

BEFORE THE  
OFFICE OF ADMINISTRATIVE HEARINGS  
STATE OF CALIFORNIA

In the Matter of:

PARENT ON BEHALF OF STUDENT,

v.

COMPTON UNIFIED SCHOOL  
DISTRICT.

OAH CASE NO. 2012060109

**DECISION**

Administrative Law Judge (ALJ) Alexa J. Hohensee, Office of Administrative Hearings (OAH), heard this matter in Compton, California on August 27, 28, 29 and 30, 2012, and on September 5 and 10, 2012.

Attorney Leejanice Toback, represented Student. Sue Redman, Student's court appointed special advocate (CASA) and educational rights holder, was also present on behalf of Student.

Attorney Daniel L. Gonzalez, represented the Compton Unified School District (District). Zakiyyah McWilliams, program administrator for District, was present on behalf of District on all days of hearing, with the exception of the afternoon of August 28, 2012, when Jennifer O'Malley, program administrator, was present on behalf of District.

On June 1, 2012, Student filed a request for due process hearing (complaint). The matter was continued on July 9, 2012. Oral and documentary evidence were received at the hearing. At the close of the hearing, the ALJ granted the parties' request for a continuance to file written closing arguments by October 24, 2012. On that day, the briefs were timely filed, the record was closed, and the matter was submitted.

**ISSUES**

1. Did District deny Student a free appropriate public education (FAPE) during the 2010-2011 school year by:

- a) Not properly assessing her in all areas of suspected disability prior to the September 22, 2010 individualized education program (IEP) team meeting; and
  - b) Not finding her eligible for special education at the September 22, 2010 IEP team meeting?
2. Did District deny Student a FAPE during the 2011-2012 school year by:
    - a) Not properly assessing her in all areas of suspected disability prior to the September 29, 2011 IEP team meeting; and
    - b) Not finding her eligible for special education at the September 29, 2011 IEP team meeting?<sup>1</sup>

## FACTUAL FINDINGS

### *Jurisdiction and Background*

1. Student is a 15-year-old young woman who has lived with her foster parents within the boundaries of District at all relevant times.
2. Student is a foster child and dependent of the Los Angeles County Juvenile Dependency Court (Dependency Court). Student was removed from the care of her biological mother (Mother) and placed in several different foster homes before being placed in her current foster home within District boundaries in January 2010.<sup>2</sup> Student was provided a stable home environment, and Student felt happy and safe there.
3. Sue Redman was appointed Student's CASA by the Dependency Court in December 2010. Student's Mother held Student's educational rights until approximately August 2011, when those rights were transferred to Ms. Redman by the Dependency Court.

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<sup>1</sup> The Prehearing Conference Order in this matter set forth two issues without subparts. However, for purposes of organizing this Decision, the issues have been reformulated with subparts without changing their substance. In Student's closing brief, for the first time, Student alleges procedural violations that are not included within the complaint, and those issues are not addressed in this Decision. (See Ed. Code, § 56502, subd. (i) ["the party requesting the due process hearing shall not be allowed to raise issues at the due process hearing that were not raised in the [complaint], unless the other party agrees otherwise".])

<sup>2</sup> The Dependency Court appointed the head of household at the foster home, and then her adult daughter, as Student's foster parents. This change did not require Student to relocate, and references to "Foster Parent" are to the then-current foster parent.

Ms. Redman is the current holder of Student's educational rights, as well as Student's CASA.

*2008-2009 School Year*

4. In June 2009, as Student finished sixth grade in another school district, the Dependency Court ordered a psychological evaluation of Student in response to concerns that Student had a learning problem. Dr. Rita Collins-Faulkner, a clinical psychologist, performed the evaluation by administering the Wechsler Intelligence Scale for Children-IV (WISC-IV), the Wechsler Individual Achievement Test-II (WIAT-II), and various tests of visual perceptual and social/emotional functioning. Dr. Collins-Faulkner did not testify at hearing.

5. According to this report, Student had a full scale IQ standard score of 66, below average processing speed, and was significantly below grade level in reading (grade equivalent of 3.5) and mathematics (grade equivalent of 3.3). Dr. Collins-Faulkner diagnosed Student with a depressive disorder and a learning disorder, with a provisional diagnosis of mild mental retardation. The report did not reference Student having a lisp or articulation difficulties.

*2009-2010 School Year*

6. Student transferred to District in January of 2010, during the 2009-2010 school year. Student attended seventh grade general education classes and a math intervention class at Enterprise Middle School (Enterprise). At the end of the first semester, she received grades of "D-" in Intervention Math, "C" in English 7, "D" in Pre-Algebra, "D" in Life Science and "F" in World History.

7. Around April 2010, Mother, who then held Student's educational rights, requested that District assess Student for special education eligibility.

8. District school psychologist Rafael Cardenas, who testified at the hearing, performed the initial psychoeducational assessment of Student over four days in May and June 2010. Mr. Cardenas has a bachelor's degree in sociology, a master's of science degree in counseling, and holds a pupil personnel services credential in school psychology. He has been a school psychologist for 12 years, and performs 50-60 psychoeducational assessments per year. Mr. Cardenas's training, credentials and education made him well qualified to administer assessments and make recommendations regarding special education eligibility.

9. Mr. Cardenas reviewed Dr. Collins-Faulkner's report, Student's developmental history (which was unremarkable), cumulative school records, and work samples. He observed Student during her remedial math class, where Student worked quietly, and appeared on task and attentive, although he did not look at her written work to see if it was completed correctly.

10. To assess Student's intellectual ability, Mr. Cardenas administered the Naglieri Nonverbal Ability Test – Individual Administration (NNAT-IA) and the Differential Ability Scales – Second Edition (DAS-2)<sup>3</sup>, on which Student obtained a standard score of 77 for nonverbal cognitive ability, which was in the borderline range, and a standard score of 81 for verbal ability, in the low average range.

11. The NNAT-IA provided a measure of Student's general ability using nonverbal content, and the DAS-2 measured acquired verbal knowledge, verbal conceptualization and Student's general knowledge base. Mr. Cardenas estimated Student's cognitive functioning skills to be in the "low average" to "borderline" range, and opined that the scores on the prior cognitive testing by Dr. Collins-Faulkner had been lower because the WISC-IV she administered underestimates the cognitive abilities of non-Caucasians. Mr. Cardenas's testimony regarding Student's cognitive abilities was credible based on his credentials and experience, and was corroborated by similar scores of cognitive ability obtained by Dr. Abbe Barron in 2012, which are discussed below.

12. Enterprise's resource specialist, Efuru Asadullah, who testified at hearing, administered Student the Woodcock-Johnson Tests of Achievement, Third Edition (WJ-III), the results of which were incorporated into Mr. Cardenas's report. Ms. Asadullah has a bachelor's degree in African American Studies, and has one class remaining to obtain her master's degree in Special Education. She holds a California education specialist credential, has taught for over five years in special education, and has been trained in administration of the WJ-III and administered it 40 to 50 times. Ms. Asadullah's training, credentials and education made her well qualified to administer the WJ-III and interpret its results.

13. Ms. Asadullah's administration of the WJ-III yielded the following standard scores/grade equivalents on the reported subtests of the WJ-III, some of which are designated "cluster," or overall, skill measures: Letter-Word Identification-83/4.5, Reading Fluency-80/4.4, Passage Comprehension- 77/3.2, Calculation-68/3.8, Math Fluency-75/3.9, Applied Problems-72/3.0, Spelling-81/4.1, Writing Fluency-96/7.0, Writing Samples-96/6.7, Broad Reading (Cluster)-79/4.1, Broad Math(Cluster)-65/3.4, Broad Written Language (Cluster)-88/5.6. Student's math and reading skills were generally at the third and fourth grade level. Student could do simple single-digit addition and subtraction, but was unable to add, subtract, multiply or do fractions, and was unable to multiply or divide multi-digit numbers, multiply positive and negative integers, or solve a two-step equation. Student also did not comprehend the term "half." Ms. Asadullah did not consider it atypical within District for a seventh grader to perform at a third grade level in mathematics and reading comprehension.

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<sup>3</sup> Student's complaint alleged that District administered prohibited intelligence tests to Student, who is of African-American descent. However, that claim was not raised or addressed in the closing brief and appears to have been dropped in light of Student's presentation of Dr. Barron's testimony on Student's full scale IQ. (See *Larry P. v. Riles* (N.D. Cal. 1979) 495 F.Supp.926, 989, *affd. in pt., revd. in pt., Larry P. v. Riles* (9th Cir. 1986) 793 F.2d 969.)

14. Mr. Cardenas admitted at hearing that Student's WJ-III math scores indicated that Student lacked the capacity to function at a seventh grade level in math, but he did not mention that in his report. Instead, he incorporated Student's scores from the Spring 2010 administration of the California Standards Tests (CST), on which Student inexplicably received an "advanced" score in (sixth grade) Math, as well as a "proficient" score in (sixth grade) English Language Arts, without noting the discrepancy between these scores and the WJ-III results.

15. Mr. Cardenas measured Student's psychological processing skills by administering the Test of Auditory Processing Skills - Third Edition (TAPS-3), the Test of Visual Perceptual Skills – Third Edition (TVPS-3) and the Beery-Buktenica Developmental Test of Visual-Motor Integration (Beery VMI). Student obtained standard scores on these tests of 75, 74, and 75, respectively, all of which were in the "low" range.

16. Mr. Cardenas learned from Student's English teacher, Ms. Horejsi, that Student struggled greatly with inference and written directions, had very low comprehension, wrote in simple sentences, made little effort to "repair" her understanding, would speed through reading at the cost of comprehension, could perform when pushed, had a poor attitude, rarely brought materials to class, did not complete homework, refused tutoring opportunities, would not become engaged unless pushed, viewed school as a place to connect with her friends rather than as a place to learn, argued back, "zone[d] out," had a habit of yelling to friends across the room, was a "ringleader," disrupted peers and worked best when separated from others. Steve Reichlin, Student's math intervention teacher, reported that Student's work was "on par or slightly above" her peers in reading word problems, but that Student was defiant, confrontational and "chooses not to engage" in the classroom.

17. Mr. Cardenas evaluated Student's social/emotional skills by interviewing Mother, and by having Foster Parent and Mr. Reichlin complete the Burks' Behavior Rating Scales – Second Edition (BBRS-2). The BBRS-2 rates behavior problems or patterns of problem behavior. Mr. Cardenas was aware that Student was receiving individual counseling, but did not speak with the therapist, or inquire into the reason for counseling. Mother reported that Student demonstrated adequate social-adaptive behavior at home and with her friends. Foster Parent did not rate any areas in the BBRS-2 as of concern. Mr. Reichlin rated the following areas of "elevated" concern for Student: ability deficits, academic difficulties, social isolation, social withdrawal, attention and impulse control problems, attention deficits, impulsivity, disruptive behavior, poor anger control, distrustfulness, aggressive tendencies, rebelliousness, and poor social conformity. Scores in the elevated range of the BBRS-2 identify problems that may be severe enough to require formal treatment. The BBRS-2 scoring program flagged Mr. Reichlin's responses as excessively negative and to be viewed with caution, but as Foster Parent had reported no problems and Student did not have a discipline record, Mr. Cardenas chose not to follow-up with Mr. Reichlin or to conduct further testing on Student's attention or classroom behavior.

18. Mr. Reichlin, a seven year math and math intervention teacher, who testified at hearing, exhibited good recall of Student and her behaviors, and testified credibly and

persuasively regarding Student's statements and actions in support of his responses to the BBRS-2. In addition, he did not have difficulty understanding Student's speech, did not notice that Student had any problems communicating with her peers, and testified that Student's frequent talking with friends in class had interfered with her classwork.

19. Mr. Cardenas observed Student had a mild lisp, but was able to adequately express her ideas through answers and conversation, and concluded that Student's expressive and receptive skills were adequate for interpersonal conversational needs, and to understand instructions and questions. No referral was made for further speech or language evaluation.

20. Mr. Cardenas concluded that Student's academic performance was varied, due to "average" scores in written expression, "low average" scores in reading, and "very low" scores in mathematics skills. He reported that Student's academic achievement scores were consistent with her "low average" to "borderline" cognitive ability and "low" psychological processing scores. Mr. Cardenas concluded that no significant discrepancy existed between Student's estimated cognitive ability and her academic achievement for purposes of special education eligibility in the category of specific learning disability (SLD). No other possible eligibility category was referenced in Mr. Cardenas's report.

21. Mr. Cardenas's report advised the IEP team to consider Student's placement in several foster homes and schools as limiting Student's opportunities to develop and consistently practice the skills for academic success "juxtaposed with a lack of motivation and effort."

22. Although Mr. Cardenas testified credibly concerning the tests completed, and candidly admitted that Student's 2010 CST "advanced" score in Math did not accurately reflect Student's mathematical achievement, his opinion that his assessment was complete in light of the information known to District at that time was not persuasive. Mr. Cardenas did not convincingly explain his failure to inquire as to the reason Student was undergoing counseling, his failure to point out or address in his report the discrepancy between Student's "advanced" CST result and her "borderline" mathematics scores on the WJ-III, or his reliance upon a non-classroom report by a new foster parent to justify lack of follow up on year-long classroom behaviors reported by Ms. Horejsi and Mr. Reichlin. Mr. Cardenas also did not convincingly explain his failure to follow up with Mr. Reichlin to determine if Mr. Reichlin's BBRS-2 responses were accurate or exaggerated, his failure to consider whether Student had attention deficit hyperactivity disorder (ADHD), or his failure to consider multiple possible categories of special education eligibility. Mr. Cardenas's opinion, at hearing and reflected in his report, that Student experienced "frequent disruptions in school placements thereby creating limited opportunities to develop and consistently practice" academic skills, was not supported by the school records in evidence or his own inquiry, and constituted unsupported speculation. Mr. Cardenas's testimony that his assessment was complete was also undermined by his admission at hearing that the behavior reported by Student's teachers, such as inability to attend, failing school work despite ability, not following through, reluctance to engage, difficulty organizing tasks, losing materials, failing to bring materials to class, and being easily distracted, could all be signs of ADHD, although

no assessment for ADHD was done, and the teacher reports and BBRs-2 responses identifying Student as exhibiting such behavior and attention problems were totally disregarded.

23. Student finished the 2009-2010 school year with grades of “D” in Intervention Math, “F” in English 7, “D” in Pre-Algebra, “F” in Life Science and “F” in World History. District promoted Student to eighth grade.

#### *2010-2011 School Year*

24. During the 2010-2011 school year, Student attended general education eighth grade classes at Enterprise. Her academic classes included Algebra 1, Science, English 8, Literature and U.S. Heritage.

25. On September 22, 2010, District held an IEP team meeting to review the results of Mr. Cardenas’s psychoeducational evaluation. The meeting was attended by Student, biological Mother, Student’s social worker, school psychologist Brad Keller, special education teacher Ms. Asadullah, two general education teachers, and an administrative designee.

26. Mr. Keller, who had reviewed the psychoeducational report with Mr. Cardenas, presented Mr. Cardenas’s report. Ms. Asadullah presented the results of the WJ-III. One of Student’s teachers, Mr. Gutierrez, reported to the team that “Student is slow to begin assignments and is often distracted easily,” and Student told the team that she would “try harder to focus in class” and do her homework. Despite the report that Student performed in math and reading comprehension at the third and fourth grade level, the team found that Student did not need an alternate curriculum for her eighth grade classes, and recommended that student’s social worker see if she could “get student an outside tutor to come to the home to help” Student.

27. The September 22, 2010 IEP team found Student ineligible for special education as a student with a specific learning disability, the only eligibility category addressed by Mr. Cardenas’s report. Mother signed the IEP, indicating that she agreed with the team’s determination that her child was not eligible for special education.

28. In January 2011, as Student’s newly appointed CASA, Ms. Redman spoke with Enterprise’s school counselor, Ms. Nash, about Student’s poor academic performance. Ms. Nash advised Ms. Redman to have Student take advantage of tutoring offered to all students by the teachers on certain days of the week, during lunch and after school.

29. Student’s grades at the end of the first semester of 2010-2011 included “F” in Algebra I, “C-” in Physical Science, “F” in English 8, “D” in Literature, and “F” in U.S. Heritage. Student was again failing three of her five academic classes.

30. On February 7, 2011, District placed Student on “daily reports” to address Student’s lack of completed homework. These reports required Student to obtain the signature of each teacher verifying Student’s homework for the day and then return the report the next day to the school with her guardian’s signature. No evidence was submitted on whether Student complied with the daily reports procedure.

31. By April 2011, Student was failing several of her second semester classes. Ms. Redman made a request that District assess Student again for special education eligibility, and on May 27, 2011, signed an assessment plan provided by District with boxes checked for assessments that would be performed, including the areas of academic achievement, health, intellectual development, motor development and social/emotional. Ms. Redman had not expressly requested a speech assessment. No box was checked for assessment in the area of language/speech communication development, although information on the assessment plan explained that language/speech tests “measure your child’s ability to understand and use language and speak clearly and appropriately.”

32. On May 26, 2011, a day before Ms. Redman consented to the assessment plan, Ms. Asadullah administered portions of the WJ-III to Student. The results of this WJ-III contained scoring errors by Ms. Asadullah, but were not incorporated into the psychoeducational assessment of Student or presented to Student’s IEP team. Nonetheless, Ms. Asadullah spent several hours with Student administering the WJ-III in May 2011, and was able to communicate with Student and understand her without difficulty.

33. A second psychoeducational assessment of Student was performed by school psychologist Ana Carrera, who testified at hearing. Ms. Carrera has a master’s of science degree in counseling and psychology, and holds a clear pupil personnel services credential in school counseling and school psychology. She has been employed by District for 15 years, and performs approximately 80 psychoeducational assessments per year. Ms. Carrera’s education, training and credentials made her well qualified to administer assessments and make recommendations regarding special education eligibility.

34. Ms. Carrera reviewed Mr. Cardenas’s report from June 2010, Student’s developmental history, Student’s cumulative school records and work samples.

35. Ms. Carrera administered the DAS-2 to measure Student’s cognitive abilities in the areas of verbal cluster, nonverbal reasoning, spatial, general conceptual ability, and nonverbal composite. Student’s cognitive ability scores were all in the “low” range with standard scores between 72 and 79, except for her spatial standard score of 90, which was in the “average” range.

36. Ms. Carrera administered the Kaufman Test of Educational Achievement–II (KTEA-II) to Student to test Student’s academic skills. Student’s obtained standard scores of 92 in Letter and Word Recognition, 90 in Written Expression, and 90 in Spelling, in the “average” range. Student’s scores of 80 in Reading Comprehension, 71 in Math Concepts and Application and 72 in Math Computation, were in the “below average” range. In



addition to recording these scores in her report, Ms. Carrera referenced Student's 2010 CST scores of "proficient" in English Language Arts and "advanced" in Math.

37. Ms. Carrera administered the TAPS-3, TVPS-3 and Beery VMI to test Student's psychological processing skills. On the TAPS-3, which tested auditory processing, Student obtained a standard score of 95, which was "average." On the TVPS, Student obtained a standard score of 83, which was "low average." On the Beery VMI, Ms. Carrera reported a standard score of 90, in the "average" range; however, at hearing it was shown that Ms. Carrera had incorrectly scored this test, and Student's actual standard score was 75, in the "borderline" range.

38. Ms. Carrera noted in her report that over four days of testing Student was able to express her needs and communicate, and that Student's expressive and receptive language appeared to be average. Ms. Carrera concluded that language and communication was not an area of concern for Student.

39. To assess Student's behavior and attention, Ms. Carrera distributed questionnaires from the Behavior Assessment System for Children – Second Edition (BASC) to Student and Student's eighth grade teachers. However, it was the end of the school year and no BASC questionnaires were returned by the teachers. Instead, Ms. Carrera relied on school counselor Ms. Nash for information concerning Student's performance and behavior at Enterprise. Ms. Carrera was unaware that Ms. Nash had only met with Student on three occasions. Ms. Nash reported that Student had been counseled about failing grades, had been placed on daily reports, had no discipline record, and was popular on campus.

40. Ms. Carrera received a generic "teacher report" from Student's English teacher S. Walker, who did not testify at hearing. S. Walker reported that Student was an average reader, but would refuse to read most of the time, that Student did not write essays and did very little work, that Student did not want to learn and refused to participate, and that Student was very rude and appeared angry. S. Walker wrote "[Student] does not want to try and can be very rude. I can't tell if she can't do the work or just doesn't want to work." Ms. Carrera did not reference S. Walker's comments in her assessment report.

41. Ms. Carrera did not complete her assessment before the end of the 2010-2011 school year.

42. Student's scores on the CST administered in spring 2011 were "far below basic" in all areas tested: English language arts, math, science and history-social science. Ms. Carrera testified that these results were not available when she completed her assessment of Student in fall 2011, and were not included in her report.

43. Student finished the second semester of the 2010-2011 school year with grades of "F" in Algebra I, "C" in Science, "F" in English 8, "F" in Literature, and "D-" in U.S. History. District promoted Student to the ninth grade.

*2011-2012 School Year*

44. Student began the 2011-2012 school year in ninth grade general education classes at Dominguez High School. Student's academic classes included English 9, Algebra I (for a second time), Health Education, Earth Science, Study Skills and French I.

45. Ms. Carrera continued her psychoeducational assessment of Student in fall 2011. She administered the self-report portion of the BASC to Student, who scored in the range of "at-risk" in attitude to teachers, and inattention/hyperactivity, and "clinically significant" in sensation seeking and hyperactivity. Scores in the "at-risk" range identify problems that may not require formal treatment, but need careful monitoring. Scores in the "clinically significant" range suggest a high level of maladjustment. Ms. Carrera testified that teenagers tend to rate themselves high in sensation seeking, and she did not see Student's "at-risk" or "clinically significant" scores as important, particularly as Student rated herself average in such positive areas as self-confidence and the ability to maintain friendships.

46. Foster Parent completed a questionnaire from the Devereaux Scales of Mental Disorders (Devereaux) to assess Student's social/emotional skills. On the Devereaux, an "elevated" score may need follow-up. Foster Parent rated Student as "borderline" in conduct, anxiety, depression, internalizing, and "elevated" in delinquency and externalizing. Ms. Carrera did not follow-up on the "borderline" and "elevated" scores, as she believed "some parents overrate certain behaviors." Ms. Carrera used the BASC and Devereaux scales to assess Student's social and emotional skills only, and did not assess Student for an attention disorder.

47. Foster Parent told Ms. Carrera that Student was seeing a counselor, but Ms. Carrera did not inquire as to the reason for counseling, as Ms. Carrera did not think she needed that information. Ms. Carrera also did not ask Ms. Redman why Ms. Redman had requested an assessment of Student for special education eligibility.

48. Ms. Carrera observed Student in the first few days of her French I class, during a video presentation. She found Student engaged, actively participating in the classroom discussion, and raising her hand to answer teacher questions.

49. Ms. Carrera also interviewed Student, who told Ms. Carrera that she could be a better student and could keep up in class, but chose not to do so. Student also told Ms. Carrera that she chose not to do her homework, although Ms. Carrera did not ask Student why she made those choices.

50. Ms. Carrera's psychoeducational assessment report concluded that Student was not eligible for special education because there was not a severe discrepancy between her "low" and "average" cognitive abilities and her "below average" and "average" academic performance, and that Student's processing skills were in the "average" range.

51. At hearing, Ms. Carrera testified that it is important for a school psychologist to determine why a student is performing poorly in school, but admitted that she had come to no conclusion as to why Student was performing so poorly. Ms. Carrera admitted that she was aware that ADHD could be a qualifying condition for special education eligibility under the category of other health impairment (OHI), but did not look at whether Student had ADHD, despite S. Walker's report of Student failing to attend or put forth effort in class, Student's own "elevated" responses to the BASC in inattention/hyperactivity and hyperactivity, and the classroom behaviors documented in Mr. Cardenas's report the prior year. Ms. Carreras's opinion that her assessment was complete in light of the information known to District in spring and fall 2011 was unpersuasive for those reasons. In addition, Ms. Carrera was neither credible nor convincing when she testified that it was not important to follow up in fall 2011 when no teachers had returned the BASC in spring 2011, that she did not need to know why Student was receiving counseling, or that Student's responses on the BASC self-report section of at-risk and clinically significant behavior could be disregarded as common teenage exaggeration. Her observation of Student in class during a video presentation did not appear designed to provide information on Student's attention and behavior during classroom instruction, and her testimony that the Student's spring 2011 CST test scores were not available for her report in September 2011 was unconvincing and contrary to other testimony that CST scores are generally available by August of the year of the test.

52. On September 29, 2011, District convened an IEP team meeting to discuss, per the IEP document, "how student is not eligible for Special Education services." The meeting was attended by Ms. Redman, Foster Parent, Ms. Carrera, a special education teacher and an administrative designee.

53. At that meeting, Ms. Carrera read her report verbatim, and told the IEP team that Student's cognitive abilities were commensurate with her academic performance, that test scores did not demonstrate a severe discrepancy or processing disorder, and that Student did not appear to be eligible for special education as a student with SLD. She also concluded that Student did not display behaviors associated with a serious emotional disturbance. Ms. Carrera recommended that Student continue her private counseling, and take advantage of the tutoring teachers offered to students in their classes during lunch or after school.

54. Foster Parent expressed concern about whether Student could obtain passing grades in her French I class, but District members of the IEP team urged Foster Parent to wait until after the first progress report to consider changing Student's classes. The team found Student not eligible for special education, and Ms. Redman consented to the IEP.

55. A few weeks later, Ms. Redman became concerned about Student's poor grades, particularly in French I. Ms. Redman visited the school to speak to Student's French I teacher, Peter Sunnarborg, who did not have any concerns at that time.

56. Mr. Sunnarborg has a bachelor's degree in French, and holds a clear California credential. He has taught French at District for nine years, and testified at the hearing. Mr.

Sunnarborg uses the total physical response storytelling methodology, and teaches 80 percent of the French I class in English. He testified credibly that all of his students generally perform well at the beginning of French I, but have more difficulty as the class progresses. Student did not stand out at the beginning of the year, although she was in the lower performance group in tests, classwork and homework as the semester progressed. Student was earning B's and C's on small group communication tasks, which involved preparing and performing a dialogue, although she later often put her head on her desk, and earned no classroom participation points.

57. On December 13, 2011, District held a Student Study Team (SST) meeting, attended by Student, Ms. Redman, Mr. Sunnarborg, the school counselor and the assistant principal. The purpose of the meeting was to discuss Student's grades and attendance, and Student's failure to bring her materials to class.

58. In preparation for the SST meeting, Mr. Sunnarborg completed an SST Classroom Modifications Form. Mr. Sunnarborg indicated that he had modified his teaching for Student by repeating directions, circulating around the room, providing visual prompts, frequent review of key concepts, reteaching, and individualized instruction, but noted that "Student refuses my help." He indicated that he attempted to modify Student's behavior by reteaching expected behavior, but that Student was uncooperative and immature, had a poor attitude toward school and work, and was disrespectful toward teachers and authority. He wrote that Student "rarely pays attention, when offered help she states that she doesn't need it, but then states she doesn't 'get it' when confronted about incomplete work or low test scores." At hearing, Mr. Sunnarborg testified that Student was regularly tardy, regularly talked with friends in class, that he had to remind her daily to put away her cell phone, and that Student had difficulty attending to task and completing her work. He did not recall that Student had a lisp.

59. The SST team discussed Student's strengths and weaknesses, and strategies that Student could utilize to improve her performance and make better decisions, such as not using her phone or socializing in class. Mr. Sunnarborg volunteered to tutor Student in French at lunch, or after school in his classroom during the French Club meetings. He believed that Student had average abilities, and could perform the work in his class to receive a passing grade.

60. The SST team recommended that Student be placed in reading intervention classes in spring 2012, and take advantage of tutoring offered by Student's English and Algebra teachers to all students during lunch, after school and by appointment.

61. Student did not avail herself of tutoring opportunities with Mr. Sunnarborg, or any of her teachers, and at the end of her first semester, Student earned grades of "F" in English, "F" in Algebra I, "F" in Health Education, "F" in Earth Science, "pass" in Study Skills, and "F" in French I, for a grade point average of 0.00.

62. In February 2012, for the spring semester, District replaced Student's Health Education, Study Skills and French I classes, with a Math Intervention and two Reading Intervention classes.

63. Student's Reading Intervention teacher, Mona Walker, testified at hearing. Ms. Walker has a single subject California credential in English, and has taught reading interventions at District for the past three years. Ms. Walker's Reading Intervention class contains a mix of 15 to 21 general education and special education students, and utilizes specialized instruction and a computer reading program, "Read 180," that focuses on reading, spelling and comprehension at each student's level. Student's initial score in Read 180 was 405, or "below proficient," with a score of 1000 representing grade level for ninth grade. After six weeks in the reading class, Student's score increased to 514, and she comprehended 52 percent of what she read. Ms. Walker opined that Student was performing at a third, fourth or fifth grade level on the various skills needed for reading, such as vocabulary, fluency and comprehension.

64. Ms. Walker described Student as a "typical" reading intervention student, with a short attention span and easily distracted by other students or her cell phone. All of Ms. Walker's students needed close supervision, but Student had particular difficulty attending to tasks, wanted constant feedback and monitoring, and often left her seat without permission. Ms. Walker had to take away Student's cell phone almost daily, but she usually had half a dozen cell phones on her desk at the end of each class. However, by the end of the school year, Ms. Walker perceived a change in Student's focus that she attributed in part to Student maturing as a young lady, and in part to Student buckling down to pass the class, as her students routinely did at the end of the school year to obtain a passing grade. Ms. Walker testified that Student pronounced the letter "s" with a "sh" sound, but that her pronunciation did not interfere with Student's intelligibility or communication.

65. Ms. Walker opined that two to four hours per week of one-on-one tutoring over a 42-week school year, for a total of 84 to 120 hours, would bring Student to grade level in English if Student were motivated to learn. She explained that the success of tutoring would depend upon Student's cooperation and the amount of effort Student wanted to put forth.

66. In February 2012, District funded an independent educational evaluation (IEE) by Dr. Abbe Barron. Dr. Barron's report was reviewed at an IEP team meeting on July 2, 2012, at which Student was found eligible for special education and related services under the eligibility category of OHI, and offered an IEP for the 2012-2013 school year.<sup>4</sup>

67. At the end of the 2011-2012 school year, Student received grades of "A-" in Reading Intervention, "B+" in Reading Intervention (second of two classes), "D" in Math Intervention, "F" in Algebra, "F" in English, and "F" in Earth Science. Student took a remedial "credit recovery" Algebra I class in summer 2012 and obtained a grade of C-

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<sup>4</sup> District's offer of FAPE in the July 2, 2012 IEP is not at issue in this proceeding.

although Ms. Redman opined that the grade was inflated in light of standardized testing (discussed below) showing that Student had third grade level math skills at that time.

*Independent Educational Evaluation by Dr. Barron*

68. The IEE assessor, clinical psychologist Abbe Barron, testified at hearing. Dr. Barron has a bachelor's degree in psychology, a master's degree in educational psychology, and a doctorate in clinical psychology. Dr. Barron has worked in California as a licensed psychologist with an emphasis on psychological assessments since 2005, and has performed over 700 assessments for private clients and school districts. Dr. Barron's education, training and credentials made her well qualified to administer assessments for purposes of determining Student's special education eligibility.

69. On February 23, 2012, Dr. Barron administered the WISC-IV to Student to test her cognitive abilities. Student's full scale IQ on the WISC-IV was 75, within the "borderline" range, and 79 on the WISC-IV global assessment index of cognitive function, in the "borderline/low average" range, both of which Dr. Barron concluded were inaccurate measurements of Student's cognitive ability due to her inability to attend during testing. Dr. Barron also administered a computerized Continuous Performance Test for Attention (IVA+), but the program self-terminated when Student was unable to sustain the necessary concentration to timely respond to test prompts. Dr. Barron stopped her assessment, and recommended that Ms. Redman arrange for Student to be seen by a psychiatrist and evaluated for ADHD and possible medication management.

70. Ms. Redman took Student to a psychiatrist, who requested that Student's teachers complete the Connor's Teacher Rating Scale – Revised (Connor's) questionnaires, which can determine if a person presents with symptoms of ADHD. The psychiatrist warned Ms. Redman that if the Connor's rating forms were left with the teachers, they would never be completed, and advised her to hand deliver the forms to each teacher and wait while the teachers completed them, which Ms. Redman did in April 2012. Based on the psychiatric assessment, including the Connor's forms, the psychiatrist diagnosed Student with ADHD, and placed Student on medication to manage Student's inattention.

71. Ms. Redman, who testified at hearing, is a retired school teacher, with bachelor's degrees in English and educational psychology and a master's degree in psychology and education. She formerly worked as a resource teacher, but is not familiar with current special education law. Ms. Redman sees Student each month to drive her to the psychiatrist for ADHD medication. Ms. Redman testified convincingly that she has seen a dramatic improvement in Student's attitude and confidence since Student has been on attention medication. Ms. Redman was not initially concerned with Student's speech, but now speculates that Student may be screening words to avoid words with the letter "s" to hide her lisp.

72. On May 9 and 12, 2012, after Student was placed on medication, Dr. Barron administered an extensive battery of standardized tests to measure student's cognitive ability, academic achievement, processing abilities, behavior and social/emotional skills.

73. Dr. Barron administered the Stanford-Binet-Fifth Edition (SB-5) to test Student's general level of intellectual functioning after medication. Dr. Barron reported that Student obtained an "average" verbal IQ on the SB-5 of 90 that was stronger than her pre-medication overall verbal reasoning index score of 81 on the WISC-IV. However, Student's nonverbal IQ score of 78 on the SB-5 and her perceptual reasoning index score of 77 on Dr. Barron's earlier administration of the WISC-IV were both in the "borderline" range. Dr. Barron attributed Student's increased verbal ability score to her increased ability to attend while on medication.

74. Dr. Barron used a variety of tests to measure Student's academic achievement. On tests of reading skills, Student scored in the "average" range on the K-DEFS Color-Word Interference Task tests (K-DEFS), in the "low average" range on the reading skills subtests of the WJA-III (with the exception of the reading vocabulary subtest, involving retrieval of synonyms, antonyms and analogies in which she scored in the "impaired" range), the Test of Silent Word reading Fluency (TOSWRF) and the reading rate score of the Gray Oral reading Test (GORT-5), and in the "borderline" range on oral reading quotient, reading fluency and comprehension on the GORT-5.

75. In written language skills, Student obtained scores in the "average" range on the WJA-III in the writing samples and writing fluency subtests, and in the "low average" range on the subtest of spelling.

76. Student's math skills on the WJA-III were in the "borderline" range in math fluency, and in the "impaired range" in the broad math cluster, calculations and applied problems subtests.

77. Dr. Barron tested Student's attention and information processing skills, noting that Student was able to sustain attention for up to three and a half hours of testing while taking ADHD medication, but continued to respond impulsively and to make careless errors. On a second administration of the IVA+, Student scored in the "average" range for auditory attention, and in the "low average" range for visual attention. However, on the Woodcock Johnson Test of Cognitive Abilities – Processing Speed Index (WJ-COG-III), Student scored in the "impaired" range, and Student's scores on various auditory and visual processing measures varied from the "superior" to "impaired" range. Dr. Barron noted that Student's ability to attend to visual tasks and not "drift out" or "tune out" was difficult for her even after medication. Her ability to regulate and respond appropriately was overall in the "low average" range, as Student could not stay on task in order to make coherent, reliable and dependable responses, particularly when switching between auditory and visual tasks.

78. Dr. Barron tested Student's executive functioning, or higher level thinking, skills with a variety of test instruments, including the IVA+, Tower of London-2, Wisconsin

Card Sorting, K-DEFS and the Comprehensive Trail Making Test (CTMT), on which Student scored in the “low average” to “impaired” range, even after medication.

79. Dr. Barron also tested Student’s visual-spatial, visual motor and fine motor functioning. On the Wide Range Assessment of Visual-Motor Abilities (WRAVMA), Student’s overall skills were in the “borderline” range, with a “low average” standard score in the visual-motor task of drawing, and a “borderline/impaired” score in the visual-spatial task of matching. Student also obtained standard scores in the “impaired” range on visual tracking tests of the CTMT and the reproduction of block designs test of the WISC-IV. On tests of fine motor speed (physical manipulation) on the WRAVMA, Student tested in the “superior” and “average” range.

80. Multiple measures were also used to evaluate Student’s social-emotional and behavioral functioning, including observation, responses to the Child Behavior Checklist (CBCL) by Foster Parent and by Ms. Redman, and a Youth Self-Report (YSR) and Beck Youth Inventories-Second Edition (BYI-II) completed by Student. Relevant here, Foster Parent rated Student in the “borderline critical” range for attention problems, Ms. Redman reported Student in the “borderline clinical” for attention deficit/hyperactivity problems, and Student scored herself in the “borderline critical” range for attention deficit/hyperactivity problems. On the YSR, Student rated her school performance as below average in language arts, but average in social studies, math and science, and her scores on the YSR problem scales were in the “normal” range, except for inattention which was in the “clinical” range. On the self-concept scale, an inventory that explores self-perceptions such as competence and self-worth, Student rated herself in the “very superior” range, indicating that she reported no difficulties in how she views herself.

81. Dr. Barron completed her report on May 24, 2012. She concluded that Student’s verbal IQ was in the average range, while her nonverbal IQ, or her overall ability to reason, solve problems, visualize and recall information, was in the “borderline” range, both as measured by the WISC-IV without medication and the SB-5 with medication. She added that Student demonstrated significantly weak skills on tasks involving expressive language, receptive language, listening comprehension and phonemic awareness, and that Student’s distractibility, inattention, lack of patience and impulse control further affected her academic performance. With regard to social/emotional functioning, Dr. Barron concluded that Student’s struggles with multiple undiagnosed learning and attention issues had affected Student’s self-image, and that increased understanding of her learning and social/emotional issues was necessary to help her develop self-confidence. Dr. Barron diagnosed Student with moderate to severe ADHD-predominately inattentive type, mixed receptive-expressive language, phonological, reading and math disorders, and learning disorders in auditory processing, visual scanning and processing speed.

82. Dr. Barron recommended Student be found eligible for special education under the category of OHI on the basis that her poor academic performance was due to her ADHD. She also concluded that Student’s scattered cognitive ability, academic achievement and processing scores should qualify Student for special education under the eligibility



category of SLD, although she did not determine whether Student had a severe discrepancy using the statutory definition of SLD. Dr. Barron recommended a large number of special education instruction strategies and services that were necessary for Student to learn.

83. Dr. Barron answered questions readily and thoroughly, and was knowledgeable and persuasive in her testimony on all aspects of psychoeducational assessment. The only aspect of Dr. Barron's report that was not persuasive was her conclusions about Student's low self-confidence, which were contradicted by Student's self-report of high self-esteem. Her testimony was generally accorded greater weight than that of Mr. Cardenas, Ms. Asadullah and Ms. Carrera, who were each demonstrated to have made scoring errors, included misleading information in their reports, failed to gather important information and/or disregarded important information concerning Student's abilities and educational performance.

84. Dr. Barron, who is not a speech pathologist, also testified that Student had a lisp that made Student difficult to understand, which testimony was contradicted by all other witnesses. However, Dr. Barron's speculative opinion when she ventured into the field of speech pathology, and her concern for Student's clarity of articulation, did not detract from the persuasiveness of her testimony regarding symptoms and manifestations of ADHD, identification of ADHD as a suspected disability, interpretation of standardized ability, achievement and psychological processing measures, and Student's educational needs.

85. With regard to the June 2010 assessment by Mr. Cardenas, Dr. Barron was critical of Mr. Cardenas' failure to assess student for an attention disorder, and particularly for ADHD, as a cause of Student's failure to attend, failure to follow through, difficulty organizing tasks and distractibility. She testified knowledgeably that ADHD is a life-long neurobiological disorder present at birth that affects a child's ability to sustain attention and perform tasks, and is exacerbated in a classroom with distracting noise and student interaction. Children with ADHD also often have additional disorders such as poor auditory processing, which affects their ability to understand words and process information or instructions from their teachers. Students with ADHD frequently mis-hear information, which affects their comprehension and ability to learn.

86. Dr. Barron testified persuasively that the 2010 teachers' comments regarding Student's classroom behavior and social/emotional skills, including that Student was confrontational in the classroom, zoned out, was a "ringleader," attempted to disrupt her peers and worked best when separated from her peers, and Mr. Reichlin's BBRS-2 responses with "elevated" concern regarding Student's attention and impulse control problems, attention deficits, impulsivity, and disruptive behavior, should have signaled to Mr. Cardenas that Student might have ADHD. She explained that such conduct is typical of children with ADHD, who are often thought of as lazy, unable to focus, and clowning around. Dr. Barron testified knowledgeably and persuasively that talking excessively, interrupting peers, making noise, failing to follow directions and initiating conversations at inappropriate times are typical classroom manifestations of ADHD, and that the teacher reports that Student exhibited these behaviors, particularly in light of her poor school performance, should have

triggered an assessment for ADHD as a suspected disability by Mr. Cardenas. In general, Dr. Barron also testified persuasively that Student's inability to do multi-digit addition and subtraction, multiplication, or to comprehend the concept of "one-half" is too extreme to be explained by inconsistent school instruction.

87. As to the June 2011 assessment by District, Dr. Barron was very critical of Ms. Carrera for not using the BASC to determine if Student had problems with attention or hyperactivity, and for completing her assessment without teacher input on the BASC. Dr. Barron testified knowledgeably and persuasively that students do not typically overrate themselves on hyperactivity on the BASC, but may overrate themselves on self-esteem to please adults. She testified that both her experience and published research have found that parents do not necessarily know what is, or is not, normal and tend to give very subjective responses regarding child behavior, and therefore it is important to focus on teacher reports from the classroom to alert the assessor to problems with attention and hyperactivity. Dr. Barron persuasively opined that Student's self-report of being at risk in inattention/hyperactivity and clinically significant in hyperactivity was very important, and should have triggered further assessment of whether Student had an attention deficit.

88. Dr. Barron also opined that the significant difference between Student's psychological processing scores in June 2010 and June 2011 (auditory processing: 2010-75/2011-95; visual processing: 2010-74/2011-83; visual-motor processing: 2010-75/2011-90) warranted further testing of all Student's psychological processes.

89. Dr. Barron testified that Student would benefit from compensatory tutoring to address Student's math deficits, and recommended three hours per week for no less than 12 weeks of intensive one-on-one academic instruction by a credentialed teacher in mathematics.

#### *Student's Speech Pathology Expert*

90. Julie Kastegar testified for Student as an expert speech pathologist. Ms. Kastegar has a bachelor's degree in speech and hearing science and a master's of science degree in communication disorders. She has been a California certified speech language pathologist for 14 years, and has a certificate of clinical competence from the American Speech-Language-Hearing Association. She worked as a speech pathologist for public schools in Arizona and California for seven years from 1998-2005, and now provides direct speech therapy services. She assessed Student in the area of articulation on August 1, 2012, for approximately one hour, in preparation for the hearing.

91. Ms. Kastegar administered the Arizona Articulation Proficiency Scale (AAPS) to Student, who made errors on the "s," "z," and "sh" sounds. Ms. Kastegar explained that Student pronounces "s," "z," and "sh" with a "slushy" sound due to incorrect tongue placement. This is a lateral lisp, rather than the common developmental lisp in which the "s" is pronounced with a "th" sound. Student's score for these sounds on the AAPS was 64, or the age equivalent of 4.7 years, the age at which such placement errors are determined

unlikely to change without remediation. Nonetheless, Ms. Kastegar rated Student's speech to be 96 percent intelligible. Ms. Kastegar speculated that someone Student's age might suffer adverse attention from her lisp, but she did not ask Student about it, and had gotten the impression from Student that Student was socially involved with her peers.

92. Ms. Kastegar recommended that Student be found eligible for special education and related services as a student with speech or language impairment, due to Student's articulation error. Ms. Kastegar recommended that Student be given one hour of speech therapy per week for 26 weeks "as a start" to addressing Student's lateral lisp.

## LEGAL CONCLUSIONS

1. As the petitioning party, Student has the burden of persuasion on all issues. (*Schaffer v. Weast* (2005) 546 U.S. 49, 56-62 [126 S.Ct. 528, 163 L.Ed.2d 387].)

2. Student contends that District failed to provide her a FAPE by failing to meet its "child find" obligations for the 2010-2011 and 2011-2012 school years. Specifically, Student contends that District failed to assess her in all areas of suspected disability in Spring 2010 (Issue 1(a)) and in Spring 2011 (Issue 2(a)), because District's assessments did not address suspected ADHD and articulation disorder. Student further contends that District should have found her eligible for special education under the eligibility categories of specific learning disability and other health impairment, due to Student's severe discrepancy between ability and achievement and inability to learn due to attention deficit disorder at IEP team meetings on September 22, 2010 (Issue 1(b)) and September 29, 2011 (Issue 2(b)).<sup>5</sup>

3. District contends that it assessed Student in all areas of suspected disability in spring of 2010 and 2011. District also contends that Student was not eligible for special education under either of those categories, and that even if Student had ADHD or a severe discrepancy between cognitive ability and achievement, Student did not require special education.<sup>6</sup>

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<sup>5</sup> Student's complaint references only eligibility for OHI on the basis of ADHD. However, as both parties presented evidence and briefed issues regarding SLD eligibility, and ADHD is a psychological process disorder that may be used to qualify for either OHI or SLD eligibility (Ed. Code, § 56339, subd. (a)), both eligibility categories are analyzed in this Decision.

<sup>6</sup> District also contends that Student's claim is not cognizable under the IDEA because (i) no claim may be brought against a school district for past failure to find a student eligible for special education, (ii) a parent's consent to an IEP bars later challenge to that IEP, and (iii) the current holder of Student's educational rights, Ms. Redman, cannot challenge the September 22, 2010 IEP to which the previous holder of educational rights, Mother, consented, because Mother "still agrees with the conclusions reached at the 2010 IEP." The first contention was raised at the Prehearing Conference (PHC) and decided

### *Applicable Law*

4. The Individuals with Disabilities Act (IDEA) and California special education law provide that children with disabilities have the right to a FAPE that emphasizes special education and related services designed to meet their unique needs and to prepare them for employment and independent living. (20 U.S.C. § 1400(d); Ed. Code § 56000.) FAPE consists of special education and related services that are available to the child at no charge to the parent or guardian, meet the standards of the State educational agency, and conform to the student’s individual education program. (20 U.S.C. § 1401(9).) “Special education” is defined as “specially designed instruction at no cost to the parents, to meet the unique needs of a child with a disability...” (20 U.S.C. § 1401(29).) California law also defines special education as instruction designed to meet the unique needs of individuals with exceptional needs coupled with related services as needed to enable the student to benefit fully from instruction. (Ed. Code, § 56031.) “Related services” are transportation and other developmental, corrective and supportive services as may be required to assist the child in benefiting from special education. (20 U.S.C. § 1401(26).) In California, related services are called designated instruction and services (DIS), which must be provided if required to assist the child in benefiting from special education. (Ed. Code, § 56363, subd. (a).)

5. A school district is required to actively and systematically seek out, identify, locate, and evaluate all children with disabilities, including homeless children, wards of the state, and children attending private schools, who are in need of special education and related services, regardless of the severity of the disability, including those individuals advancing from grade to grade. (20 U.S.C. §1412(a)(3)(A); Ed. Code, §§ 56171, 56301, subds. (a) and (b).) These duties are often described as a district’s “child find” obligations. “The purpose of the child-find evaluation is to provide access to special education.” (*Fitzgerald v. Camdenton R-III School District* (8th Cir. 2006) 439 F.3d 773, 776.)

6. For purposes of evaluating a child for special education eligibility, a school district must ensure that “the child is assessed in all areas of suspected disability.” (20 U.S.C. § 1414(b)(3)(B); Ed. Code, § 56320, subd. (f).) The initial evaluation must consist of procedures to determine whether a child is a child with a qualifying disability and to determine the educational needs of the child. (20 U.S.C. § 1414(a)(1)(c).) In conducting the evaluation, a district must “use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information, including information provided by the parent, that may assist in determining” whether the child is a child with a disability and the contents of an individualized education program. (20 U.S.C. § 1414(b)(2)(A); see also Ed.

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against the District in the PHC Order. That contention was also raised, and rejected, in *Compton Unified School Dist. v. Addison* (2010) 598 F.3d 1181, 1184. As to the second and third contentions, whether or not a parent consents to an IEP has no bearing on a school district’s obligations to conduct child find and offer a FAPE, and whether a former holder of Student’s educational rights “agrees” with the timely claims brought by current holder of Student’s educational rights is irrelevant to this proceeding.

Code, § 56320.) A school district is required to ensure that the evaluation is sufficiently comprehensive to identify all of the child's needs for special education and related services. (34 C.F.R. § 300.304(c)(6).) The determination of what tests are required is made based on information known at the time. (See *Vasherresse v. Laguna Salada Union School District* (N.D. Cal. 2001) 211 F.Supp.2d 1150, 1157-1158 [assessment adequate despite not including speech/language testing where concern prompting assessment was deficit in reading skills].)

7. A failure to assess a child in an all areas related to the suspected disability is a procedural violation of the IDEA. (*Park, ex rel. Park v. Anaheim Union High School Dist.* (9th Cir. 2006) 464 F.3d 1025, 1032.) In the event of a procedural violation, a denial of FAPE may only be found if that procedural violation impeded the child's right to a FAPE, significantly impeded the parents' opportunity to participate in the decision making process regarding the provision of a FAPE, or caused deprivation of educational benefits. (Ed. Code, § 56505, subd. (f)(2).)

8. A student is eligible for special education and related services if he or she is a "child with a disability" such as mental retardation, hearing impairment, speech or language impairment, visual impairment, emotional disturbance, orthopedic impairment, autism, traumatic brain injury, other health impairments, or specific learning disabilities, and as a result thereof, needs special education and related services that cannot be provided with modification of the regular school program. (20 U.S.C. § 1401(3)(A); 34 C.F.R. § 300.8(a)(1); Ed. Code, § 56026, subds. (a) & (b).)

9. The law defines an individual with exceptional needs as one who, because of a disability, requires instruction and services which cannot be provided with modification of the regular school program in order to ensure that the individual is provided a FAPE. (Ed. Code, § 56026, subd. (b).) A pupil shall be referred for special education instruction and services only after the resources of the regular education program have been considered and, where appropriate, utilized. (Ed. Code, § 56303.) A pupil shall not be determined to be an individual with exceptional needs if the prevailing factor for the determination is one of the following: (A) lack of appropriate instruction in reading; (B) lack of appropriate instruction in mathematics; (C) limited English proficiency; or (D) if the pupil does not otherwise meet the eligibility criteria under federal and California law. (Ed. Code, § 56329, subd. (a)(2).)

10. California law recognizes that ADD and ADHD are often underlying conditions for SLD or OHI eligibility. A student "whose educational performance is adversely affected by a suspected or diagnosed attention deficit disorder or attention deficit hyperactivity disorder," and who meets the eligibility criteria for SLD or OHI, is entitled to special education and related services. (Ed. Code, § 56339, subd. (a).)

11. For eligibility purposes, OHI is defined, in relevant part, as "having limited strength, vitality, or alertness, including a heightened alertness to environmental stimuli, that results in limited alertness with respect to the educational environment, that...is due to chronic or acute health problems such as...attention deficit disorder or attention deficit

hyperactivity disorder...and [a]dversely affects a child's educational performance." (34 C.F.R. § 300.8(c)(9); see also Cal. Code Regs., tit. 5, § 3030, subd. (f).)

12. A child qualifies for special education under the category of SLD if he or she has "a disorder in one or more of the basic psychological processes involved in understanding or in using language, spoken or written, which may manifest itself in the imperfect ability to listen, think, speak, read, write, spell, or perform mathematical calculations." (Ed. Code, § 56337, subd. (a).) Basic psychological processes include attention, visual processing, auditory processing, sensory-motor skills, and cognitive abilities including association, conceptualization and expression. (Cal.Code Regs., tit. 5, § 3030, subd. (j)(1).)

13. California law provides three alternative methods that a school district may use to determine whether a child requires special education due to SLD. (Ed. Code, § 56337.) A district may use a "process that determines if the pupil responds to scientific, research-based intervention" as part of the assessment procedures (the RTI approach.). (Ed. Code, § 56337, subd. (c).) Alternatively, a district may "take into consideration whether a pupil has a severe discrepancy between achievement and intellectual ability in oral expression, listening comprehension, written expression, basic reading skill, reading comprehension, mathematical calculation, or mathematical reasoning," by computing and measuring mathematical differences between ability and achievement scores on standardized testing (the severe discrepancy approach).<sup>7</sup> (Ed. Code, § 56337, subd. (b).) Third, when standardized tests do not reveal a severe discrepancy, "the [IEP] team may find that a severe discrepancy does exist, provided that the team documents in a written report that the severe discrepancy between ability and achievement exists as a result of a disorder in one or more basic psychological processes," and identifies the area, the degree, and the basis and method used in determining the discrepancy after consideration of: 1) data obtained from standardized assessment instruments; 2) information provided by the parent; 3) information provided by the pupil's present teacher; 4) evidence of the pupil's performance in the regular and/or special classroom obtained from observations, work samples, and group test scores; 5)

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<sup>7</sup> "When standardized tests are considered to be valid for a specific pupil, a severe discrepancy is demonstrated by: first, converting into common standard scores, using a mean of 100 and standard deviation of 15, the achievement test score and the ability test score to be compared; second, computing the difference between these common standard scores; and third, comparing this computed difference to the standard criterion which is the product of 1.5 multiplied by the standard deviation of the distribution of computed differences of students taking these achievement and ability tests. A computed difference which equals or exceeds this standard criterion, adjusted by one standard error of measurement, the adjustment not to exceed 4 common standard score point, indicates a severe discrepancy when such discrepancy is corroborated by other assessment data which may include other tests, scales, instruments, observations and work samples as appropriate." (Cal. Code Regs., tit. 5, § 3030, subd. (j)(4)(A).)

consideration of the pupil's age, particularly for young children; and 6) any additional relevant information. (Cal. Code Regs., tit. 5, § 3030, subd. (j)(4)(C).)

14. SLD eligibility does not include a learning problem “that is primarily the result of visual, hearing, or motor disabilities, of mental retardation, of emotional disturbance, or of environmental, cultural, or economic disadvantage.” (Ed. Code, §56337, subd. (a).) In addition, a discrepancy “shall not be primarily the result of limited school experience or poor school attendance.” (Cal. Code Regs., tit. 5, § 3030, subd. (j)(5).)

15. A student is eligible for special education under the category of language or speech disorder, also known as speech and language impairment (SLI), when he or she demonstrates difficulty understanding or using spoken language to such an extent that it adversely affects his or her educational performance and cannot be corrected without special education and related services. (Ed. Code, § 56333.) The difficulty understanding or using spoken language must result from certain statutorily delineated causes, including, as relevant here, “articulation disorders, such that the pupil's production of speech significantly interferes with communication and attracts adverse attention.” (*Ibid.*; Cal. Code Regs., tit. 5, § 3030, subd. (c)(1)(A).) Significant interference occurs when the pupil’s production of a sound is below that expected for his or her chronological age and adversely affects educational performance. (Cal. Code Regs., tit. 5, § 3030, subd. (c)(1)(A).)

16. If found eligible for special education, the IDEA requires a school district to provide a student with a “basic floor of opportunity,” which “consists of access to specialized instruction and related services which are individually designed to provide educational benefit to” a child with special needs. (*Board of Education of the Hendrick Hudson Central School Dist. v. Rowley* (1982) 458 U.S. 176, 200 [102 S.Ct. 3034] (“*Rowley*”). In *Rowley*, the Supreme Court expressly rejected an interpretation of the IDEA that would require a school district to “maximize the potential” of each special needs child “commensurate with the opportunity provided” to typically developing peers. (*Id.* at p. 200.) Instead, *Rowley* interpreted the FAPE requirement of the IDEA as being met when a child receives access to an education that is reasonably calculated to “confer some educational benefit” upon the child. (*Id.* at pp. 200, 203-204.)

17. A school district’s determinations regarding special education, including eligibility, are based on what was objectively reasonable for the district to conclude given the information the district had at the time of making the determination. A district cannot “be judged exclusively in hindsight” but instead, “an IEP must take into account what was, and what was not, objectively reasonable...at the time the IEP was drafted.” (*Adams v. State of Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149, citing *Fuhrman v. East Hanover Bd. Of Education* (3d Cir. 1993) 993 F.2d 1031, 1041.)

#### *Analysis of Issue 1– Assessments and Eligibility in the 2010-2011 School Year*

18. Student demonstrated by a preponderance of the evidence that District failed to assess Student in all areas of suspected disability in June 2010. District had information in

June 2010 that should have prompted assessment of Student for ADHD or other attention disorders as a suspected area of need. Student did not demonstrate by a preponderance of the evidence that District was required to assess Student for speech and language impairment. (Legal Conclusions 19 and 20).

19. The weight of the evidence supports a finding that District was aware by June 2010 that Student was exhibiting significant signs of ADHD, but failed to assess Student for ADHD or other attention or psychological processing problems that may have manifested in limited strength, vitality or alertness, an impaired ability of Student to listen, think, speak, read, write, spell or do mathematical calculations, or have otherwise affected her educational performance. Contrary to District's contention that teacher comments that Student was capable of doing the work if she was motivated and Mr. Carrera's speculation that Student had missed opportunities to practice academic skills during her foster home and school changes adequately explained Student's poor educational performance, the weight of the evidence showed attention and processing disorders should have been suspected by spring 2010. Student's teachers wrote not that Student performed when motivated, but when "pushed," and reported extensively on Student's failure to attend or engage, lack of organization to the point of failing to bring materials to class, distractibility, disruptive behavior, and learning best when separated, all of which should have triggered an assessment of Student for suspected attention disorder. Student's behaviors in class were so significant that Ms. Horejsi characterized Student as a "ringleader," and Mr. Reichlin responded so negatively to the BBR-2 that his responses were rated to be viewed with caution. The teachers' comments about Student failing to bring materials to class, being more interested in talking than learning, and being unengaged should have alerted District to assess for ADHD, rather than having been used to justify lack of further inquiry into Student's poor academic performance. District's own assessment of Student's academic skills at the third or fourth grade level renders District's reliance on Student's lack of motivation as the explanation for failing seventh grade curriculum unreasonable. There was no evidence presented that Student had changed schools mid-year more than once, that one mid-year move had created gaps in her education, or that Student had missed opportunities to practice academic skills while in foster placements. Student's poor educational performance was not explained by lack of motivation or missed instruction or skill practice, and further inquiry, particularly in the area of attention disorders, was required under District's child find obligation. (Factual Findings 4-18, 21-23, 83, 85, 86 and Legal Conclusions 1, 4-14.)

20. However, Student failed to demonstrate by a preponderance of the evidence that by June 2010, District had reason to suspect a speech and language disorder. Student's "slushy" pronunciation of "s" sounds was a mild articulation error that did not make it difficult for Student to communicate in the classroom, or significantly affect her intelligibility. Although Student's slushy "s" sound on a developmental scale was below that for her chronological age, there was no evidence that it adversely affected her educational performance. Student's own speech and language expert, Julie Kastegar, testified that Student was 96 percent intelligible without remediation of her lateral lisp, and District's teachers and assessors testified persuasively and consistently that Student was able to ask questions in class and was readily understood. No evidence was presented that Student's lisp



attracted adverse attention, and there was extensive evidence that Student was sociable and had a network of friends both on and off campus. District did not violate its child find obligation by failing to assess Student in 2010 for a speech or language impairment. (Factual Findings 5, 17-19, 90, 91 and Legal Conclusions 1, 4-10, 15.)

21. The weight of the evidence established that Student was deprived of an educational benefit following the assessments because she should have been found eligible for special education under the category of OHI on the basis of her ADHD at the time of the September 22, 2010 IEP team meeting. However, the evidence did not show that Student should have been found eligible for special education under the category of SLD. (Legal Conclusions 18, 19, 22-26.)

22. Student established that she had limited attention due to life-long ADHD, which seriously impacted her ability to attend in the school environment and would have qualified her for special education under the eligibility category of OHI. Student's ADHD manifested itself in Student forgetting to bring materials to class, speaking with friends in class, speeding through assignments at the cost of comprehension, lacking sustained focus in the classroom, being disengaged, "zoning out," disrupting peers, and working best when separated from her peers, all of which were disruptive to the learning process. (Factual Findings 4-18, 21-23, 70, 77, 81-86 and Legal Conclusions 1, 4, 8-11, 16-19.)

23. The weight of the evidence also established that as of September 22, 2010, Student required instruction and services that could not be provided with modification of the regular eighth grade curriculum. Tutoring by eighth grade teachers in eighth grade curriculum in the eighth grade classrooms would not have met Student's needs, as Student was tested by District as having third and fourth grade level math and reading skills. Such tutoring was by its nature for very short periods of time, during lunch or after school, and on an as-available basis, and patently insufficient to overcome Student's four-year delay in academic skills. Student's math intervention class at Enterprise in the seventh grade had not provided the necessary support for Student, who entered Algebra I in eighth grade without the ability to add or subtract large numbers, to multiply, divide or calculate with fractions, or to even understand the concept of one-half. Despite Student's promises to "try harder" to focus in class and do homework, District's assessment results showed Student incapable of performing at an eighth grade level in reading and math. In fact, Student failed Algebra I in 2010-2011, and had to take the course again in ninth grade. Lastly, the September 22, 2010 IEP team did not even offer District tutoring to Student to determine if general education interventions would succeed, but instead asked a social worker to arrange private after-school tutoring. The evidence established that District could not meet Student's needs with modifications in the general education classroom, and that she should have been found eligible under the OHI category and provided appropriate services. (Factual Findings 6, 13, 14, 20, 22, 23, 26 and Legal Conclusions 4-18, 20-23, 26, 28, 70, 77, 81-86 and Legal Conclusions 1, 4, 8-11, 16-19, 22.)

24. As to eligibility for SLD, the weight of the evidence did not establish that, in spring 2010, Student had a severe discrepancy between intellectual ability and achievement.

School districts may choose to use either the severe discrepancy model or the RTI model to determine if a student is eligible for special education, and District used the severe discrepancy model. Student failed to meet her burden of establishing that she met all three of the criteria for SLD eligibility under the severe discrepancy model, that is, that Student had (i) a disorder in one or more of the basic psychological processes and (ii) a severe discrepancy between intellectual ability and achievement (iii) that cannot be provided for with modification of the regular school program. The testimony of Mr. Cardenas that standardized testing did not show the necessary discrepancy between intellectual ability and achievement under the severe discrepancy model was uncontradicted. Dr. Barron testified that she did not use the severe discrepancy model in evaluating Student's standardized test scores for SLD. Without such a severe discrepancy, Student did not qualify for SLD using the severe discrepancy model, even with a disorder in the basic psychological processes of attention, visual processing, auditory processing and sensory-motor skills, and the need for modification of grade level curriculum. (Factual Findings 8-16, 20, 82 and Legal Conclusions 1, 4, 8-10, 12-14, 16, 17.)

25. Student contends that in the absence of standardized tests revealing a severe discrepancy, the IEP team should have used the alternate model provided by statute and found that a severe discrepancy between ability and achievement existed as a result of Student's chronic ADHD based upon consideration of: (1) data obtained from standardized assessment instruments; (2) information provided by the parent; (3) information provided by the pupil's present teacher; (4) evidence of the pupil's performance in the regular and/or special classroom obtained from observations, work samples, and group test scores; (5) consideration of the pupil's age, particularly for young children; and (6) any additional relevant information. However, the language of that statute is permissive, not mandatory, and although the September 22, 2010 IEP team could have used alternate criteria to find Student eligible for SLD, it was not required to do so. (Legal Conclusion 13.)

26. Nonetheless, had the IEP team used this alternate method, Student failed to meet her burden of establishing SLD eligibility under the alternate model: (1) Standardized testing by Mr. Cardenas demonstrated that Student's low and average academic achievement was commensurate with her low average to borderline intellectual ability; (2) Student's foster mother had no areas of academic concern; (3) Ms. Horejsi reported that Student had poor reading comprehension and struggled with inference, but could write satisfactorily when pushed, and Mr. Reichlin reported that Student was "on par" with other students in his math intervention class, neither of which demonstrated that Student's performance was severely discrepant with her ability; (4) Mr. Cardenas observed Student being engaged and doing her work in the Mr. Reichlin's math intervention class; (5) Student's standardized academic achievement scores showed that Student was performing well below her same age peers; and (6) Student's previous assessment by Dr. Collins-Faulkner had measured Student's cognitive ability at such an impaired level that she had given Student a provisional diagnosis of mild mental retardation. Taken together, this information suggests that Student was performing at or near her ability level, rather than that Student was performing far below her potential. On this evidence, Student failed to meet her burden of establishing that, had the IEP team used the alternate method permitted by statute, she would have been found to have a severe

discrepancy between intellectual ability and achievement, and in light of her ADHD and need for modification of the general education curriculum, made eligible under the eligibility category of SLD. (Factual Findings 4, 5, 8-17, 20 and Legal Conclusions 1, 4, 8-10, 12-14, 16-19, 24, 25.)

*Analysis of Issue 2 – Assessment and Eligibility in the 2011-2012 School Year*

27. Student demonstrated by a preponderance of the evidence that when Student was again assessed in June 2011, District obtained additional information which should have prompted an assessment of Student for an attention disorder as a suspected disability, yet District failed to properly perform a behavior and attention assessment of Student, and summarily dispensed with an attempted behavior and attention assessment without a replacement measure. (Legal Conclusions 28 and 29.)

28. The weight of the evidence established that District was aware by June 2011 that Student was exhibiting significant signs of ADHD, but failed to assess Student for ADHD or other attention problems that may have manifested in limited strength, vitality or alertness, an impaired ability of Student to listen, think, speak, read, write, spell or do mathematical calculations, or have otherwise affected her educational performance. In June 2011, Ms. Carrera began an assessment of Student's behavior and attention by distributing the BASC rating scales to Student's teachers, but when none of the BASC scales were returned, she simply abandoned that portion of her assessment, leaving Student's attention and classroom behavior unassessed. Ms. Carrera's distribution of the Devereaux to Foster Parent was not a substitute for the teacher portion of the BASC, because it neither assessed for attention nor was distributed to persons knowledgeable about Student's behavior in the school environment. Student self-reported being at risk in inattention/hyperactivity and having clinically significant hyperactivity, which should have triggered further assessment of whether Student had an attention deficit. In addition, Ms. Carrera's psychological processing scores varied significantly from those a year earlier, which should have prompted further assessment to explain the discrepancy. Ms. Carrera admitted at hearing that she had not formed an opinion from her assessment on the reason for Student's poor educational performance, rendering her assessment incomplete and of little guidance to the September 29, 2011 IEP team. District's failure to assess Student for ADHD or other attention problems in June 2011 was a violation of its child find obligations. (Factual Findings 8-18, 29-31, 33-51, 54, 70, 77, 81-88 and Legal Conclusions 1, 4-14.)

29. Student failed to demonstrate by a preponderance of the evidence that by June 2011, District had reason to suspect a speech and language disorder. As discussed in the analysis of Issue 1a, above, Student had a mild articulation error that did not make it difficult for Student to communicate in the classroom, significantly affect her intelligibility, or adversely affect her educational performance. Ms. Carrera communicated with Student during administration of standardized testing, and could understand her without difficulty, and District's teachers and assessors testified persuasively and consistently that Student was able to ask questions in class and be readily understood. Ms. Redman did not request addition of a speech and language assessment to the assessment plan, although the plan

explained that a child's ability to speak clearly could be assessed. District did not violate its child find obligation by failing to assess Student in 2011 for a speech or language disorder. (Factual Findings 5, 17-19, 31, 32, 38, 52-54, 90, 91 and Legal Conclusions 1, 4-10, 15.)

30. Student established by a preponderance of the evidence that she deprived of educational benefit because of the incomplete assessments because she should have been made eligible for special education under the category of OHI on the basis of her ADHD at the time of the September 29, 2011 IEP team meeting. However, Student failed to establish she should have been found eligible for special education under the category of SLD at that time. (Legal Conclusions 27-29, 31-35.)

31. Student met her burden of establishing by a preponderance of the evidence that, as of the September 29, 2011 IEP team meeting, she was eligible for special education under the eligibility category of OHI. Student established that she has limited attention due to chronic ADHD, which seriously impacted her ability to attend in the school environment. Student's ADHD manifested itself in Student's eighth grade English class, taught by S. Walker, the only teacher from whom Ms. Carrera received a report, as refusal to read in class "most of the time," failure to complete work, refusal to write essays, and failure to try in class, each of which was disruptive to the learning process. (Factual Findings 4-18, 21-23, 29-31, 33-51, 54, 70, 77, 81-88 and Legal Conclusions 1, 4, 8-11, 16-19, 21-23, 28.)

32. The weight of the evidence also established that as of September 29, 2011, Student required instruction and services that could not be provided with modification of the regular ninth grade curriculum. The recommendation by the September 29, 2011 IEP team that Student avail herself of tutoring by ninth grade teachers in ninth grade curriculum in ninth grade classrooms would not have met Student's needs. Although Ms. Carrera's testing of Student's academic skills placed her in the "below average" range in math and reading comprehension, and Student stated that she could "keep up in class," testing by District in June 2010 had demonstrated that Student possessed rudimentary third and fourth grade math and reading skills, and Student had failed her eighth grade Algebra I, English 8 and Literature classes, providing no reasonable basis to determine that Student could do ninth grade work.<sup>8</sup> Also, by September 29, 2011, Student's across-the-board CST scores of "far below basic" in English language arts, math, science and history-social science should have been available to the IEP team. The tutoring recommended was also for very short periods of time, during lunch or after school, and on an as-available basis, and patently insufficient to overcome Student's five-year delay in academic skills. District eventually placed Student in reading intervention classes in spring 2012, but the Reading Intervention class with Ms. Walker included special education as well as general education students, and Student only improved from approximately 40 percent of the skills necessary for the ninth grade level curriculum, to 50 percent, or to the fourth or fifth grade level, failing to support District's argument that a general education reading intervention class (assuming, for sake of argument, that Ms. Walker's class was a general education class) was sufficient to meet

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<sup>8</sup> In fact, the following month, Student received failing grades in all of her ninth grade classes.

Student's needs in the ninth grade curriculum. Student received a "D" grade in Math Intervention and failed Algebra I for a second time, requiring her to take Algebra I in the summer for a third time for "credit recovery," and Student continued to test in the impaired and borderline range on math and reading skills in May 2012, demonstrating that the ninth grade math intervention class did not meet Student's needs. (Factual Findings 4-18, 21-23, 28-31, 33-51, 53-54, 60-65, 67, 70, 77, 81-88 and Legal Conclusions 1, 4, 8-11, 16-19, 21-23, 28, 31.)

33. To the extent Student argues for SLD eligibility, the weight of the evidence did not establish that, in spring 2011, Student had a severe discrepancy between intellectual ability and achievement. District elected to use the severe discrepancy model to interpret the results of its assessment, and the testimony of Ms. Carrera that standardized testing did not show a discrepancy between intellectual ability and achievement under the severe discrepancy model was uncontradicted. Dr. Barron testified that she did not use the severe discrepancy model in evaluating Student's standardized test scores for SLD. Without such a severe discrepancy, Student does not qualify for SLD using the severe discrepancy model, even with a disorder in the basic psychological processes of attention, visual processing, auditory processing and sensory-motor skills, and the need for modification of grade level curriculum. (Factual Findings 33-51, 82 and Legal Conclusions 1, 4, 8-10, 12-14, 16, 17, 21, 24-26.)

34. As discussed at Legal Conclusion 25, Student contends that in the absence of standardized tests revealing a severe discrepancy, the IEP team should have used the alternate model provided by statute and found that a severe discrepancy between ability and achievement existed as a result of Student's ADHD based upon consideration of delineated factors. But again, the language of that statute is permissive, not mandatory, and although the September 29, 2011 IEP team could have used alternate criteria to find Student eligible for SLD, it was not required to do so. (Legal Conclusions 13, 25.)

35. Nonetheless, had the September 29, 2011 IEP team used this alternate method, Student fails to meet her burden of establishing SLD eligibility: (1) Standardized testing by Ms. Carrera demonstrated that Student's average and below average academic achievement was commensurate with her generally low average intellectual ability; (2) No areas of academic concern were reported, although it appears that Ms. Carreras did not ask Foster Parent, either, and did not ask Ms. Redman why she had requested the re-assessment, either; and Student reported herself "average" in school problems on the self-report portion of the BASC; (3) S. Walker reported that Student was an 'average reader;'" (4) Ms. Carrera observed Student in her French I class actively listening to a video presentation and participating in a class discussion afterward; (5) Student's standardized academic achievement scores on the KTEA-II showed that Student was performing in the average range in reading and written language, and below average in mathematics, generally on par with her same-aged peers; and (6) Student's previous assessment by Mr. Cardenas had not found Student to have a severe discrepancy. Taken together, this information suggests that Student was performing at her ability level, rather than that Student was performing far below her potential, and that her difficulties with the ninth grade curriculum were the result

of other factors. On this evidence, Student failed to meet her burden of establishing that, had the September 29, 2011 IEP team used the alternate method permitted by statute, she would have been found to have a severe discrepancy between intellectual ability and achievement, and in light of her ADHD and need for modification of the general education curriculum, made eligible under the eligibility category of SLD. (Factual Findings 20, 33-51 and Legal Conclusions 1, 4, 8-10, 12-14, 16, 17, 21, 24-26, 33, 34.)

### *Remedy*

36. As discussed above, Student met her burden of demonstrating that she was denied a FAPE by District's failure to properly assess her and find her eligible for special education under the OHI eligibility category during the 2010-2011 and 2011-2012 school years. Accordingly, Student is entitled to compensatory education. (Legal Conclusions 1, 4, 8-11, 16, 17, 21-23, 30-32).

37. Under federal and state law, courts have broad equitable powers to remedy the failure of a school district to provide FAPE to a disabled child. (20 U.S.C. § 1415(i)(1)(C)(iii); Ed. Code, § 56505, subd. (g); see *School Committee of the Town of Burlington, Massachusetts v. Dept. of Education* (1985) 471 U.S. 359, 369 [105 S.Ct. 1996, 85 L.Ed.2d 385].) This broad equitable authority extends to an ALJ who hears and decides a special education administrative due process matter. (*Forest Grove School Dist. v. T.A.* (2009) 557 U.S. 230, 244, n. 11 [129 S.Ct. 2484, 174 L.Ed.2d 168].)

38. An ALJ can award compensatory education as a form of equitable relief. (*Park v. Anaheim Union High School Dist.* (9th Cir. 2006) 464 F.3d 1025, 1033.) Compensatory education is a prospective award of educational services designed to catch-up the student to where he should have been absent the denial of a FAPE." (*Brennan v. Regional School Dist. No. 1* (D.Conn. 2008) 531 F.Supp.2d 245, 265.) Compensatory education awards depend upon the needs of the disabled child, and can take different forms. (*R.P. v. Prescott Unified School Dist.* (9th Cir. 2011) 631 F.3d 1117, 1126.) Typically, an award of compensatory education involves extra schooling, in which case "generalized awards" are not appropriate. (*Parents of Student W. v. Puyallup School Dist. No. 3* (9th Cir. 1994) 31 F.3d 1489, 1497.) "There is no obligation to provide a day-for-day compensation for time missed. Appropriate relief is relief designed to ensure that the student is appropriately educated within the meaning of the IDEA." (*Ibid.*)

39. Here, Mona Walker, Student's reading intervention teacher, testified knowledgeably and persuasively that one-on-one tutoring with a reading remediation teacher two to four hours per week for a 42 week school year, for a total of 84 to 120 hours, could bring Student up to grade level in reading and comprehension. Student lost two years of special education and related services to address her reading deficits, and based on Ms. Walker's uncontroverted opinion, a block of hours equivalent to a year-long intensive remediation program would fairly compensate Student for her educational loss. Accordingly, Student is awarded a block of 84 hours of compensatory education in one-on-

one reading remediation by credentialed District staff. (Factual Findings 63-65 and Legal Conclusions 1, 4, 8-11, 16, 17, 21-23, 30-32, 38.)

40. As to mathematics, Dr. Barron's opinion that Student required 36 hours of intensive academic instruction to learn foundational math skills she missed in general education classes was uncontradicted, and represents equitable compensation for the loss of two years of special education and relates services to meet her needs in math. Student is awarded a block of 36 hours of compensatory education in one-on-one math remediation by credentialed District staff. (Factual Findings 89 and Legal Conclusions 1, 4, 8-11, 16, 17, 21-23, 30-32, 38.)

41. As Student failed to establish that her lateral lisp significantly reduces her intelligibility, interferes with her communication or attracts adverse attention, or interferes with her educational performance, no compensatory speech services are awarded. (Legal Conclusions 1, 4, 16-18, 20, 27, 29, 38.)

#### ORDER

1. District shall provide a block of 84 hours of compensatory education in reading remediation to Student, which shall be provided as one-on-one intensive academic instruction by credentialed District staff, to be used by October 1, 2014.

2. District shall provide a block of 36 hours of compensatory education in math remediation to Student, which shall be provided through one-on-one intensive academic instruction by credentialed District staff to be used by October 1, 2014.

3. District is not required to provide these compensatory services through District staff if Student moves outside of the jurisdictional boundaries of District, or if Student cancels or misses scheduled sessions at agreed times for reasons not attributable to District.

#### PREVAILING PARTY

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

RIGHT TO APPEAL THIS DECISION

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

Dated: October 24, 2012

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ALEXA J. HOHENSEE  
Administrative Law Judge  
Office of Administrative Hearings