbal memory.

92. Dr. Majors assessed Student in academic achievement by administering the Wechsler Individual Achievement Test-III and the Gray Oral Reading Tests-5B.

93. Regarding reading skills and comprehension, Student's Wechsler Achievement scores showed a relative weakness on measures reflecting single word recognition and decoding of nonsense words. Student's standard score on single word recognition was in the low average range, but his rate of word reading was better than only 25 percent of students in the normative sample. Based on the performance she would expect, given his I.Q., Dr. Majors categorized this task as a relative weakness for him. Student obtained a standard score in the average range on decoding of nonsense words, but his significantly slow rate of speed in decoding the nonsense words (better than only two percent of students in the normative sample) contributed to Dr. Major's conclusion that decoding of nonsense words was a relative weakness for Student. Student obtained scores falling significantly below expectation and/or grade level on measures of early reading skills and reading comprehension.

94. On the Gray, Student obtained scores falling significantly below expectation and/or grade level on the following: accuracy of single word reading in context; reading rate; reading fluency, and reading comprehension.

95. In the area of written expression, Student's Wechsler Achievement scores fell within expectation in alphabet fluency, sentence combination when required to combine two to three sentences into one good sentence that meant the same thing, and essay composition (grammar and mechanics). On the alphabet fluency measure, Student could not write the complete alphabet unless he sang the entire alphabet song while he wrote. Student's scores showed relative weakness in the areas of spelling to dictation and essay composition (theme development and text organization). Student's scores fell significantly below expectation and/or grade level on measures of sentence building when given one word and required to write a sentence using that word, and essay composition (word count).

96. In math, Student's Wechsler Achievement scores fell within expectation on measure of mechanical arithmetic and math fluency (multiplication). He obtained scores falling significantly below expectation and/or grade level on measures of applied mathematics and math fluency (addition and subtraction). Dr. Majors attributed Student's low applied math scores to his deficient language skills.

97. Dr. Majors assessed Student's behaviors pertaining to attention by administering the Conners 3 to Mother and to Ms. Reger. Mother's response pattern indicated she answered the questions in a straightforward, consistent manner. Ms. Reger's response patterns indicated some inconsistencies in her responses, but since many of her responses were similar to Mother's, Dr. Majors was not concerned. Based on their responses, Dr. Majors concluded that Student met criteria for the diagnosis of attention deficit/hyperactivity disorder, predominantly inattentive presentation.

98. Dr. Majors also administered the Behavior Rating Inventory of Executive Functioning to Mother and Ms. Reger. This rating scale assessed the processes responsible for guiding, directing, and managing cognitive, emotional, and behavioral functions, particularly during times of active, novel problem solving. Mother's response pattern indicated clinically significant elevations on the Metacognition Index. The Metacognition Index represents the child's ability to initiate, plan, organize, and sustain future-oriented problem solving in working memory, reflect the child's ability to self-monitor, and is a measure of the child's ability to cognitively self-manage tasks. Ms. Reger's response indicated clinically significant elevations on both the Metacognition Index and the Behavioral Regulation Index. The Behavioral Regulation Index represents a child's ability to shift cognitive set and modulate emotions and behavior via appropriate inhibitory control. Dr. Majors concluded that Student's scores on these indexes and on the Inhibit subscale suggested that Student had poor inhibitory control and/or that more global behavioral dysregulation was having a negative effect on active metacognitive problem solving. Current research suggested that behavior regulation, and particularly inhibitory control, underlay most other areas of executive functioning.

99. Dr. Majors administered the Adaptive Behavior Assessment System-II to Mother to assess Student's adaptive functioning. The instruments assess three domains of adaptive behavior. The Conceptual Domain involves adaptive behavior in the areas of communication, functional academics, and self-direction. The Social Domain involves adaptive behavior in the areas of leisure and social skills. The Practical Domain involves adaptive behavior in the areas of community use, home/school living, health and safety, and self-care. The scores in all three domains serve to generate a global index level of adaptive functioning. Student's standard scores in the Conceptual Domain and Social Domain were in the borderline range, and his score in the Practical Domain was in the below average range. His global index level standard score was in the extremely low range.

100. Dr. Majors concluded that Student's scores in reading skills and comprehension revealed that he met criteria for a diagnosis of Specific Learning Disorder with Impairment in Reading, Severity: Moderate, in the areas of word reading accuracy, reading rate or fluency, and reading comprehension.<sup>9</sup> Dr. Majors reported that this diagnosis was reflected by Student's decline in Woodcock Johnson III standard scores between October 25, 2012 and October 16, 2014 in Letter Word Identification, Reading Fluency, and Passage Comprehension. Student's score in Letter Word Identification declined by 13 points (almost one standard deviation) between the two administrations of the Woodcock-Johnson III (standard score of 108 in 2012; standard score of 95 in 2014). His Reading Fluency score declined by 19 points (more than one standard deviation) during that period, representing a decline from the average range to the low average range. His score in Passage Comprehension declined by 22 points (approximately one-and-one-half standard deviations) during that period, representing a decline from average range to below average range.<sup>10</sup> In view of Student's history of speech and language delays, as well as his current deficits in speech/language skills, auditory processing, and phonological processing, his profile was consistent with a language learning disability. In Dr. Majors' opinion, to make minimal progress in language-based academics, it was critical that Student be provided with an intensive program of interventions addressing these deficits.

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<sup>9</sup> This diagnosis is based on the Diagnostic and Statistical Manual of Mental Disorders, 5th Edition.

<sup>10</sup> It is unclear from where Dr. Majors obtained Student's 2012 Woodcock scores as set forth in her report. The October 25, 2012 test report in evidence lists Student's standard scores in Letter-Word Identification as 114, Reading Fluency as 108, and Passage Comprehension as 112. These scores are higher than those Dr. Majors reported, and therefore they serve to increase the differential between Student's 2012 and 2014 scores that Dr. Majors noted in her report. It is noteworthy that Student's October 25, 2012 IEP purports to list several of Student's test scores from October 25, 2012; however, they are listed in a confusing manner, with two scores given for each subtest. One set of those scores matches those listed in Dr. Majors' report; one set of those scores matches the ones documented in the October 25, 2012 test report.

101. Behaviorally, Student's symptoms met criteria for the diagnosis of Attention-Deficit/Hyperactivity Disorder, Predominantly Inattentive Presentation, Severity: Moderate. His symptoms included inattention, mildly anxious behavior, and difficulty with organizational skills, initiation, working memory, self-monitoring, inhibition, and emotional control. These behaviors interfered with his development of independent problem solving skills. Student's attention deficits were not sufficient to explain his learning deficits in reading, and his uneven performance on tests of written expression and mathematics. Adaptively, Student was functioning in the extremely low range.

102. Student's identified cognitive weaknesses and behaviors adversely affected his functioning at school by interfering with his ability to accurately process verbal information, initiate and sustain attention to task, utilize appropriate organizational skills, modulate his behavior and emotions, read efficiently and comprehend the material he reads, accurately read words in context, and engage in independent problem solving.

103. Dr. Majors recommended a variety of classroom accommodations. She also recommended the services of a one-to-one aide specifically trained to address difficulties that arose from his traumatic brain injury and subsequent attention deficit hyperactivity disorder, such as difficulty sustaining attention and poor organizational and planning skills. At hearing, Dr. Majors elaborated on this recommendation. In her opinion it would be appropriate for the one-to-one aide to have training in applied behavior analysis, so that the aide would respond to and prevent behaviors, and the aide should be supervised, preferably by a board certified behavior analyst. She also recommended that the aide be present throughout the school day.

104. At hearing, Dr. Majors commented on the 60 minutes, four times per week of specialized academic instruction provided in Student's IEP of October 16, 2014. She believed Student needed intensive efforts to remediate his reading, and the amount of specialized instruction provided for in the IEP was not sufficient. This was especially so because the IEP allowed the instruction to occur on a "push in" basis, which made delivery of intensive reading instruction difficult, especially since the amount of specialized instruction in the IEP also encompassed special education in math. She also recommended evidence-based interventions to address Student's specific learning disability with impairment in reading, such as Lindamood-Bell services.

105. Dr. Majors also discussed the behavior support plan in Student's October 16, 2014 IEP. She agreed that Student's behaviors as described in the behavior support plan were inappropriate, but thought that a functional behavior assessment should have been done to pinpoint the problem behaviors, and provide information on how often they occurred and the environment in which they occurred. A functional behavior assessment would also provide baseline data so one could determine whether the behavior support plan was effective.

106. Dr. Majors also considered the impact of Student's attention deficits on his academic performance. She acknowledged that attention deficits can impact a child's ability

to learn. In her opinion, however, Student's attention deficit was not severe enough to impact his academic performance, in view of his low test scores in phonological and auditory processing, and his speech and language deficits.

107. At hearing, Dr. Majors commented on Mr. Tan's fall 2014 psychoeducational assessment. She did not believe that Student's standard score of 70 on the Wechsler accurately represented his cognitive functioning. As Mr. Tan's own testing demonstrated, Student's verbal comprehension index score was at the 6th percentile. That score demonstrated that Student's verbal abilities were so impaired that Mr. Tan should have relied on a non-verbal measure of general cognitive ability. The non-verbal score reflected Student had cognitive ability in the average range, as opposed to the Wechsler, which reflected that Student's cognitive ability was in the borderline range. Dr. Majors also noted Mr. Tan's conclusion that Student did not meet the eligibility criteria for a specific learning disability, but Mr. Tan had not specified the IQ score he was referencing. If Mr. Tan had referenced Student's non-verbal IQ of 98 on the Naglieri, there would have been a significant discrepancy between Student's cognitive ability and his academic achievement. Dr. Majors also criticized Mr. Tan's assessment for his failure to administer the Comprehensive Test of Phonological Processing, which she described as the "go to" test for children who have reading deficits. In her view, the Auditory Processing test that Mr. Tan used instead does not define reading problems as well as the Phonological Processing test.

108. Dr. Majors was a credible witness. She was thoroughly versed in her field, she had thoroughly reviewed Student's records, and she had given much consideration to the meaning and implications of Student's assessment results. No witness explicitly criticized her assessment, her assessment report, or her qualifications.

#### *2015-2016 School Year*

109. Prior to the beginning of the 2015-2016 school year, when Student was about to enter fourth grade, Student began to take Adderall. When school started, Mother did not advise District that Student was on medication.

110. In October 2015, District reported Student's progress on his annual goals. He met his writing goal and math rounding goal. He met his behavior goal by maintaining personal space when he wanted to gain access to preferred objects with 80 percent accuracy for five consecutive days, and his behavior goal of recognizing the personal space of others in social interactions during unstructured times with 80 percent accuracy for five consecutive days. Student partially met his reading goal, which required that he read a grade level text with his teacher, determine the main idea of the text, recount two to three details, and explain how they supported the main idea with 70 percent accuracy in one sitting. He did not meet the goal as while he could identify the main idea and details, he could not explain how the details supported the text. Student also partially met the math regrouping goal.

111. On September 17, 2015, Student took the California Standardized Testing and Reporting Program Reading test, and his score was reported October 6, 2015. Student obtained a below average score on this test. His instructional reading level was first grade.

*OCTOBER 6, 2015 IEP TEAM MEETING*

112. On October 6, 2015, when Student was nine years old, District convened Student's annual IEP meeting. The IEP team included two administrators, Mother, Ms. Reger, Janet Gass (Student's substitute general education teacher)<sup>11</sup>, Student's language and speech therapist, an occupational therapist, and a District program specialist.<sup>12</sup>

113. The team noted Student's primary eligibility of traumatic brain injury, and his secondary eligibility of speech and language impairment, both of which affected his involvement and progress in the general curriculum, as stated in his October 16, 2014 IEP. He had strengths in nonverbal reasoning skills, spelling, and writing fluency. He was a kinesthetic learner, eager to please and motivated to do well. He responded positively to both praise and redirection. Mother shared that she noticed improvement in his academics. For the first time, she advised District that Student had begun taking 10 milligrams of Adderall daily, which she believed had helped his progress. Nevertheless, he still needed to work hard. He continued to have issues pertaining to his traumatic brain injury. Mother related that Student could read, but did not comprehend what he read. She was still concerned with his auditory processing, but had seen great progress with his behaviors.

114. The team reviewed Student's present levels of performance, with Mother's input. The team reviewed Student's progress on his previous annual goals and objectives, updated from the June 2015 progress report. He met his goals in written language, mathematics (rounding), behavior, sensory processing, self-help, and following multi-step directions, and expressive language. Student made progress on his reading goal. He had partially met a math goal regarding regrouping.

115. More specifically, with respect to reading, Student could read grade level material with 96 percent accuracy, but only at the rate of 45 words per minute (approximately the 10th percentile). He could independently and accurately color code the main ideas and details directly from the text, but could not explain how the details supported the text. When given a list of sentences in random order from a passage, he could color code and label each as a main idea or detail. Mother was surprised that Student could even do this much, because at home Student did not understand what he read at all. He benefited from

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<sup>11</sup> Ms. Gass served as a long-term substitute for Student's assigned fourth grade general education teacher, Ms. Meza, from October 2015 through March 2016.

<sup>12</sup> The list of attendees at this IEP team meeting did not identify any school psychologist. Whether a school psychologist was required to attend the meeting was not raised as an issue in this matter.

the use of graphic organizers and color coding. He was currently earning an “A” in English Language Arts, with accommodations, and he scored a 1 (Standard Not Met) on the Smarter Balanced Assessment.

116. In writing, Student could independently write an on-topic paragraph containing solid organization, proper mechanics, transition words, and a conclusion, at the Basic level. Student earned a “B” on his first two classroom writing tasks, with accommodations. Student often needed support in elaborating his ideas in his essays. He earned a “3” (Basic) on the District Writing Prompt. He was currently earning a “B+”, with accommodations.

117. At hearing, Ms. Reger attempted to explain the discrepancies between his scores on the Smarter Balanced Assessments versus his grades, on the grounds that his grades were accomplished with the classroom accommodations in his IEP, while the Smarter Balanced Assessments did not permit prompting, redirection, and the use of tools. She also noted that his assessments in previous years involved simpler academic tasks than third grade and higher grade assessments, which she believed explained Student’s decline in his academic testing scores over the years. First graders were learning to read, whereas third graders were reading to learn.

118. In math, Student mastered his multiplication facts, and had solid basic math skills. He could tell time, solve problems using reciprocal operations, and round to the nearest ten and hundred. He could add and subtract within 1,000, with minimal verbal prompting and/or the use of base 10 blocks when regrouping was required. He could consistently add and subtract two-digit numbers involving regrouping. He was currently earning a "B-" with accommodations. He scored a “1” (Standard Not Met) on the Smarter Balanced Assessment.

119. In communication development, Student could follow directions that involved inclusion/exclusion concepts, with repetition of the direction. He needed visual and verbal cues to solve higher order thinking problems. He needed to work on his abstract and semantic language needs, such as learning multiple meaning words, paraphrasing, and figurative language.

120. In the social-emotional/behavioral area, he had an overall positive attitude toward school, he showed much success on his daily behavior charts and he met his annual behavior goals. He had friends at school.

121. Student had regular attendance and was motivated to do well. He had excellent focus during directed lessons, and always put forth his best effort. He had outstanding work completion, with the accommodation that his assignments were reduced at times. He could care for his personal needs at school, and his health was not a concern.

122. The team wrote goals in the following areas of need: behavior (maintaining personal space/demonstrating self-control), reading comprehension (explaining events in a

non-fiction text), written language (write informative/explanatory texts to convey ideas and information clearly), mathematics (solve word problems and convert the word problems to equations), handwriting, language comprehension, and expressive language.

123. Student would take the Smarter Balanced Assessment in English Language Arts and Math, with designated supports embedded and text to speech.

124. Assistive technology devices included visual supports for auditorily presented information; visual highlighting to help focus on key ideas; visual structure, such as graphic organizers, to aid with writing output; and an air-filled seat cushion. The team discussed a possible referral for assistive technology for organization of and assistance in, writing. Due to fatigue, Student had difficulty writing in his agenda at the end of the day.

125. The IEP contained a behavior plan. Mother, Ms. Reger, Ms. Meza, the speech and language pathologist, the school psychologist, the principal, and the interim assistant principal participated in developing the plan. The behavior plan was generally the same as the plan in the October 16, 2014 IEP, but with some modifications. For example, the behavior impeding learning was the same as in the previous behavior plan, but the behavior also included biting, which was not mentioned in that previous behavior plan. Also, the circumstances which supported the occurrence of the behavior included lack of aide supervision, which the October 16, 2014 behavior plan did not mention. The behaviors occurred once or twice on one or two days per month, with the close proximity of the aide and feedback on the behavior chart at one-and-one half to two hour intervals to discourage the behaviors. The two behavior goals remained essentially the same as before, but the proficiency level of the behavior goals was modified to be five out of five consecutive days with the aide at a distance of 15 yards, instead of simply 80 percent accuracy for five consecutive days. The plan designated Student's one-to-one aide to assist in implementing the behavior plan, along with other staff members. There was no evidence that any behavior specialist was involved in the development of the plan or would supervise its implementation.

126. When she testified, Dr. Majors' opinion of this behavior plan was the same as her opinion regarding the behavior plan in Student's October 16, 2014 IEP, stated above. She believed that District should have conducted a functional behavior assessment.

127. The IEP team also developed an independence plan, designed to fade out Student's one-to-one aide. The independence plan was based upon Ms. Reger's review of the information on Student's behavior charts, which led her to conclude that Student's behaviors had improved. The independence plan described the aide's duties as supervising unstructured activities and providing positive reinforcement. The independence plan provided that the aide would gradually increase the distance at which she supported Student on the playground and during dismissal. Student's behavior chart would be reduced from three time blocks daily to one time block daily. Data on the fade-out plan would be collected on the behavior chart, and the behavior chart would be retained as long as it was needed.

128. The team decided that Student's least restrictive environment would be the general education classroom at Hidden Trails, with five percent of his time spent outside of the general education environment. His accommodations and modifications remained the same as in the October 16, 2014 IEP, as amended, except that the team added the use of multiplication charts/calculator for aid in math.

129. The IEP offered the same level of specialized academic instruction and the same amount of one-to-one aide services, as were set forth in the October 16, 2014 IEP. Assistive technology services were added. The team offered special education summer school.

130. On October 20, 2015, District convened a second session of the IEP meeting to discuss Dr. Majors' neuropsychological evaluation and Ms. Segal's speech and language evaluation. The participants included an administrator, Mother, Ms. Reger, Ms. Gass, the school psychologist, the speech and language pathologist, the occupational therapist, the District program specialist, Ms. Segal, and Dr. Majors.

131. Dr. Majors and Ms. Segal presented their reports. Mother was concerned about Student's reading comprehension, and his ability to learn as he grew older. The team considered the differences in Student's verbal and nonverbal IQ scores. They agreed that Student's non-verbal ability was strong and that his area of need was comprehension. The team discussed Lindamood-Bell services. Dr. Majors advised that Lindamood-Bell worked on processing and skills. Dr. Majors and Ms. Segal advised that Lindamood-Bell would help with fluency and processing to help Student better comprehend. The team noted that Student was using the SRA Flex and Fast ForWord computer programs, both of which were to help Student with reading and in language arts. District members of the team expressed skepticism as to the utility of Lindamood-Bell services.

132. Mother took a copy of the IEP home to review before signing. On November 8, 2015, Mother signed the October 20, 2015, IEP, and wrote on the IEP her consent to the following areas of the IEP: the behavior plan and behavior goals, occupational therapy goals and services, supplementary aids and services, and special education summer school services. Mother also requested the notes be amended to reflect Mother had noticed behavior improvements as well as Student's desire to complete all school work. Mother noted that 8 out of 12 goals were met last year. She noted that speech goals and academic goals would not be agreed to until they were reviewed and agreed to at the IEP team meeting scheduled for November 2015.

133. On November 19, 2015, District convened an amendment IEP meeting to review Student's academic and speech goals. The team included a District administrator, Ms. Reger, Mrs. Gass, a speech and language pathologist, and a District program specialist.<sup>13</sup>

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<sup>13</sup> The IEP did not reflect that a school psychologist was present at this meeting, but, again, this was not raised as an issue at hearing.

The team modified Student's math goal, and speech and language goals. Ms. Gass advised that Student was doing well using graphic organizers in class. The team offered a program to address social skills.

134. Mother agreed to the assistive technology referral offered at the October 6, 2015 meeting. She asked for responses from District to the independent evaluators' recommendations for Lindamood-Bell services and dichotic therapy. District agreed to follow-up on those recommendations.

135. On November 20, 2015, Mother signed her agreement to the November 19, 2015 IEP amendment, but noted that she still believed that Student required Lindamood-Bell services and dichotic therapy.

136. By letter dated December 3, 2015, Ms. Ingulsrud, District's director of special education, told Mother that District would not fund Lindamood-Bell services, or dichotic therapy. Ms. Ingulsrud stated that the Fast ForWord program supported Student in the areas of working and long-term memory, attention, auditory and linguistic processing rates, and sequencing. District agreed to perform an assessment in the area of central auditory processing disorder.

137. On December 4, 2015, Mother signed consent to the October 20, 2015 IEP, but noted that she did not agree the IEP was a FAPE in the areas of speech, central auditory processing disorder, reading, writing or math. Mother requested that District implement the goals, but felt the goals and the services were insufficient to provide meaningful educational benefit.

#### EVENTS DURING THE 2015-2016 SCHOOL YEAR

138. Student's behavior began to deteriorate in November 2015. Consequently, Student's doctor eventually changed his medication. Student stopped taking Adderall in December 2015, and started Ritalin towards the end of March 2016. Student's deteriorated behavior manifested itself at school during this time. Student had several behavior citations or office referrals during December 2015 and early 2016. On December 11, 2015, Student tried to take an item from another student without asking. On December 18, 2015, Student took another student's hand and tried to force the other student to touch Student on his "private parts." On January 7, 2016, Student threw erasers at another student. On January 21, 2016, Student purposely hit another student in the eye with his hand while in line to play handball. On February 18, 2016, Student pushed another student who then fell into a third student, who hurt his hand as a result.

139. Ms. Gass, Student's general education substitute teacher at this time, considered Student's behavior to be typical of other students, but she nonetheless issued some of the citations. She considered Student to have some attention problems, but she also did not believe that his attention problems were out of the ordinary. She would not have picked Student out in the classroom as a child who needed an aide for behavior, and, indeed,

she had not been informed that he required an aide for behavior. Ms. Meza, the teacher for whom Ms. Gass was substituting, had only advised her that Student had an aide to help him with his academic work. The aide assisted Student with his visual issues, such as transitioning visually from work on the board to work on paper. The aide also helped Student stay on task in the classroom, follow directions, and stay organized. Ms. Gass's relatively benign view of Student's behavior and attention issues did not comport with the view of Student's IEP teams.

140. The initial dosage of Ritalin was not very effective. Therefore, in April 2016, Student's Ritalin dosage was increased to 20 milligrams. His behaviors improved at this dosage level. Student continued to take Ritalin through the time of the hearing.

141. Student's first trimester grades for fourth grade were a "C-" in Common Core Mathematics, a "B" in Common Core English Language Arts, a "B" in Common Core Writing, a "B" in Social Science, and a "C" in Science. At the midpoint of the second trimester, Student's grades were an "A" in Reading, an "A" in Written Language, a "C" in Mathematics, a "C" in Science, and a "B" in Social Studies. Mother was shocked at Student's reading grades, since she did not believe he understood what he read. Student's grades as of April 21, 2016, during the third trimester, were "F's in English Language Arts, Math, and Reading. He earned a "C" in Science, an "A" in Social Science, and an "A" in Writing. Student's grades in English Language Arts, Math, and Reading seriously declined between the end of the 2014-2015 school year to nearly the end of the 2015-2016 school year. District contended that these lower grades were due to excessive absences and missed assignments. However, Student's attendance record for February through March, 2016, showed only nine days of absences, and no absences in April.

142. During the 2015-2016 school year, District evaluated Student's reading, and his progress was reported in the Reading Individual Benchmark Comparison Report. His fall, 2015-2016 score of 476 put him in the high risk category. His winter, 2015-2016 score of 480 also put him in the high risk category.

#### LINDAMOOD-BELL ASSESSMENTS AND SERVICES

143. On April 21, 2016, Parents arranged for Lindamood-Bell to assess Student. Anne Perry, an executive center director for Lindamood-Bell, testified regarding Lindamood-Bell's program, and its assessments and recommendations. Ms. Perry has been employed by Lindamood-Bell Learning Processes in various capacities from October 6, 2016, through the present. At the time of hearing, Ms. Perry oversaw Lindamood-Bell centers in Pasadena and Rancho Cucamonga, as well as a summer learning center in Santa Clarita. She received her bachelor's degree in English from Lewis and Clark College, and master's degree in teaching from Lewis and Clark Graduate School of Professional Studies. She holds a California clear multiple subject teaching credential in English. She is not a special education teacher, and does not hold any degree in special education.

144. Lindamood-Bell offers instructional programs designed to help students read fluently and increase their reading comprehension. The instruction was delivered on a one-to-one basis. The program has successfully served students with traumatic brain injury. Lindamood-Bell performed an academic assessment over the course of four hours, divided into small tasks, with breaks. His score was borderline average on the Peabody Picture Vocabulary Test IV, Form A; below average on the Word Opposites subtest of the Detroit Tests of Learning Aptitude 4; average on the Word Attack subtest on the Woodcock Reading Mastery Tests III, Form A; average on the Slosson Oral Reading Test; and average in Spelling and Math Computation on the Wide Range Achievement Test-4. On the Gray Oral Reading Tests 4, Form A, his scores were below average in Reading Rate and Accuracy, Fluency, Comprehension. He scored below average on the Lindamood Auditory Conceptualization Test-3; and average on the Symbol Imagery Test. On the Informal Tests of Writing, he correctly answered 3 out of 50 items on the Symbol to Sound test and had no correct answers on the Nonsense Spelling test. The test battery also included older versions of certain tests, to provide more information for program planning. In general, the assessment revealed that Student's areas of strength were in the reading process, decoding, sight words, and spelling. However, when he read on the page, he did not display those skills. He could read words, but not a story. His weaknesses included vocabulary, lack of phonemic awareness, reading fluency (rate and accuracy), and comprehension. She noted that several of his skills were at the first grade level, and commented that, unlike in first grade through third grade, in fourth grade teachers start to introduce abstract concepts, and academic tasks grew more sophisticated.

145. Not all of the tests Lindamood-Bell administered, such as the Informal Tests of Writing, were normed, or were the most recent version of the test. However, in this case, the Lindamood-Bell assessment was used, and presented, as a diagnostic tool to determine how Student performed on tasks children were required to do at school, and to determine Student's strengths and weaknesses in the underlying sensory/cognitive functions that are necessary for reading and comprehension, all for placement of Student in the appropriate Lindamood-Bell program. There was no evidence that the testing was unreliable for Lindamood-Bell's purposes. Further, both Dr. Majors and Ms. Segal, who had performed their own assessments of Student, recommended that Student receive Lindamood-Bell services.

146. Based on Student's scores, Kaela Owen, Lindamood-Bell's center manager, prepared a written report that recommended Student receive intervention four hours per day, five days per week, for an initial period of 16 to 18 weeks, to develop his language and literacy skills. She recommended the Lindamood-Bell Visualizing and Verbalizing for Language Comprehension and Thinking program for 11 to 12 weeks, and the Seeing Stars program for five to seven weeks. Visualizing and Verbalizing focused on reading comprehension. The Seeing Stars program focused on decoding (reading) words on the page.

147. On May 21, 2016, Parents wrote a letter to Ms. Ingulsrud. Parents advised that, despite the District's efforts, recent assessments disclosed that Student still could not

read. Parents advised that they would be sending him to the Lindamood-Bell program starting on June 8, 2016, and he would continue in that program throughout the summer. The letter asked that District fund the program, but if it did not, Parents would fund the program and seek reimbursement from District.

MAY 27, 2016, IEP TEAM MEETING

148. On May 27, 2016, District convened an IEP meeting, in part to review the Lindamood-Bell assessment. The IEP team included Parents, the speech and language pathologist, the occupational therapist, Ms. Meza, Ms. Reger, a District administrator, Dr. Lord (program manager of the special education local plan area), a District program manager, and Ms. Owen (via teleconference).<sup>14</sup>

149. The team discussed the Lindamood-Bell program and the assessment results. Ms. Owen stated that Student struggled with phonemic awareness and weakness in vocabulary. Comprehension was inconsistent. Ms. Owen believed that Student demonstrated many skills on the informal assessments, even though his scores did not reflect that. Ms. Owen explained that Lindamood-Bell focused on how the brain processed information. The team considered whether Lindamood-Bell was effective with children with traumatic brain injury, and whether there was any peer-reviewed research on that issue. Parent advised that Student did not like to read because it was difficult. He liked books that were read aloud to him. Student's general education teacher advised Student read aloud in class, and participated fully in class. Student used visuals, drawing, writing, and thinking maps to picture the events in the story, and he was making a connection between the story and mental imagery. Student's speech and language therapist used similar strategies to support mental imagery. The team discussed Student's attendance and its effect on his grades. District members of the team noted that assistive technology had recently been added to support Student at home and school. Student used it with his writing prompt and to take pictures of his agenda, but he needed more practice.

150. District members of the IEP team recommended accommodations be added with respect to notes, study guides, and re-taking tests. Parent disagreed with the suggested accommodations, but would review them and respond to District by June 3, 2016. Parent requested more data from District in the area of reading comprehension, and requested Lindamood-Bell services.

151. At some point after the meeting, Parent signed consent to the amended IEP, subject to two pages of comments to be added to the IEP document. Parents sought to correct the meeting notes regarding Ms. Owen's statements that Student's scores did not seem to be from a lack of effort. Additionally, Parents felt that District did not appropriately acknowledge Student's work ethic at school during the meeting. Parents also wished to know the name of the reading program Student used at school, along with references to peer-

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<sup>14</sup> There was no specific evidence that a school psychologist attended this meeting, but, again, that issue was not raised at hearing.

reviewed research that such program was effective with children with traumatic brain injury. Parents also disputed the IEP notes regarding the discussion of Student's comprehension. Parents also disputed the number Student's absences from school and that they affected his grades, as he had made up the work.

152. In their written comments, Parents asserted that an internet search would reveal much peer-reviewed research supporting Lindamood-Bell programs. Parents expressed their concerns at the meeting that Student was being promoted through school without having learned necessary skills. Parents did not agree to accommodations regarding the use of notes, study guides or text books during tests. Rather, they wanted Student to know the information.

153. Student began to receive Lindamood-Bell services on June 8, 2016. He was in the "Visualizing and Verbalizing" program. This program focused on comprehension, which involved dividing a story into sentences, visualizing the content of each sentence, and then describing what the student visualized. At the end of each story, the student was to remember what he had visualized and retell his visualizations from the beginning. Student attended four hours per day, five days per week, and at the time of the hearing he had had 136 hours of instruction, or approximately seven weeks. At the time of hearing, Student was making some progress at Lindamood-Bell. He could visualize and describe the visualization, but could not restate the story. Student enjoyed his Lindamood-Bell program, and it made him feel successful. Lindamood-Bell planned to reassess him after nine weeks to evaluate his progress.

154. As of the time of the hearing, Parents had paid a total of \$10,856 for Lindamood-Bell services, but those services were continuing and Parents expected that more expenses would be incurred.

155. Parents paid Dr. Majors \$3,500 for the assessment she performed and the report she provided.

## CONCLUSIONS OF LAW

### *Introduction: Legal Framework under the IDEA*

1. This hearing was held under the IDEA, its regulations, and California statutes and regulations intended to implement the Individuals with Disabilities Education Act and its regulations. (20 U.S.C. § 1400 et. seq.; 34 C.F.R. § 300.1 (2006) et seq.<sup>15</sup>, 5 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

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<sup>15</sup> Unless otherwise stated, all references to the Code of Federal Regulations are to the 2006 edition.

prepare them for employment and independent living and higher education; 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. The IEP describes the child’s needs, academic and functional goals related to those needs, and a statement of the special education, related services, and program modifications and accommodations that will be provided for the child to advance in attaining the goals, make progress in the general education curriculum, and participate in education with disabled and non-disabled peers. (20 U.S.C. §§ 1401(14), 1414(d); Ed. Code, § 56032.)

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

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

issues alleged in the complaint, unless the other party consents. (20 U.S.C. § 1415(f)(3)(B); Ed. Code, § 56502, subd. (i).) Subject to limited exceptions, a request for a due process hearing must be filed within two years from the date the party initiating the request knew or had reason to know of the facts underlying the basis for the request. (20 U.S.C. § 1415(f)(3)(C), (D).) 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]; see 20 U.S.C. § 1415(i)(2)(C)(iii) [standard of review for IDEA administrative hearing decision is preponderance of the evidence].) In this case, Student, as the petitioning party, has the burden of persuasion as to all issues.

#### *Student's Issue A: Appropriate Psychoeducational Assessment*

5. Student contends that the psychoeducational assessment performed in fall 2014 failed to adequately assess Student's behaviors, and his learning disabilities. District contends that the assessment was appropriate and met all legal requirements.

#### ASSESSMENTS

6. The failure to comply with procedures for assessments is a procedural violation of the IDEA. (*Park v. Anaheim Union High School Dist.* (9th Cir. 2005) 464 F.3d 1025, 1031.) In this regard, states must establish and maintain certain procedural safeguards to ensure that each student with a disability receives the FAPE to which the student is entitled, and that parents are involved in the formulation of the student's educational program. (*W.G., et al. v. Board of Trustees of Target Range School Dist., etc.* (9th Cir. 1992) 960 F.2d 1479, 1483 (*Target Range*)[superseded by statute on other grounds, as stated in *R.B. v. Napa Valley Unified School Dist.* (9th Cir. 2007) 496 F.3d 932, 939.].) Citing *Rowley, supra*, the court also recognized the importance of adherence to the procedural requirements of the IDEA, but determined that procedural flaws do not automatically require a finding of a denial of a FAPE. (*Target Range, supra*, at 1484.) This principle was subsequently codified in the IDEA and Education Code, both of which provide that a procedural violation only constitutes a denial of a FAPE if the violation (1) impeded the child's right to a FAPE; (2) significantly impeded the parent's opportunity to participate in the decision making process regarding the provision of a FAPE to the child; or (3) caused a deprivation of educational benefits. (20 U.S.C. § 1415(f)(3)(E)(ii); Ed. Code, § 56505, subd. (f)(2).)

7. The general law pertaining to assessments provides that, before any action is taken with respect to the initial placement of an individual with exceptional needs, an assessment of the pupil's educational needs shall be conducted. (20 U.S.C. § 1414(a)(1)(A); Ed. Code, § 56320.) The pupil 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 pupil has a disability or whether the pupil's educational program is appropriate. (20 U.S.C. § 1414 (a)(2), (3); Ed. Code, § 56320, subds. (e) & (f).) The assessment must be

sufficiently comprehensive to identify all of the child's special education and related service needs, regardless of whether they are commonly linked to the child's disability category. (34 C.F.R. § 300.306.)

8. As part of a reevaluation, the IEP team and other qualified professionals must review existing evaluation data on the child, including teacher and related service providers' observations. (20 U.S.C. § 1414(c)(1)(A); 34 C.F.R. §300.305; Ed. Code, § 56381, subd. (b)(1).) Based upon such review, the school district must identify any additional information that is needed by the IEP team to determine the present level of academic achievement and related developmental needs of the student, and to decide whether modifications or additions to the child's special education program are needed. (20 U.S.C. § 1414(c)(1)(B); Ed. Code, § 56381, subd. (b)(2).) The school district must perform assessments that are necessary to obtain such information concerning the student. (20 U.S.C. § 1414(c)(2); Ed. Code, § 56381, subd. (c).)

9. Tests and assessment materials must be administered by trained personnel in conformance with the instructions provided by the producer of such tests. (20 U.S.C. § 1414(a)(2), (3); Ed. Code, § 56320, subds. (a), (b).) Assessments must be conducted by individuals who are both "knowledgeable of the student's disability" and "competent to perform the assessment, as determined by the school district, county office, or special education local plan area." (Ed. Code, §§ 56320, subd. (g), and 56322; see 20 U.S.C. § 1414(b)(3)(B)(ii).) A psychological assessment must be performed by a credentialed school psychologist. (Ed. Code, § 56324.) A health assessment shall be conducted by a credentialed school nurse or physician who is trained and prepared to assess cultural and ethnic factors appropriate to the pupil being assessed. (Ed. Code, § 56325, subd. (b).) Tests and assessment materials must be validated for the specific purpose for which they are used; must be selected and administered so as not to be racially, culturally, or sexually discriminatory; and must be provided and administered in the student's primary language or other mode of communication unless this is clearly not feasible. (20 U.S.C. § 1414(a)(2), (3); Ed. Code, § 56320, subds. (a), (b).)

10. In conducting the assessment, the school district must use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the student. This includes any information provided by the parent which may assist in determining whether the student is a child with a disability and the content of the IEP. (20 U.S.C. § 1414(b)(2)(A)(i).) The school district must use technically sound instruments to assess the relative contribution of cognitive and behavioral factors, as well as physical or developmental factors. (20 U.S.C. § 1414(b)(2)(C).)

11. Assessments must be selected and administered to best ensure that the test results accurately reflect the pupil's aptitude, achievement level, or any other factors the test purports to measure and not the pupil's impaired sensory, manual, or speaking skills unless those skills are the factors the test purports to measure. (Ed. Code, § 56320, subd. (d); 34 C.F.R. § 300.304(c)(3).)

12. The assessor must prepare a written report that includes: (1) whether the student may need special education and related services; (2) the basis for making that determination; (3) the relevant behavior noted during observation of the student in an appropriate setting; (4) the relationship of that behavior to the student's academic and social functioning; (5) the educationally relevant health, development, and medical findings, if any; (6) if appropriate, a determination of the effects of environmental, cultural, or economic disadvantage; and (7) the need for specialized services, materials, and equipment for pupils with low incidence disabilities. (Ed. Code, § 56327.) The report must be provided to the parent at the IEP team meeting required after the assessment. (20 U.S.C. § 1414(b)(4)(B); Ed. Code, § 56329, subd. (a)(3).)

13. The IEP team shall meet to review an initial formal assessment, and may meet to review any subsequent formal assessment. The team shall also meet upon the request of a parent to review, develop, or revise the IEP. (Ed. Code, § 56343, subd. (a), (c).)

#### ANALYSIS

14. Many aspects of the District's psychoeducational assessment met all legal requirements for assessments. For example, Mr. Tan was qualified and trained to conduct the assessment. He conducted the assessment in English, Student's native language. The assessment instruments he used were valid and reliable, they were not discriminatory, and he administered them appropriately.

15. However, District's psychoeducational assessment was deficient in several respects. First, the report did not describe the previous records that Mr. Tan reviewed, which raises issues of the thoroughness of Mr. Tan's review. Mr. Tan acknowledged it was normal protocol to review documents before an assessment, especially if they were in the Student's cumulative file, and also that it was important to review all available assessment reports. However, either Mr. Tan did not do a thorough records review, or he overlooked certain important information that a thorough records review would have revealed. As a result, the assessment report did not mention Student's history of aggression towards other Students, documented in Student's IEP's since kindergarten. This was an area of suspected disability, and warranted at least a recommendation by Mr. Tan for a behavior assessment. Nor was Mr. Tan aware of Student's previous diagnoses of central auditory processing disorder and attention deficit hyperactivity disorder, and the assessment report did not account for them. As a result, there was no assurance that Student was assessed in all areas of suspected disability, or that Mr. Tan recognized the serious impact of Student's ability to process verbal information. Consequently, Mr. Tan applied the Wechsler verbal IQ score of 70 in his analysis of Student's strengths and weaknesses, which resulted in the failure to find him eligible for special education under the category of specific learning disability.

16. Second, had Mr. Tan given more weight to Student's Naglieri score of 98, he would not only have had to change the discrepancy analysis that he used in determining whether Student met eligibility criteria under the category of specific learning disability, but he likely would have found a different child overall. Mr. Tan's justification for considering

Student's Wechsler IQ. was that a classroom is a verbal environment, and Student's verbal cognition was important to provide information as to Student's ability to perform in that environment. This, by itself, is not an unreasonable consideration as to Student's classroom performance, but not necessarily indicative of Student's overall intelligence. However, as set forth above, the law requires that assessment instruments be selected to accurately reflect the pupil's aptitude. Mr. Tan selected the Naglieri, which the evidence demonstrated likely accurately reflected Student's aptitude, and then largely discounted it in his assessment report. He deemed Student's Wechsler IQ score as an equally representative indicator of Student's cognitive ability as the Naglieri score, because of "scatter," and because Student's scores were likely impacted by Student's attention issues. This analysis is questionable. First, Mr. Tan did not explain why "scatter" affected Student's Naglieri score, and he only reported one score on the Naglieri: the "Total Test Score." Second, since the Naglieri score was in the average range, it was probably impacted less by Student's attention issues than Student's Wechsler score. Therefore, the Naglieri score would be more reliable. When Dr. Major's opinion that Student's language learning disability makes the Naglieri score more reliable is added, Mr. Tan's justification for relying on the Wechsler score becomes even weaker.

17. Third, the report states that Mr. Tan observed Student in class, but the report does not describe any such observation. At hearing, Mr. Tan stated that he had observed Student in his resource class, but could not recall how many times he did, or for how long. These circumstances render the observation essentially useless, and cast a shadow on the thoroughness of the assessment. The law requires that a variety of assessment instruments be used, and a classroom observation is one such instrument. Further, Mr. Tan did not observe Student in his general education class, where he spent the majority of his day, or on the yard, where his aggression issues were likely to surface. Again this casts doubt upon the thoroughness of the assessment, and whether Student was assessed in all areas of suspected disability.

18. Fourth, a comparison of the tables in the report and the text of the report demonstrated discrepancies in the reporting of Student's scores on the Test of Visual-Perceptual Skills and on the Beery Visual Perception subtest. The inaccurate reporting of these scores calls into question the accuracy of Mr. Tan's analysis of these areas of disability. This is especially so where, as here, Student's processing deficits contribute to a great extent to his academic struggles.

19. Fifth, Mr. Tan's report did not mention or explore Student's downward trend in Student's Woodcock-Johnson academic testing scores. His report contained Student's 2011 Woodcock-Johnson III achievement test scores in Letter-Word Identification (105), Applied Problems (93), and Writing Samples (97). He also reported Student's recent, 2014 Woodcock-Johnson standard scores in those areas, which showed a slight decline to 95 in Letter-Word Identification a large drop to 80 in Applied Problems, and a slight rise to 101 in Writing Samples. As Dr. Major's report reflected, a comparison of Student's 2012 Woodcock Johnson scores with his 2014 scores also reflected a downward trend in certain of the scores. Mr. Tan's failure to examine this downward trend in some of Student's academic

scores calls into question the thoroughness of the assessment and whether District indeed assessed Student in all areas of suspected disability.<sup>16</sup>

20. As a result of these lapses, the assessment is inappropriate. As was stated in Legal Conclusion 6, the failure to comply with assessment procedures is a procedural violation of the IDEA and the Education Code. A procedural violation constitutes a denial of a FAPE if the violation (1) impeded the child's right to a FAPE; (2) significantly impeded the parents' opportunity to participate in the decision making process regarding the provision of a FAPE to the child; or (3) caused a deprivation of educational benefits. Here, the failure to appropriately assess Student as set forth above impeded Student's right to a FAPE. He was not assessed in all areas of suspected disability, his processing deficits may not have been accurately analyzed, and his eligibility for special education based upon specific learning disabilities was not completely considered, in contrast with Dr. Majors' assessment. For the same reasons, the inappropriate assessment hindered Parents' ability to participate in Student's IEP's as they did not have an accurate picture of Student since the flaws in the District's assessment rendered it incomplete or misleading. Student's remedies for this violation are set forth below.

*Student's Issues B 1 and C 1: Failure to Offer a Sufficient Amount of Specialized Academic Instruction in the October 16, 2014 IEP, and the October 6, 2015 IEP*

21. Student contends that Student's declining and low test scores in reading and math supported an increase in his small group specialized academic instruction beyond the 240 minutes per week provided in the October 16, 2014 and October 6, 2015, IEP's. District contends that Student had made progress on his goals, that his attention and processing deficits impacted his performance on standardized assessments, and that the amount of specialized academic instruction in the IEP was reasonably calculated to provide Student educational benefit.

22. An IEP is evaluated in light of information available to the IEP team at the time it was developed; it is not judged in hindsight. (*Adams v. State of Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149.) "An IEP is a snapshot, not a retrospective." (*Ibid*, citing *Fuhrmann v. East Hanover Bd. of Ed.* (3rd Cir. 1993) 993 F.2d 1031, 1041.) The IEP must be evaluated in terms of what was objectively reasonable when the IEP was developed. (*Ibid*.) Additionally, to determine whether a school district offered a student a FAPE, the focus must be on the adequacy of the district's proposed program. (*Gregory K. v. Longview School Dist.* (9th Cir. 1987) 811 F.2d 1307, 1314.) If the school district's program was designed to address the student's unique educational needs, was reasonably calculated to provide the student with some educational benefit, and comported with the student's IEP,

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<sup>16</sup> District also performed an academic assessment of Student in 2013, but that assessment used another Woodcock-Johnson test (the Woodcock Johnson III Normative Update Tests of Achievement (Form B)). There was no specific evidence as to whether the scores on this test could be compared to the scores on the tests in 2011, 2012, and 2014.

then the school district provided a FAPE, even if the student's parents preferred another program and even if the parents' preferred program would have resulted in greater educational benefit. (*Ibid.*)

#### ANALYSIS

23. District did not deprive Student of a FAPE in the amount of specialized academic instruction it provided Student at the October 16, 2014 IEP. At the time of the October 16, 2014 IEP, District knew that Student's standardized test scores had declined since 2011 and 2012. However, District also knew that Student had met or made progress on his academic goals, and that his grades were average. At his previous annual IEP on October 24, 2013, his reading was not a concern; his needs were in writing and math. Thus, at the time of the October 16, 2014 IEP, reading became a new concern. Aware that Student was struggling academically, District doubled Student's specialized academic instruction from 120 minutes per week to 240 minutes per week. The team added a reading comprehension goal and additional accommodations, and shortly after the IEP meeting, at Mother's request, the team added an additional math goal. These changes reflect that the IEP team recognized Student's recent academic struggles in reading comprehension and math, and was attempting to address them. It was not unreasonable for District to wait to see if adding more specialized instruction and the new goals and accommodations would be effective.

24. This conclusion does not change because of the conclusion, set forth above, that the District's psychoeducational assessment was defective. It is not clear that, had the assessment been appropriate, the amount of Student's special education instruction would have increased even more than it had had increased from the previous October 24, 2013 IEP. Under the circumstances, and applying the "snapshot rule," Student did not demonstrate that District's doubling of Student's specialized academic instruction in the October 16, 2014 IEP, along with the addition of reading and math goals, was not reasonably calculated to provide Student an educational benefit.

25. The analysis is different, however, with respect to the amount of specialized academic instruction contained in the October 6, 2015 IEP. The October 6, 2015 IEP team did not increase the number of minutes of specialized academic instruction beyond the 240 minutes per week that Student was already receiving in the October 14, 2014 IEP. At the time of the October 6, 2015 IEP, however, and its continued sessions, the team had a variety of additional information. First, the team had information about Student's progress after receiving 240 minutes per week of specialized academic instruction and additional goals. In this regard, there were two possible indicators of progress. Student had met or made progress on his academic goals, and his grades generally stayed at the "C" level throughout the 2014-2015 school year, notwithstanding his teacher's comments on his report card that he had made amazing progress. However, his performance on standardized tests was extremely low, as compared to his grades. He scored below standard on the California Assessment of Student Performance and Progress, and on the Smarter Balanced Assessments, both of which were administered in the third trimester of the 2014-2015 school

year. He scored far below basic on all District unit tests given during that school year. His attention and impulsivity issues likely impacted these scores, but, as Dr. Majors stated, they did not impact his academic performance as much as his processing and language deficits. District needed to address those deficits. The progress that Student made on his goals, and his average grades, did not make up for his stark inability to perform on academic assessments.

26. Second, the team had Dr. Majors' report and Ms. Segal's report, which Dr. Majors and Ms. Segal had presented at a continuation of the meeting on October 20, 2015. Dr. Majors' report, which referenced Ms. Segal's report, documented Student's deficits in such areas as attention, phonological awareness and memory, auditory processing, and learning and recall of verbal information. The report explained the negative impact of these deficits on his academic performance, particularly reading skills and reading comprehension, and math. District knew far more about Student's academic deficits at the October 6, 2015, IEP team meeting and its continuation meeting than it had known before. Dr. Majors' report highlighted Student's numerous deficits and needs and the reasons for his academic struggles.

27. Student was presented with more sophisticated and complex academic tasks in third grade (the 2014-2015 school year) and in fourth grade (the 2015-2016 school year), such as common core requirements. District and state standardized testing demonstrated that Student's performance on a variety of academic tasks was declining. Student could not understand what he read. In Dr. Majors' opinion, Student's profile was consistent not only with a specific learning disorder in reading, but also with a language learning disability. To make minimal progress in language-based academics, he required an intensive program of interventions to address his speech/language, auditory processing, and phonological processing deficits. These deficits particularly impacted Student's ability to read. The evidence reflected that Student struggled with more sophisticated academic tasks because his disabilities prevented him from performing them, in spite of his average cognitive level, and even though he was able to perform less sophisticated academic tasks.

28. Student could not access his curriculum and obtain some educational benefit unless he could understand what he read. As Dr. Majors stated, 240 minutes per week of specialized academic instruction was not sufficient to provide him the intensive reading instruction that he needed. Yet the October, 2015 IEP team did not increase Student's specialized academic instruction, or offer him anything in the way of additional help beyond various computer programs, such as Fast ForWord, (which he had in the 2014-2015 school year) and SRA Flex.

29. District staff had good intentions, and they were not uncaring. District held a great number of IEP team meetings regarding Student during the 2014-2015, and 2015-2016 school years. District considered and responded to Mother's requests (even though it did not always grant them.) However, ultimately District's efforts only involved tinkering with the edges of Student's academic program, when the evidence demonstrated that Student was only making de minimis progress and required more to access his curriculum and obtain

some educational benefit. Student's October 6, 2015, IEP was not reasonably calculated to provide Student some educational benefit. District deprived Student of a FAPE by not offering Student additional specialized academic instruction in that IEP.

*Student's Issues B 2 and C 2: Failure of the October 16, 2014 IEP, and the October 6, 2015 IEP to Offer Educational Therapy to Address Student's Deficits in Processing and Memory*

30. Student contends that District failed to offer any therapy to address Student's deficits in phonological processing and verbal and visual memory, and seeks Lindamood-Bell therapy to address those deficits. District contends that Student did not require any such therapy to receive a FAPE, and, moreover, that Student's contention that he receive such services in a one-to-one setting compromised the principle that Student should be educated in the least restrictive environment.

31. As described above, as of the October 16, 2014 IEP meeting, the IEP team first became aware of Student's difficulties in reading. Student's academic testing prior to the fall 2014 triennial academic testing had reflected that Student's academic abilities were in the average range, including reading. The IEP team's response to the new information that Student had developed problems with reading was to double Student's specialized academic instruction, to add a reading goal, and to add new accommodations. Ms. Reger also attempted to assist Student's memory by providing visual supports that he could use as tools or refer to later.

32. At the time of the IEP meeting, District had not ascertained the reason behind Student's difficulty with reading. District's psychoeducational assessment was not appropriate, but, even if it had been, there was insufficient evidence that the only reasonable conclusion Mr. Tan could have drawn from such an assessment would have been that Student's newly discovered reading difficulty was part of a larger picture of academic struggles stemming from the constellation of Student's speech/language and processing deficits. It was not unreasonable for District to undertake simpler, less intensive methods to address Student's reading difficulties before it tried more intensive supports based on the information that existed. Under the "snapshot" rule, there was insufficient evidence that District's initial attempts to address Student's reading problems were not reasonably calculated to provide Student an educational benefit.

33. The same analysis, however, does not apply with respect to the October 6, 2015 IEP, and its October 20, 2015 continuation session. By the time of the October 6, 2015 IEP, described above, Student's progress during the prior school year was primarily indicated by his progress on his goals. His grades were average, but flat. His performance on all District and state standardized academic tests during the previous school year was well below standard. Furthermore, by the continuation IEP meeting of October 20, 2015, District had the benefit of Dr. Majors' assessment report. The report detailed the impact of memory and phonological processing difficulties on his academic abilities, and recommended that District provide intensive services, such as Lindamood-Bell services, to address Student's

deficits in processing and memory. Yet, District did not provide any additional special education instruction or services to assist Student with these deficits, other than what it had provided in the October 16, 2014, IEP. Those supports had not resulted in Student making any but de minimis progress during the 2014-2015 school year, even with the additional specialized academic instruction. The IEP team therefore failed to provide Student with an educational program that was reasonably calculated to provide Student with some educational benefit, and so deprived him of a FAPE.

34. The evidence reflected that the Lindamood-Bell services that Student was receiving at the end of the 2015-2016 school year were designed to address Student's deficits in processing and memory, and Student was making some progress in the program. In May 2016, Mother had requested that District provide such services, and District refused. District provided no evidence to counter Student's evidence that Lindamood-Bell services and service level were appropriate. District's contention at hearing that Lindamood-Bell services were one-to-one services and therefore did not meet the requirement of least restrictive environment is unmeritorious. The principle of least restrictive environment does not prohibit District from providing a program, such as Lindamood-Bell, that meets Student's unique needs and provides educational benefit. (See *County of San Diego v. Cal. SEHO* (9th Cir. 1996) 93 F.3d 1458, 1468.) As is further described below, Student is entitled to receive Lindamood-Bell services, at District's expense, as a remedy for its failure to address these issues in Student's October 6, 2015 IEP.

*Student's Issues B 3 and C 3: Failure of October 16, 2014 IEP and October 6, 2015 IEP to Offer Sufficient Behavior Support*

35. Student contends that District's behavior support plans were ineffective to address Student's behaviors, and that Student's one-to-one aide was not only untrained and unsupervised, but also that District had no clear idea as to the aide's purpose. District contends that Student's IEP offered sufficient behavior support. Student made progress such that his behaviors were not maladaptive or different than typical children of his grade level, and there was no evidence that Student required applied behavior analysis services to control his behaviors.

BEHAVIOR

36. The IDEA and California law require that an IEP team consider the use of positive behavioral interventions and supports, and other strategies, to address behavior when a student's behaviors impedes his learning or that of others. (34 C.F.R. § 300.324(a)(2)(i); Ed. Code, § 56341.1, subd. (b)(1).) Under the IDEA, the Department of Education recommends that school districts be proactive and perform a functional behavior assessment when a child engages in behaviors which interfere with learning. Following the functional behavioral assessment, a school district develops a behavior support plan or a behavioral intervention plan. (Assistance to States for the Education of Children with Disabilities and Preschool Grants for Children With Disabilities, 71 Fed. Reg. 46721 (August 14, 2006).)

37. In a recent letter, the U.S. Office of Special Education and Rehabilitative Services and Office of Special Education Programs focused attention on the need to consider and include evidence-based behavioral supports in IEP's which, when implemented with fidelity, can often serve as alternatives to unnecessary disciplinary removals, increase participation in instruction, and may prevent the need for more restrictive placements. The letter set forth the IDEA requirements regarding assessments, noting that they include references to evaluations of behavior and social/emotional status. (Office of Special Education and Rehabilitative Services and Office of Special Education Programs, *Dear Colleague Letter*, August 1, 2016, 116 LRP 33108.) Citing title 34 Code of Federal Regulations, parts 300.321 and 300.324, the letter noted that the IEP team is to have formal and informal information about an eligible child's "current functional (e.g. behavioral) performance" for the IEP team's consideration. (*Ibid.*) Additionally, the letter noted that, title 34 Code of Federal Regulations parts 300.156 and 300.207, which require districts to ensure that all personnel necessary to carry out the purposes of the IDEA are appropriately and adequately prepared and trained, applies to the training of teachers and other school personnel to provide required behavioral supports to students with disabilities. (*Ibid.*) A failure to provide appropriate behavioral support, because teachers and other staff are not adequately trained to implement such supports, may constitute a denial of a FAPE if the failure results in the child not receiving a meaningful educational benefit. (*Ibid.*)

#### ANALYSIS

38. The IEP's of October 16, 2014 and October 6, 2015, failed to offer sufficient behavior support and deprived Student of a FAPE, for several reasons. First, Student has had a behavior plan for five years, since kindergarten. His primary behavior goal has been virtually the same each year: maintain his personal space with peers. The "progress" Student has made on this goal has been reflected in the recent minor modifications the IEP team has made to the goal since 2013, with respect to whether Student controls himself with 80 percent accuracy four out of five days (in the October 24, 2013 IEP) or with 80 percent accuracy for five out of five consecutive days (in the October 16, 2014, IEP), or with five out of five consecutive days with his aide standing 15 yards away (in the October 6, 2015, IEP). This "progress" is de minimis. The repetition of essentially the same behavior goal year after year lends strong support to the proposition that Student's behavior support plan and behavior goals were not working, despite the presence of an aide. Indeed, it was only in April 2016, after Student filed his Complaint, that Student's behavior improved, due to an increase in the dosage of his medication. However, under title 34 Code of Federal Regulations, part 300.174 (a), a school district cannot mandate medication for a child with attention deficit hyperactivity disorder.

39. Second, there was no evidence that, at any relevant time, the one-to-one aide who was initially put in place in the December 11, 2012 IEP for three hours per day to help implement the behavior plan, was actually trained in behavior support, or appropriately supervised. Indeed, without any discussion or authority by the IEP team, the aide soon morphed into an aide who not only assisted with Student's behaviors, but who also assisted Student with his attention and academic issues in the classroom. Moreover, none of

Student's IEP's, including the October 16, 2014 IEP, and the October 6, 2015 IEP, increased the aide's hours from three hours per day, even though the aide's duties expanded. Dr. Majors recommended that Student required a one-to-one aide throughout the school day, to address not only Student's maladaptive behaviors, but also to assist him to sustain attention and help with his organization and planning skills. Dr. Majors further recommended that the aide should be trained in applied behavior analysis and be supervised by a board certified behavior analyst. These recommendations were uncontradicted by any specific evidence at hearing. The failure of District to provide such a one-to-one aide throughout the school day contributed to Student's inability to make meaningful progress in improving his behavior, and deprived Student of a FAPE.

40. Under these circumstances, at the October 16, 2014 IEP team meeting, the team should have offered to perform a functional behavior assessment to obtain data as to the circumstances under which Student was engaging in unwanted and, in some instances, aggressive behaviors toward his peers. Then, the IEP team would have discussed the assessment at an IEP team meeting, and the team would have developed a behavior plan in accordance with the results of such an assessment. Since no functional behavior assessment was performed during the 2014-2015 school year, such an offer should have been made at the October 6, 2015 IEP meeting (or one of its continuation sessions), an IEP team meeting should have been held to review the results of the assessment, and the IEP team should have developed a behavior plan based upon the results of the assessment. In any event, Student's aide during both school years should have had clear duties and supervision, and been present full-time to assist Student in class and during unstructured time.

## REMEDIES

1. Student prevailed on Issues A, B 3, and C 1, C 2, and C 3. As a remedy, Student requests reimbursement for Dr. Majors' services, reimbursement for Lindamood-Bell services, that District provide prospective services from Lindamood-Bell, and that District provide a one-to-one aide who is trained in applied behavior analysis throughout the school day, from a nonpublic agency. Student requests that District provide supervision for the aide by a board certified behavior analyst from a nonpublic agency.

2. School districts may be ordered to provide compensatory education or additional services to a student who has been denied a FAPE. (*Parents of Student W. v. Puyallup School Dist., No. 3* (9th Cir. 1994) 31 F.3d 1489, 1496.) These are equitable remedies that courts may employ to craft "appropriate relief" for a party. (*Ibid.*) An award of compensatory education need not provide a "day-for-day compensation." (*Id.* at p. 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 analysis, just as an IEP focuses on the individual student's needs. (*Reid v. District of Columbia* (D.C. Cir. 2005) 401 F.3d 516, 524.) The award must be fact-

specific 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.” (*Ibid.*)

3. Reimbursement of parents’ expenses for services they obtained for student and paid for out-of-pocket is another available remedy in an appropriate circumstance. Parents may be entitled to reimbursement for the costs of placement or services they have procured for their child when the school district has failed to provide a FAPE, and the private placement or services were appropriate under the IDEA and replaced services that the school district failed to provide. (20 U.S.C. § 1412(a)(10)(C); *School Committee of Burlington v. Department of Education* (1985) 471 U.S. 359, 369-371 [1055 S.Ct. 96].)

4. Student prevailed on Issue A. As was discussed above, Dr. Major’s assessment and report provided a thorough records review, a more detailed and reliable assessment of Student’s processing deficits and how those related to his diagnoses of traumatic brain injury, language deficits, and central auditory processing disorder, and a different perspective about Student’s cognitive abilities than the deficient psychoeducational assessment performed by District. Student should be reimbursed for the expenses that Parents incurred for Dr. Major’s services, not only because the defects in District’s psychoeducational assessment deprived Student of a FAPE, but also because Dr. Major’s assessment and report provided value to District.

5. Student prevailed on Issues B 3 and C 3. Student is entitled to a functional behavior assessment. Student is also entitled to a one-to-one aide throughout the school day, at District expense, who has been trained in applied behavior analysis and who is supervised, at District’s expense, by a board certified behavior analyst. Both the one-to-one aide and the board certified behavior analyst should be from a nonpublic agency. The aide is to assist in implementing Student’s behavior plan, as well as to assist with Student’s behaviors, such as attention to task, in the performance of academic tasks. The services of the one-to-one aide, as described here, as well as the Lindamood-Bell services described below, represent compensatory education for the District’s failure to provide a properly supervised and trained aide.

6. Student prevailed on Issues C 1 and C 2. Student is entitled to reimbursement for the Lindamood-Bell expenses Parents have incurred to the time of hearing, as well as to prospective Lindamood-Bell services, for a total of 18 weeks of Lindamood-Bell services. These services are compensatory for the failure of District to provide sufficient specialized academic instruction and educational therapy in the October 6, 2015 IEP.

## ORDER

1. Within 45 days of this decision, District to reimburse Parents the sum of \$3,500 for Dr. Major’s 2015 neuropsychological assessment and report. Documents submitted in this hearing constitute adequate proof of payment by Parents to Dr. Major.

2. Student shall have a functional behavior assessment by an independent assessor selected by Parents at District expense, as soon as practicable. District to provide Parents, in writing, with its criteria for assessors within 30 days of the date of this Decision.

3. Within 30 days after the functional behavior assessment has been completed, District shall convene an IEP meeting to discuss the assessment. District shall pay for the time of the assessor who performed the assessment to prepare for and attend this IEP meeting, including payment for the assessor's time and expenses to travel to and from the meeting.

4. Within 45 days of this decision, District to reimburse Parents for Student's Lindamood-Bell Learning Processes services in the sum of \$10, 856, representing the amount Parents have paid or been billed for services received through July 15, 2016. Documents submitted in this hearing constitute adequate proof of payment by Parents to Lindamood-Bell Learning Processes.

5. District to pay for all Lindamood-Bell Learning Processes services for Student that Student received subsequent to July 15, 2016, until Student receives a total of 18 weeks of such services since he began to receive such services in June 2016, within 45 days after Parents submit proof of payment. These services shall not be stay put.

6. District to provide Student a one-to-one behavior aide from a nonpublic agency, who has been trained in applied behavior analysis, and who will be present throughout the school day. This service shall be stay put.

7. District to provide 12 hours of supervision per month of the one-to-one aide by a board certified behavior analyst from a nonpublic agency. This service shall be stay put.

#### PREVAILING PARTY

Education Code section 56507, subdivision (d), requires that this Decision indicate the extent to which each party prevailed on each issue heard and decided in this due process matter. Student prevailed on issues A, B 3, C 1, C 2, and C 3. District prevailed on issues B 1 and B2.

