

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Consolidated Matters of:
PARENTS ON BEHALF OF STUDENT,

v.

SANTA MONICA-MALIBU UNIFIED SCHOOL
DISTRICT,

OAH CASE NO. 2013051152

SANTA MONICA-MALIBU UNIFIED SCHOOL
DISTRICT,

v.

PARENTS ON BEHALF OF STUDENT.

OAH CASE NO. 2013040629

DECISION

Administrative Law Judge (ALJ) Eileen M. Cohn, Office of Administrative Hearings (OAH), State of California, heard this matter on September 30, October 1, 2, 3, 7 and 8, 2013, in Santa Monica, California. Attorneys N. Jane Dubovy and Mandy S.L. Favaloro, represented Student. Student's parents (Parents) attended the hearing. Attorney Geneva Engelbrecht represented Santa Monica-Malibu Unified School District (District). District representatives, Sara Woolverton, Ph.D., special education director and Victoria Hurst, special education coordinator, attended the hearing.

District filed its request for a due process hearing (complaint) on April 12, 2013. On May 28, 2013, Student filed her complaint, and moved to consolidate the District's and Student's complaints for hearing, and to continue the dates of District's complaint to the dates applicable to Student's complaint. District did not oppose Student's motion, and on

May 31, 2013, OAH granted the motion for consolidation and continuance. On June 27, 2013, the parties jointly requested, and OAH granted, a continuance of the consolidated hearing.

At the close of hearing Student withdrew three issues and District moved to dismiss several Student issues for lack of evidence, including issues 2(a) through 2(e) below.

Student opposed the motion to dismiss. The ALJ granted Student's request to withdraw issues, and took District's motion to dismiss under submission. Student has the right to have her Individuals with Disabilities Education Act (IDEA)-related issues heard and decided on the merits, unless the issues are facially outside of OAH's jurisdiction, or barred by the statute of limitations. (20 U.S.C. § 1415(b)(6); Ed. Code, § 56501, subd. (a); see *Wyner v. Manhattan Beach Unified School Dist.* (9th Cir. 2000) 223 F.3d 1026, 1028-1029.) All of Student's issues are based upon the IDEA. District's motion is not based upon OAH jurisdiction or the statute of limitations. Accordingly, District's motion to dismiss is denied.

At the close of the hearing, October 8, 2013, the ALJ granted the parties' joint request for a continuance to file written closing arguments by October 29, 2013. On October 29, 2013, upon written receipt of written closing arguments, the matter was submitted and the record closed. On November 20, 2013, the parties stipulated to a further continuance of the decision deadline to December 23, 2013, to accommodate the ALJ's family emergency.

ISSUES¹

DISTRICT ISSUE

- (1) Were the January 2013 psychoeducational and academic assessments appropriately conducted such that Student is not entitled to an Independent Education Evaluation (IEE) at public expense?

STUDENT ISSUES

- (2) Did the District violate the IDEA by denying Parents the right to participate in the Individualized Education Program (IEP) process or deny Student a FAPE by failing to:
 - (a) convene an IEP meeting after May 28, 2011, through January 2012, because of Student's lack of progress on the January 2011 IEP goals;
 - (b) consider, at the January 2012 IEP team meeting, (a) Student's strengths, academic, developmental, and functional needs, and (b) parental concerns;
 - (c) consider, at the June 2012 IEP team meeting, (a) Student's strengths, academic, developmental, and functional needs, and (b) parental concerns;
 - (d) consider, at the January 2013 IEP meeting, (a) Student's strengths, academic, developmental, and functional needs, and (b) parental concerns;
 - (e) timely provide all of Student's educational records pursuant to Parents' July 12, 2012 request;
 - (f) timely hold an IEP meeting after Parents signed the Assessment Plan on June 28,

¹ The issues have been rephrased and reorganized for clarity. The ALJ has authority to redefine a party's issues, so long as no substantive changes are made. (*J. W. v. Fresno Unified School Dist.* (9th Cir. 2010) 626 F.3d 431, 442-443).

2012;

- (g) fund an IEE in the area of psychoeducation because it failed to timely file for Due Process, without unnecessary delay
 - (h) consider the results of the written assessment report by Student's neuropsychologist, at the May 2013 IEP meeting; and
 - (i) have a special education teacher in attendance at the May 2013 IEP team meeting?
- (3) Did District deny Student a FAPE, as of May 28, 2011, by failing to offer appropriate goals and an appropriate program and related services, including specialized academic instruction in an appropriate setting, in its January 2011 IEP?
- (4) Did District deny Student a FAPE in the January 2012 IEP by failing to offer appropriate goals and an appropriate program and related services, including specialized academic instruction in an appropriate setting?
- (5) Did District deny Student a FAPE in the June 2012 IEP by failing to make any changes from the previous IEP and offer an appropriate program and related services, including specialized academic instruction in an appropriate setting?
- (6) Was District's January 2013 psychoeducational assessment appropriate and sufficient to identify all of Student's unique needs?
- (7) Did District deny Student a FAPE in its January 2013 IEP by failing to:
- (a) find Student eligible for special education and related services under the category of Specific Learning Disorder (SLD);
 - (b) write any academic goals as a result of finding Student ineligible for special education as a pupil with a SLD; and
 - (c) offer an appropriate program and related services, including specialized academic instruction in an appropriate setting, that would permit Student to

make progress toward a general education curriculum?

- (8) Did District deny Student a FAPE in its May 2013 IEP by failing write appropriate goals in in the areas of reading and writing fluency and offer an appropriate program and related services, including specialized academic instruction in an appropriate setting?

FACTUAL FINDINGS

1. Student is a 15-year-old young woman currently attending a nonpublic school (NPS), Summit View, where she was parentally placed at the start of her eighth grade, 20122013, school year.

2. Student was born with strabismus, a condition of the ocular motor system characterized by uneven coordination of the muscles controlling eye movement, which impaired her depth perception. During her time in District schools, Student underwent two corrective and one cosmetic surgery for strabismus. Student began wearing glasses at age two, and later, contact lenses, which improved her vision to 20/30.

3. At age three, Student was assessed for developmental delays and was found to have significantly delayed motor skills, visual challenges, including poor depth perception, and slightly delayed cognitive development. Student received interventions for her cognitive delay over the next two years, and made significant gains.

4. Student timely matriculated into kindergarten at age five. She was retained an additional year in kindergarten due to her maturity, her significant challenges with distractibility and completing tasks independently, and her small stature. At age six, Student was evaluated privately by a psychiatrist, who diagnosed her with attention deficit hyperactivity disorder (ADHD), a condition which made it difficult for her to maintain her attention and complete tasks. She was prescribed medication to enhance her attention, and has continually taken medication throughout the relevant time period of this matter,

with the possible exception of a short period during summer before her 2011-2012 school year.

5. During Student's elementary school years, between first and fifth grades, Student performed in the basic and proficient level on statewide academic standardized tests, which are administered to all pupils.

6. Student required significant supplemental after school support to complete her class work. Starting in second grade, Parents either worked with Student directly in excess of two hours daily after school or secured the support of tutors to assist her with her school work.

7. Student's elementary school teachers noted difficulties with attention, focus and work production. Student's elementary school principal reported that she had low energy, appeared depressed, and struggled with school.

8. District provided Student accommodations to address her challenges and a Student Study Team (SST) monitored Student's progress in general education.

9. Within the first few days of sixth grade, in August or September 2010, the special education resource teacher observed that Student required considerable support to attend to task and to complete her work.

10. On November 3, 2010, during Student's sixth grade year, the SST referred Student for special education assessments. Parents consented to the assessment plan on November 24, 2010, and District's school psychologist, Juliette Boewe, Ph.D., conducted Student's initial psychoeducational assessment.

11. As part of her assessment, Dr. Boewe administered a wide range of standardized assessments, including the Woodcock Johnson, Third Edition (WJ-III), test of cognitive ability (WJ-III COG), which measures the ability to learn, remember and understand information, apply knowledge, generalize information and utilize concepts. Together, the various cognitive abilities assessed by the WJ-III COG comprise a pupil's

global intellectual ability (GIA). Some degree of variance between an individual's cognitive abilities is expected. In Student's case, Ms. Boewe found that Student's GIA results were "uninterpretable" because the variability among cluster and subtest scores was "considerable."

12. Dr. Boewe used the WJ-III test of achievement, (WJ III-ACH) administered by a district special education teacher, Heidi Kleis, to measure Student's achievement in the eight areas that are relevant to a determination as to whether Student is eligible for special education as a pupil with a SLD. Student achieved a superior score in listening comprehension, a high average score in basic reading, average scores in reading comprehension, math calculations and reasoning, and oral expression, and low average scores in reading fluency and written expression.

13. Dr. Boewe prepared a written report which detailed her findings and referenced Student's educational and medical history, including her strabismus. Based upon the results of her assessment, Dr. Boewe identified various weak cognitive processes, including visual processing challenges, and concluded that Student was eligible for special education under the category of Other Health Impairments (OHI). She found that Student's variable cognitive processes, particularly her weaknesses in processing speed, working memory and attention, were related to her diagnosis and chronic ADHD, which resulted in limited strength, vitality, or alertness, and which significantly interfered with her access to education. However, Dr. Boewe concluded that Student did not have a severe discrepancy between ability and achievement, and did not qualify for special education as a pupil with a SLD.

14. Dr. Boewe determined that the accommodations in place were not sufficient to allow Student to access her education and advised the IEP team to consider specialized academic instruction (SAI) in organization, attention and task completion skills. She advised the IEP team to consider a structured multi-modal learning style for Student. For

attention, memory processing deficits and weaknesses she recommended encouragement, reminders, preferential seating, shortened or chunked assignments, physical breaks, redirection, cuing, memory tools such as mnemonics or mental pictures, and repetition of information and instruction. For sensory motor, and processing speed deficits, she recommended extra time for tests and assignments, note taker assistance, graph or landscape lined paper for math and writing organization, and use of oral, written or performance components in assignments to allow demonstration of learned material. For visual processing challenges she recommended more time to complete work and note taking assistance, and highlighting important visual details and facts to increase retention and assist with studying. She recommended assistive technology for sensory motor and processing deficits, including access to word processing or a computer, and use of a calculator for fluency related tasks. To compensate for her auditory memory challenges, particularly on math problems, Dr. Boewe recommended repetition of auditory input.

15. On December 7, 2010, District's nurse conducted a hearing and vision screening and record review. Student's vision due to strabismus was noted, her vision with and without glasses was reported, and her eye tracking assessed to be within normal limits. District's nurse concluded that there were no physical impediments to learning.

16. On January 10, 2011, Student's initial IEP team meeting was held with all necessary members, including Parents. At the time of the IEP team meeting, Student was earning Ds in Humanities and Math. The team adopted Dr. Boewe's recommendations for eligibility and Student was made eligible for special education and related services under the category of OHI due to Student's diagnosis of ADHD. The IEP team also adopted Dr. Boewe's recommendations for accommodations, assistive technology and SAI.

17. The IEP team developed two goals. The goals addressed Students unique needs in the area of attention, because Student was often unable to sustain attention for more than five minutes without prompting, and work completion. Student's annual

attention goal required that she be able to sustain her attention to a task for 10 minutes with one prompt on three of four trials. Her first short term goal required her to sustain her attention to a task for 10 minutes with three prompts on two of four trials. Her second short term goal required her to sustain attention for 10 minutes with two prompts on two of four trials. Her third short term objective required her to sustain attention for 10 minutes with two prompts on three of four trials.

18. The IEP team developed a work completion goal to address Student's unique attention needs in the area of work completion, because Student frequently forgot that she had homework and failed to do it, or turned in classwork and homework that was incomplete. Using a homework management system, the work completion goal required Student to increase her ability to complete home and class work on or before deadline by turning in 80 percent of designated assignments for three consecutive weeks as measured by the teacher grade book. The first short term objective required Student to use a homework agenda system including daily recording and checking, with two prompts. The second and third short term objectives required Student to be timely 70 and 75 percent of the time, respectively.

19. Dr. Boewe's recommended accommodations and modifications were made part of the IEP.

20. The IEP team provided for placement in general education with a study skills group SAI in a separate classroom once daily for 55 minutes.

21. Parents agreed with District's initial IEP offer and signed the IEP.

22. Student continued to receive tutoring from a substitute district high school teacher or assistance from Parent several hours each night to complete her homework.

23. No one was taking data on Student's goals, but Student's attention deficits were ongoing, and unabated. Ms. Kleis, an experienced and qualified special education teacher, led Student's SAI study skills class. Ms. Kleis was interviewed as part of a

psychological evaluation Student received from the University of California, Los Angeles (UCLA) in the second semester of sixth grade. Ms. Kleis reported that Student had a very difficult time staying on task, and at times needed to be prompted by the minute to continue to work. Ms. Kleis also reported that Student produced "much less" work than other pupils her age, and needed "much more" effort to stay on task compared to other pupils.²

24. By the end of her second semester in sixth grade, spring 2011, Student earned passing grades in her academic classes, C/B+ in Science, C-/C- in Math, and D-/C+ in Humanities. Student earned an A in SAI Study Skills.

25. On the sixth grade statewide Standardized Testing and Reporting (STAR), achievement test administered to all pupils. Student obtained a proficient score in English-language arts (ELA) and a basic score in math. Students' performance within each area varied with a low performance in measurement and geometry, a strong performance in word analysis, literary response and analysis, and basic proficiency in writing strategies.

26. During summer 2011, Student's psychiatrist lowered the level of her ADHD medication. Student was less cooperative, but otherwise there was little impact because Student was not required to do much during the summer months. Student's medication level was adjusted back to its usual levels at the inception of the 2011-2012 school year. Student quickly readjusted to her usual levels, but Parents spoke to Ms. Kleis about it.

27. Student struggled in her seventh grade, the 2011-2012 school year. As required by the operative IEP, Student participated in general education academic classes.

² At hearing Ms. Kleis disputed the statement saying that she made that observation when Student's medications were problematic and she reported that fact to UCLA.

However, the UCLA report was dated June 8, 2011, during Student's 2010-2011 school year, and before the summer where Student's medication was modified.

Student's general education academic classes were large, with 30 to 35 pupils. The curriculum was not modified. Student required constant redirection, and due to the large class size, her teachers could not be expected, and did not, consistently redirect her or assist her.

28. No data was being taken of Student's progress on her IEP goals.

29. Ms. Kleis was responsible for Student's SAI class. She was assisted by a teaching assistant (TA) or an instructional assistant (IA), an assistant with more specialized training. There were approximately seven pupils in Student's SAI class. Ms. Kleis also sent her assistants into the classroom. Ms. Kleis participated in upwards of 60 IEP's a year, and was responsible for coordinating the IEP's for special education pupils with the classroom teachers. Her tremendous workload was confirmed by Student, who observed her during her SAI period to be focused on her computer preparing IEPs, and commenting to the TA that the large number of IEP's was stressful.

30. Student did not receive enough assistance in the SAI class to manage and organize her workload. Student reported that she did very little in the SAI class. Parents continued to provide Student personal one-on-one assistance or professional tutoring from a special education teacher for two to three hours each school night throughout the 2011-2012 school year.

31. As the semester progressed, Student turned in less work. Student particularly struggled in her ELA class, where she did not always turn in homework although it was posted on the website. Her experienced, well-qualified and competent ELA teacher, Mary Laine Yarber, found her daydreaming during class, and becoming less productive as the semester progressed. Overall, she found that Student could not pay attention long enough to complete assignments. Ms. Yarber considered a grade of C or below cause for concern. Melissa Kay Andino, Student's math teacher, and chair of the math department, who was also experienced and well qualified observed that Student stopped working the moment

she was left unattended, and was very social during class time. Student was not doing the math “learn check” problems which were needed for her teacher to check her progress. Student was receiving failing grades.

JANUARY 2012 IEP

32. On January 4, 2012, the IEP team met with all required members including, Parents, District’s Assistant Principal, Ms. Kleis, Ms. Yarber, and Ms. Andino. A representative of Student’s private therapy team from UCLA also attended. The meeting lasted 65 minutes.

33. Parents expressed concerns with Student’s grades and finding a more effective way to communicate with school staff. At the time of the IEP team meeting Student’s academic grades were poor: F in Math, D in Science, C-/D+ in ELA and C in Social Studies. Student’s teachers discussed Student’s progress. Ms. Yarber was excused from the meeting after 30 minutes, and after she provided Parents with her observations and answered Parents questions. At hearing, Ms. Yarber did not have a clear recollection of what occurred at the IEP team meeting, but she did recall providing Student some accommodations, including cuing, redirection, extended time. She worked with Student to get her started on assignments during the last 10 minutes of class. Her curriculum was not modified, and she typically used about 20 minutes of the class for lectures. She did not take data on Student’s goals, but Student had significant attention challenges and observed a significant decline in Student’s attention and performance as the semester progressed. She considered Student capable, but attributed her problems in class to poor organization. Student and Ms. Andino joined the meeting about 25 minutes before it ended and like Ms. Yarber, discussed her observations about Student’s progress with Parents. Parents confirmed that they received courtesy notices from Ms. Andino about failing grades. Ms. Andino also advised them about tutoring opportunities at school.

34. Student's present level of performance on her two goals remained unchanged. Student's attention continued to wander during class room seat work, discussion and lecture, generally after five minutes without prompting. Student's work completion challenges persisted unabated. She continued to either forget she had homework or presented incomplete homework. Ms. Kleis reported that Student continued to rely upon heavy prompting to stay on task. Ms. Kleis concluded that Student's medication changes were "clearly" the cause of her decreased ability to sustain attention, complete her homework, and meet her goals.

35. District offered the same attention and work completion goals and accommodations it offered in the initial January 2011 IEP, with the exception that the goals were now less ambitious. Instead of requiring Student to sustain attention for 10 minutes, with one prompt, on three of four trials, the 2012 annual goal required her to sustain attention for five minutes with two prompts on two of four trials. Student's work completion goal required her to complete home and class work on or before the deadline for three consecutive weeks 75 percent of the time, instead of 80 percent of the time.

36. Accommodations offered in the initial IEP were offered again, and included the same assistive technology considerations as before. Like before, Student was offered up to 100 percent extra time to take tests in a smaller setting, and the use of a calculator and word processor. The IEP team continued to identify Student's areas of deficit as attention, working memory, processing speed, and work completion.

37. The IEP team discussed the general education setting and SAI, and repeated the January 2011 offer of placement in general education with a study skills group SAI in a separate classroom once daily for 55 minutes.

38. Parents took the IEP home to review and signed their consent the next day, January 5, 2012.

39. Student's first semester grades were modified after the IEP team meeting.

Student's F grade in math was change to a D- by her teacher.

40. After the IEP team meeting, Ms. Kleis communicated with Student's counseling representative from UCLA, who informed her that Parents would be requesting an NPS.

41. On May 26, 2012, Parents completed an application for Student to attend Summit View because Student was struggling to keep up with other pupils academically, and struggled particularly with reading comprehension, written organization, and attention.

JUNE 7, 2012 IEP TEAM MEETING

42. On June 7, 2012, the IEP team met. All necessary members of the IEP team were present including Student's father, the Assistant Principal, Ms. Kleis, and Student's general education science teacher. Ms. Kleis understood the primary purpose of the meeting was to memorialize Parent's request for an NPS.

43. The meeting lasted 30 minutes. Student's father expressed his concerns with Student's placement, particularly ELA. He stated that accommodations were not being implemented in that class, and that overall her deficits required her to work too hard to keep up with classwork. As a consequence Student was arriving home depressed because she did not perform well despite her hard work. Father memorialized Parents' concerns in writing which he submitted to the IEP team. It was attached to the IEP.

44. Student's grades were discussed. At the time of the IEP team meeting Student had the following grades in academic subjects: A- in History; F in ELA (with 24 assignments, including four missing assignments marked as zero); C+ in Math (32 assignments, including one missing marked as zero); D in Science, (28 assignments, including three missing assignments marked as zero).

45. Problems with providing Student with IEP accommodations were reviewed.

Student's ELA teacher, Ms. Yarber, had not been providing the required testing accommodations to Student, or the redirection Student required. Ms. Kleis admitted that she was unaware that Ms. Yarber was not providing test accommodations, and confirmed that Student was challenged in ELA class by a teaching style of providing oral quizzes which impacted her second semester grades. Ms. Kleis had only recently been made aware of the oral quizzes and proposed an additional accommodation to require orally presented quizzes and tests to be presented visually. Given this teaching style, Ms. Kleis advised Parent that she would modify Student's ELA grade. Student's science teacher advised that she provided Student a place to store her papers in her classroom as an additional accommodation. Student's science teacher noted that her grades would be modified upward once all the grades and missing labs were entered into the computer system.

46. Student's placement was discussed and Father requested that District change Student's placement to an NPS, and make the necessary referrals. Father informed District that despite exhaustive testing by the District and UCLA, where she tested in the "normal range," Student had severe learning disabilities resulting from her slow processing speed, poor working memory loss, and poor executive functioning/organization skills that could not be accommodated by District, and required referral to an NPS. Father reported that Ms. Kleis informed Parents that "special needs" classes were an option, but the IEP team rejected that placement option last year because given Student's cognitive test results, the work would be too easy for her, and she would become bored and unmotivated.

47. Parents did not consent to the IEP.

48. Student's final seventh grade report published after the IEP, was higher than her grade report at the IEP. Ms. Kleis amended Student's final grade in ELA to a C, from Ms. Yarber's F at the time of the IEP, (and previous grading period D-), without consultation with Ms. Yarber, which was contrary to Ms. Kleis's practice of changing grades in

collaboration with general education teachers. As part of Ms. Kleis' SAI responsibilities, she modified pupil's general education grades where she considered it appropriate. At trial Ms. Kleis testified that the grade was modified by the Assistant Principal after she graded Student's missing assignments. Ms. Yarber testified that Student had earned a D and she was unaware of the grade change until the hearing. Ms. Yarber considered a C a passing grade, not a D and appeared upset that the grade had been changed. She also reviewed the grade books and did not have any missing assignments, and always allowed her special education students time to turn in late work and receive full credit. Student's science teacher changed her grade from a D to a C because she thought it was a fairer representation of her effort.

49. Student performed proficient on the statewide academic assessment, California Standards Tests (CST) in ELA and math for 7th grade.

50. On June 16, 2012, Parents reiterated their request for a change of placement in an e-mail.

51. On June 18, 2012, District provided Parents with prior written notice (PWN) of its disagreement with Parents' request to change Student's placement to an NPS. District notified Parents that it made its determination based upon three facts: Student's psychoeducational assessment where her average cognitive and academic functioning, but attention and processing issues, qualified her for special education as a Student with OHI; District's IEP offer addressed attention and work completion issues; and Student did not demonstrate significant emotional issues.

52. In its PWN, District requested Parents' consent to an early triennial assessment to address Parents' concerns that Student required additional academic and social-emotional support. District represented that it would complete the assessment within 60 calendar days of its receipt of parental consent, exclusive of summer break. District provided Parents with an assessment plan with the PWN.

53. Parents consented to the assessment plan by signing it on June 19, 2012, and notified District of their consent by mailing the signed assessment plan to District on June 28, 2012, by certified mail. By signing the assessment plan, Parents agreed that the District assessments would satisfy the District's obligation to conduct its triennial assessment, which was not due until January 2013, three years after Student's initial assessment and IEP team meeting of January 2011.

54. Between May 28, 2011, and the end of the 2011-2012 school year, Parents paid \$1,620 dollars in tutoring costs, to assist Student in accessing her education.

55. In summer 2012, Student interviewed with Summit View's Director Nancy Rosenfelt, a credentialed and experienced special education teacher, who provided credible testimony about Summit View's program. Student was overwhelmed in the District school. She could not manage her work and felt bad about her grades. She expressed interest in smaller classes. Due to her command of Student's profile and her progress, Ms. Rosenfelt's testimony was given weight against contrary testimony when determining whether Summit View could address Student's unique needs.

56. On July 2, 2012, District confirmed receipt by signature of its employee, and then misplaced the signed assessment plan.

57. On July 12, 2012, Parents through counsel submitted a written records request for Student's educational records within five days. The records were delivered, within 45 days, but not within five days because District misplaced the request.

58. On August 22, 2012, the first day of the 2012-2013 school year, Parents notified District in writing that they were withdrawing Student from her District school for at least a semester, and were enrolling her in another school. When asked, Parents informed District that they would be enrolling Student in Summit View.

59. Summit View enrolls pupils who primarily are eligible for special education under primarily under the category of SLD. Summit View also caters to pupils eligible as

OHI, due to ADHD. The cognitive abilities of the Summit View population range from average to above average. Summit View's population might, but rarely, include pupils who also exhibit autistic-like behaviors. Summit View's population does not accommodate pupils with disruptive behaviors. Summit View's curriculum qualifies its pupils for a high school diploma, and 99 percent of its pupils receive a high school diploma. Ninety-six percent of Summit View's pupils advance to college. Summit View's curriculum is modified so that the workload is not as great as in public school, and the learning techniques used are multimodal so that pupils can access lessons visually, and orally and in a variety of formats. Summit View makes use of smartboards connected to the class computer so that pupils can view group and individual work in progress with the teacher, and that class lessons and notes, can be printed. Textbooks are also available in computer format. Work organization, note taking, study skills, and time management techniques, repetition, are incorporated into the class structure and lessons. Class size is small, on average between 12 and 14 pupils, with one teacher and one assistant. A full range of accommodations are provided within each class according to a pupil's IEP, including reading tests out loud, extended time, small group test proctoring, peer tutors. Summit View also offers extracurricular activities. Student's Summit View teachers were qualified to teach, but were not as experienced, and did not have the same level of state certifications, as District's teachers.

60. Student continued to struggle with the same challenges with attention and organization, as she had at District, but her progress report of September 28, 2012, established that she was working well in all academic areas. Her English class teacher, Adam Legg noted that Student made a "great" transition to Summit View. He reported that her written work was greatly improving as Student learned the format of writing assignments for his class, participated well in class discussions, completed all homework assignments, but turning many in late. Student's reading teacher reported that Student

was friendly and participated in class discussion, but needed to work on class completion. Student was learning about Venn diagrams, predictions and character motivations. Student's Algebra teacher noted that Student participated fully and asked for clarifications when needed. Student's American history teacher expressed concerns about Student's focus and attention in the class, and noted that Student often turns in homework late. Student's physical education teacher also noted her challenges with focus, and her preference to socialize with friends, instead of participating in activities.

61. On October 4, 2012, Parents' again notified District of Student's placement in Summit View through counsel, and requested reimbursement.

62. On October 8, 2012, District sent a second PWN notifying Student of its refusal to change Student's placement to any NPS, including Summit View, or to fund or reimburse Parents for the NPS placement.

63. In its PWN, District for the first time notified Parents that it had not received their consent to conduct District assessments.

64. Parents did not respond to District until November 2, 2012, Parents through counsel provided District with a copy of the signed triennial assessment plan and enclosed the U.S. Postal Service, certified receipt signed by a District employee and dated July 2, 2012. Parents reminded District that it was obligated to complete that assessment within 60 days of the start of the school year, and hold an IEP team meeting by October 20, 2012.

65. Parents' signed release authorizing District to communicate directly with Summit View was also attached to counsel's letter.

66. District conducted its triennial assessments without delay upon receipt of Parents' consent.

TRIENNIAL ASSESSMENT

67. Dr. Boewe, who conducted Student's initial assessment, was responsible for

Student's triennial psychoeducational assessment. Dr. Boewe prepared her report on November 19, 2012. Dr. Boewe was exceptionally qualified to conduct Student's psychoeducational assessment. Dr. Boewe, has been a school psychologist for 33 years. She held a Ph.D. in educational counseling and licenses as an educational psychologist and a marriage, family and child therapist. Dr. Boewe held state school administrative certifications, including clear pupil personnel services credential with a specialization in basic pupil personnel services, a community college psychology instructor credential, and a community counselor credential. Dr. Boewe also held national certifications as a school psychologist, and behavior intervention case manager (BICM). Dr. Boewe had conducted over one thousand assessments in the area of SLD, and had assessed hundreds of pupils with attention deficits.

68. Dr. Boewe administered a variety of standardized and valid assessments, the administration of which was not disputed, and which fairly replicated the results of the initial assessment. As she did in her initial assessment, Dr. Boewe administered the WJ-III COG. Student test results were consistent with her initial assessment, excepting Students total GIA increased from the low average to average range.

69. Dr. Boewe used grade norms for the WJ-III for both the cognitive and achievement measures. She chose grade norms because Student was average for her grade and she thought grade norms allowed for a better comparison of standard scores of others in her grade nationally. Age norms were used for processing and social emotional measures to compare her results with others her age nationally.

70. Student had an average GIA of 92, which was comprised of variable cluster scores which included borderline scores in cognitive efficiency (ability to process information automatically), processing speed, working memory and broad awareness, a low average score in short term memory; average scores in verbal ability, thinking ability (the ability to draw on reasoning, associative, and memory to solve problems),

comprehension, long term retrieval, visual spatial thinking, high average in phonemic awareness, and superior in auditory processing. Subtest scores also revealed considerable variability: mild developmental delay in visual matching (finding two of same number in a group of similar numbers), borderline in numbers reversed (ability to attend to information presented while changing it), low average scores in decision speed, auditory working memory, spatial relations (ability to measure visual spatial relations), retrieval fluency, average scores in auditory attention, picture recognition, visual auditory learning, incomplete words, verbal comprehension and a superior score in sound blending. Dr. Boewe attributed Student's lower than previous scores to her attention deficits. Overall, Student's GIA was higher than the initial assessment, but Dr. Boewe did not consider the variation in scores statistically significant.

71. Dr. Boewe administered other standardized tests and other accepted measures to provide additional information regarding Student's weaknesses and strengths and to confirm the results the WJ-III COG. She confirmed Student's weakness in cognitive efficiency due to Student's attentional challenges, with the Test of Auditory Processing Skills, Third Edition (TAPS-III). Her lower performance on the cognitive efficiency related tests in the TAPS-III, e.g., the word memory subtest, provided further evidence of the impact of Student's deficits in attention on her ability to attend to, remember and respond to instruction, and the impact this had on her relatively lower scores on various WJ-III COG subtests, such as decision speed, visual matching and numbers reversed. Dr. Boewe administered the Delis Kaplan Executive Function System (D-KES) to further assess the impact of both attention and emotional dysregulation on executive functioning, cognitive (planning, organizing, attention shifting, working memory, retrieval fluency) and behavioral/emotional (impulsivity, emotional regulation). Student's scores were variable, somewhat due to her variable attention and focus, but overall supported her other assessment results. Her retrieval fluency, or ability to name words or letters within a time

limit was high average, but her nonverbal fluency was in the borderline range, including her ability to connect similar dots. As with her visual matching subtest in the WJ-III COG, Dr. Boewe attributed Student's poor results to slow processing speed, and perfectionism when doing fine motor tasks, not mistakes, as she was able to remember the directions and rules of the task, but worked very slowly and could only generate up to four designs in the time limit.

72. Dr. Boewe administered the Test of Visual Perceptual Skills – Third Edition (TVPS-3) to assess Student's visual processing, which includes identifying and discriminating visual-spatial relationships, visual part-whole relationships, visual memory, and items with visual interference. Overall Student performed lower than she did in her initial assessment and in the borderline range in basic processes which include recognizing, identifying, and differentiating visual cues, when presented with interfering information/stimuli.

73. Dr. Boewe attributed the lower scores to attention challenges, but did acknowledge that the variability in Student's visual processing scores required accommodations to ensure Student was accessing visual input. Dr. Boewe recommended highlighting important visual details when reading to assist with review and studying, and using visual models such as math equations, formulas, and outlines to make sure Student did not miss important information, and to help keep her focused on the steps of the process.

74. Dr. Boewe incorporated in her report the results of academic testing performed by Maureen Rosen, an experience special education resource teacher. Ms. Rosen administered the WJ III-ACH, Form A, on November 19, 2012. Ms. Rosen has been an educator for 20 years, including 10 years as a certified resource specialist with the District. Ms. Rosen held a California Clear Resource Specialist Certificate of Completion and Professional Clear Multiple Subject Teaching Credential. Ms. Rosen was qualified to

administer the WJ-III-ACH. Ms. Rosen had never taught Student, and was only familiar with her through her testing.

75. Ms. Rosen obtained a score report from the publisher that set forth the standard score, grade equivalent and age equivalent. The scores were normed based upon school grade, 8.3. Although Ms. Rosen's narrative referred to same age peers when discussing grade equivalent scores, the score sheet attached clarified any confusion. Student's standard scores encompassed ranges that established whether she was performing in the low average, average, high average or superior ranges compared to the normed population.

76. Student's scores on academic areas relevant to a determination of special education SLD eligibility, did not vary appreciably from the scores she obtained in her initial assessment, with the exception of her listening comprehension score which fell from a superior standard score to average, and included a low average score of understanding directions, a test that was not administered during the initial assessment. Student obtained an average score in the reading skills cluster, which measured basic reading skills. She obtained an average score in the reading comprehension cluster, a high average on the passage comprehension subtest, and an average score on the reading vocabulary subtest. She obtained low average scores on the reading fluency measure, which measured her ability to read simple sentences and answer yes or no questions under a time constraint. Student obtained average scores in measures of her mathematics, oral expression, listening comprehension, and written expression skills. Her written expression score was comprised of a low average standard score in writing fluency and an average standard score in writing samples.

77. After completing the WJ-III COG and ACH tests, Dr. Boewe produced a score report which included all the cognitive and achievement scores normed to grade 8.3, and also a score report viewing discrepancies based upon various WJ-III comparative

processes, including the cognitive/ability (comparing the GIA with ACH clusters.)

78. To further assess Student' reading fluency as it pertained to her comprehension, Student was provided a subtest of the Wechsler Individual Achievement Test-Third Edition (WIAT-III) which required Student to read passages out load and then answer a comprehension question, to measure Student's ability to read for meaning, not just for speed or accuracy. Student obtained an average standard score.

79. Dr. Boewe's psychoeducational assessment also incorporated District registered nurse (RN) Ann McGreevy Ernst's health screening. Ms. Ernst had over 28 years of clinical experience and was well qualified to conduct the health screening. The nurse did not find any hearing or vision abnormalities aside from 20/30 vision with contacts. The nurse understood the visual motor aspects of strabismus, and that tracking deficits were common to the condition, but from her own assessment and her review of Student's records noted that Student's eye tracking was "OK. The nurse did not mention Student's history of strabismus in the "additional information" section of her report referencing "significant health history" affecting educational progress. She recorded Student's history of ADHD and her related medications.

80. As part of the triennial assessment Student's social-emotional status was assessed and incorporated into Dr. Boewe's report. Other than attentiveness, no social-emotional impediments to learning were found. The Connors Comprehensive Behavior Rating Scales (Conners) were used and completed by Student's English, history and algebra teachers, Student's mother and Student. Individual comments of Student's teachers included observations that she had good writing and critical thinking skills, good computational skills, and concerns with her focus and organization as she needed many prompts and would forget to turn in homework. Student's algebra teacher noted that prompts were needed to stay focused and that Student tended to drift off, but that she showed her work and asked for help when needed. Student was reported to get along with

people. In her Conner's self-report, Student stated that she was good in reading and writing, and easy to get along with. Student's mother reported elevated emotional distress, anxiety disorder, social problems, hyperactivity and academic difficulties. Overall, the Conners confirmed Student's ADHD. The Beck Self-Concept Inventory-Youth (BDI-Y), a pupil self-report inventory to assess self-concept, depression, anger and disruptive behavior. Student confirmed a much lower than average score on her self-image relative to others her age, and reported that she only sometimes felt competent or as good as others. Otherwise, Student's self-report did not report any significant symptoms of depression, anxiety, anger or disruptive behavior. Dr. Boewe also administered the Achenbach scale to Student where Student rated herself within the normal range in all areas, with the exception of activities and social experiences, where she rated herself low in comparison to others her age, primarily due to her involvement in only one sport, surfing, and one hobby, reading. At hearing Student stated that she complained to Parents about her anxiety, but did not complain at school.

81. Dr. Boewe interviewed Student to further assess her social emotional status. Student reported that she had many friends that she kept in touch with since leaving the District high school, and also made new friends at Summit View. When Dr. Boewe asked Student about Mother's report that she did not have friends at the District school, Student disagreed with her mother's assessment of her social life, and stated that her Mother often saw situations different than she did, and with more concern. During testing with Dr. Boewe Student went to see her friends on campus.

82. Dr. Boewe also referenced Student's educationally-related mental health status (ERMHS) assessment in her report which generally confirmed Dr. Boewe's findings regarding Student's ability to cope within the school environment, and was consistent with other social-emotional assessments, as well as her interview with Student. The ERMHS assessor interviewed Student's teachers at Summit View, who reported that Student's

struggles were with her attention, and manifested as daydreaming and difficulty getting started on assignments. The ERMHS assessor found that Student did have some struggles with anxiety, depression and social relations, but that these problems did not appear at that time to impede Student's access to her education or academic progress, and were best handled with continued private counseling, which Student could access through her UCLA counseling team.

83. Dr. Boewe also considered the findings of the occupational therapy (OT) assessment. The OT assessment was conducted by a qualified District assessor, and was made part of Student's triennial assessment. Overall, Student performed in the average range, including assessments involving fine and visual motor skills, and visual perception, where tasks included visual tracking, printing, drawing within the lines, and reproducing figures of various geometric shapes. She performed in the below average range on tasks involving motor coordination and manual dexterity and which required her to reach and grasp small objects. She was below average in manual dexterity and coordination. Student was observed to take an extended amount of time to complete tasks, which the assessor attributed to her desire to do well. The assessor concluded that OT was not required to access Student's education.

84. Dr. Boewe also considered the results of outside assessments conducted by the private tutoring company Lindamood-Bell using alternative standardized measures. Dr. Boewe found the Lindamood-Bell assessments to be consistent with her assessments in the area of receptive language, reading, mathematics, and written language (average). She noted that the borderline scores in oral directions, and low average scores in understanding directions, and reading rate and fluency on one measure did not account for Student's attention deficits. She also concluded that the Lindamood-Bell recommendations for services to develop her language and literary skills did not address an identifiable reading or language disability, especially given Student's average scores on

another measure.

85. Dr. Boewe spoke with Student's teachers at Summit View or obtained their comments from rating scales. Reports by Student's Summit View teachers of Student's attention deficits were consistent with Student's noted challenges while attending District. Teachers reported concerns with Student's focus, "drifting off" and organization, her need for many prompts to stay focused, especially with independent work. Student's English teacher, Mr. Legg, reported that Student was a hard worker, was capable of focusing on quizzes and worksheets independently, but without many prompts, would get little done writing essays, including pre-writing tasks. At hearing, Mr. Legg, reported that Student exhibited difficulty with written organization. In history, Student showed interest in the subject matter and participated in discussion, showed good writing and critical thinking skills, but had a hard time keeping focused, would get distracted often, would get lost in her thoughts, and required many prompts to stay focused on independent tasks. Student's algebra teacher reported good computational skills and did not think she had problems academically as she showed her work and asked for help when needed, but noted that she needed prompts "at times" to maintain focus, and drifted off, requiring redirection. Summit View's Assistant Principal established that Student did not have any significant social, emotional or academic difficulties, but repeated teachers' concerns with her focus and attention.

86. Summit View's Assistant Principal noted concerns with Student's visual tracking, recommending an accommodation allowing Student not to have to use the Scantron bubble form due to her visual tracking issues. She also mentioned that the PE teacher observed Student having difficulty tracking a ball when it is thrown her way.

87. Dr. Boewe observed Student at Summit View but due to an assembly, she did not observe her during class instruction. From her observation of Student's interactions with her peers in class, she concluded that Student was more socially advanced than her

peers, and communicated more with the teacher than with peers.

88. Dr. Boewe received input from Parents on Student's specific areas of growth since the last assessment and Parents reported that Student's writing had become more legible and the content and planning of her essay writing improved. They reported an improvement in her ability to work independently, reading comprehension, improvement, but "struggled" with organization, and had continuing issues with attention. They reported improvement with social skills and emotional regulation.

89. Dr. Boewe reviewed Student's eligibility under the IDEA and recommended that she remained eligible as OHI. Referring to the severe mathematical discrepancy model, Dr. Boewe found that there was no evidence to suggest that Student had a severe discrepancy of at least 1.5 standard deviations between ability and achievement in any of the eight areas encompassed by the IDEA, including reading fluency, reading comprehension, mathematics calculations, mathematics reasoning, written expression, oral expression and listening comprehension. Dr. Boewe relied upon the WJ-III COG GIA and ACH, to determine the extent of the discrepancy, and other assessments to determine whether any of her low scores were significantly discrepant from her expected levels of performance, particularly reading fluency, oral directions. Dr. Boewe set out all the scores obtained in the WJ-III in an attachment to her assessment. Dr. Boewe attributed Student's educational challenges to her diagnosis of ADHD and its impact on her processing speeds and her working memory. Student's slow response time and difficulty focusing and staying on task required that she be provided with a range of accommodations. Dr. Boewe noted Student's variable visual processing skills but attributed challenges arising from visual tasks to her ADHD.

90. Dr. Boewe provided recommendations for the IEP team to consider. She recommended that the IEP team consider continue Student's placement in general education with SAI for 55 minutes in a separate classroom to work on organization. She

recommended accommodations and modifications in the general education setting to address Student's attention, working memory, processing speed deficits and variable visual attention, including: encouragement and reminders of problem solving techniques; preferential seating to reduce distractions; shorten or chunk assignments including minimizing the amount of problems or tasks on a page; breaks; redirection, cuing and instruction to stay on task; repetition and clarification of oral information and instruction; extra time to complete assignments and tests; shorten repetitive writing tasks after the skill is demonstrated; note taking assistance; visual models such as equations, formulas and outlines, highlighting visual details, reminders to turn in homework and projects; and, for a Scantron test, allow another way to provide the answer. Dr. Boewe recommended that the IEP team consider assistive technology to address Student's working memory and processing speed deficits, including access to a word processor or computer; calculator if speed is required; and a visual timer to help with attention and work completion.

JANUARY 2013 IEP

91. On January 30, 2013, the IEP team met to review the triennial assessment and develop an annual IEP. All required members of the IEP team were present, including Parents, their counsel, Dr. Boewe, District OT, Ms. Rosen, a general education math teacher, and the ERMHS assessor. Summit View Administrator Trudy Barker was invited but did not attend because it was not Summit View's practice to attend IEP meetings for privately placed pupils, but advised District to call with any questions. The meeting lasted three hours.

92. Dr. Boewe reviewed her report and findings and responded to questions from Parent's attorney. Student's varying performance on timed versus untimed tests was discussed, and its greater effect on nonverbal or visual tasks. Dr. Boewe confirmed that Student slows down "because she wants to do well, and is a bit of a perfectionist." Her

slower pace is particularly apparent on timed writing tests, not verbal tests. Student's nonverbal fluency was lower. Student's scores were lower because of her speed, not due to errors. Student also had lower motor speed skills. She had lower visual scanning scores which Dr. Boewe attributed to attention. Dr. Boewe concluded that Student's problem solving, fluid reasoning and planning were average to high average, so Student had the skills but given her shifting attention, scores were lower when tests were timed.

93. Dr. Boewe responded to counsel's queries about Student's range of variability on tests the last time which made it hard to score, but commented that the overall score was higher but not statistically significant.

94. Parents participated, asked questions and contributed observations. Parents remained concerned with Student's social life, and activities, and her use of Internet social networks to interact. District IEP team members assured Parents that Student was socially successful at school and did not display any signs of depression or social skill deficits.

95. The OT summarized her findings that Student did not need interventions to access her education. Parents asked the OT about writing speed and the OT reviewed her report and the results of assessments showing that she performed average in visual motor integration and visual perception. She performed low in motor coordination tasks because she was slow, but she still performed in the low average range. The OT commented that Student slowed down because she was meticulous and a perfectionist. Parents agreed, and commented that when Student writes and misprints one letter, she will erase the whole line. Parent observed Student did not often use the computer at Summit View, and used "hunt and peck" typing.

96. Father raised Student's strabismus, explaining that strabismus affects depth perception, and that one eye still moves a little. Student has had three operations, the last one was cosmetic. Parents were told that Student does not have the best depth perception.

97. Father asked the OT about Student's strabismus and she advised him that it did not appear to affect her performance on tests, and she did not observe any depth perception problems in testing. Dr. Boewe advised Parents that Ms. Barker from Summit View reported that Student sometimes has problems in physical education class when the ball is thrown to her.

98. Prior to the meeting, District was not aware of Student's operations or Student's strabismus-related visual issues, including depth perception problems. Parents agreed to provide reports. Dr. Boewe did not refer to Student's strabismus in this report, as she had in the initial IEP. She advised the IEP team that she would amend the report, and she did.

99. Father raised concerns about Student's academic progress and her performance last school year, noting that Student's test performance was not reflected in her grades. Parents did not understand how Student could have passed ELA when she had an F just weeks before the end of the year. Parents were told that she was given the opportunity to retake quizzes with accommodations, which she was not previously given. District's representations in the IEP conflict with Ms. Yarber's recollection of events and were discounted. Father observed that Student could perform algebra equations, but did not get credit when she showed her work if she made one small mistake.

100. Parents raised concerns about the two hours they were required to work directly with Student each night on homework. District stated that on average there is a half hour per subject so two hours is typical, and many parents hire tutors or help their children with homework.

101. Student's progress on goals for the period between the January 2012 IEP and June 2012 were reviewed and discussed. Student's attention goal was discussed which affected all academic areas. Student partially met her task attention goal of paying attention for five minutes or more by June. As of June 2012 she was able to attend to tasks

for five minutes with three prompts on two of four trials, not one prompt as the annual goal required. Student's work completion goal was discussed. Student needed skills to improve her ability to focus, complete and submit work. District reported that Student made excellent progress on her work completion goal of turning in work 75 percent of the time. However, current history teacher reported that between 25 and 50 percent of the time work is missing or late. The average class lecture time was discussed. A math class lecture is generally 20 minutes, and there may be a warm-up period for practicing previous math skills.

102. Parents and District members fully discussed annual goals. The District proposed to keep the same two goals on task attention and work completions, with modifications as to the time and percentage of success, and one additional goal for planning and organization focused solely on turning in work by using a planner. District used information it received from Summit View to prepare baseline and goal. Parents did not have any concerns about these goals. District did not think academic goals were needed. Parents' counsel asked about a typing goal and a note taking goal. District did not believe a typing goal was needed and Student could learn typing by using available computer programs. District did not believe a note taking goal was necessary at the time, as note taking was included in the curriculum, and notes were provided to Student.

103. District offered the following goals to be accomplished by January 30, 2014: task attention, which required Student to begin an assigned academic task (reading, writing, math) and remain on task (by being engaged in the task) for 10 minutes, in three of four opportunities; completion, which required Student to use an organization system that supports her needs and accommodation for extra time so that she could complete homework and class projects, and turn in assignments within the time frame, 75 percent of the time, 90 percent of the opportunities; and planning and organization, which required Student to use a planner and homework web-site to organize short and long term

assignments by creating a daily plan with SAI supports to follow and to study for tests, with 75 percent accuracy, four of five times per week. The goals included interim benchmarks.

104. Accommodations were reviewed. Dr. Boewe's recommendations were adopted, which did not vary from the last IEP. Parents did not object to the accommodations but questioned whether they would be implemented based upon past experience where teachers did not know of the accommodations or refused to implement them, and failed to respond to Parents' communications. District recommended one hour per week of collaboration between the SAI and teachers, which Father maintained did not seem to be anything new. District also advised Parents to communicate with the teachers at the beginning of the year to clarify the accommodations the teachers would be using in class.

105. Services and placement were reviewed and the least restrictive environment was discussed. District offered the same placement and services as before, but added a one hour a week time period for collaboration between SAI and general education instructors to address implementation of accommodations and "approaches" in class.

106. District members maintained that Student's deficits could be addressed in the general education program with SAI support and that Summit View did not provide the least restrictive environment for Student. Student did not have a peer group at Summit View. The EHRMS assessor observed Student at Summit View and observed that she was not engaged with other pupils which could have been attributed to her superior social skills. The District team members disagreed with Parents that Student's peers have only academic needs. District team members considered Student's peer group to be pupils in the general education campus. Ms. Wooverton offered that the pupils that District sent to Summit View had much greater needs than Student.

107. At hearing, District witnesses reaffirmed positions regarding the least

restrictive environment. District witnesses, including Ms. Kleis, Dr. Boewe and Dr. Vegas, maintained that Student benefitted from District's quality of instruction based upon the core curriculum. Based upon her experience and research Ms. Kleis, opined that placing Student in an overly restrictive setting could have long term impacts on her self-esteem and self-perception, as she comes to see herself as someone who is limited, and incapable of performing like her public school peers. Student understood that the work was easier at Summit View, which is why she was doing better. Student was socially engaged with her friends at the District school, and did not fit the profile of pupils at Summit View. To Ms. Kleis, Student "sparkled," was funny, bright and witty and fit in well with her peers at public school.

108. At hearing Student made a compelling case for being adequately engaged with peers at Summit View. To Student, pupils at Summit View were "quirky" like her.

109. Parents did not sign the IEP.

REQUEST FOR IEE

110. On Friday, February 8, 2013, Parents requested an IEE. The request was made in writing and sent to the District via facsimile transmission after business hours, at approximately 6:15 p.m. District acknowledged that it received the facsimile on Monday, February 11, 2013. Parents explained that they disagreed with the manner in which the assessor calculated

111. In that same letter, Parents requested that grade books be made available, and District provided the grade books on February 15, 2013.

112. The grade books showed that Student earned an F in Science during the first semester of seventh grade, and a D in ELA the second semester.

113. On Thursday, February 21, 2013, 10 days after District received Parents' IEE request, it sent Parents a PWN of its refusal to provide an IEE. District posited that its

assessment met all legal requirements, and covered all areas of Student's "concerns," was comprehensive, used multiple measures, observations, and communications among IEP team members, including Parents, considered multiple areas of eligibility, and included programming options.

114. In its February 21, 2013, letter, District acknowledged its obligation to file for due process. It notified Parents that it would wait to file for due process until mid-march, to provide Parents time to consult with their attorney and withdraw their IEE request in writing no later than March 8, 2013.

115. On March 18, 2013, Student's Father commenced a private assessment by submitting to a clinical interview with assessor, Mari S. Davies, Ph.D. a clinical psychologist and neuropsychologist. Dr. Davies conducted a neuropsychological evaluation of Student and prepared a report. Dr. Davies charged Parents \$4,000 dollars for her report. Dr. Davies possessed all the necessary training, credentials, including a California license, to conduct a neuropsychological evaluation of Student. Dr. Davies held a B.A., M.A. and Ph.D. in psychology, which was awarded in 2009. Prior to 2009, she conducted significant research in the area of brain functioning and development, particularly in the area of traumatic brain injury, and brain functioning in autistic children. Dr. Davies was not a credentialed school psychologist. Her vitae memorializes some exposure as a post-doctoral fellow to school-based assessment reports containing diagnoses for neurodevelopmental or learning disorders, but otherwise her resume did not reveal any significant exposure to assessments related to eligibility determinations or school-based services until 2011. After Dr. Davies entered private practice in 2012, she conducted IEE's and psychoeducational evaluations. Dr. Davies' assessment report reflected her focus on the diagnostic tools used by psychologists, particularly the DSM-IV, not the IDEA. Nevertheless, her assessment, although flawed as a psychoeducational assessment, was thorough, and generally confirmed the scope of Student's unique needs, consistent with District's assessment, and

supported similar interventions.

116. Parents did not respond to District's letter, and District did not communicate with Parents regarding the IEE in person, by email, letter or telephone, again. On April 12, 2013, District filed its request for due process to establish that its psychoeducational assessment was appropriate such that Student was not entitled to an IEE. District's request for due process was two months after it received Parent's IEE request.

117. On May 1, 2013, Dr. Davies prepared her report which included a comprehensive review of Student's educational and assessment history, and the results of her interviews with Parents, Student, Student's Summit View teachers, school observations, and her administration of formal assessment measures. Dr. Davies did not review District's triennial assessment before preparing her report. She did not interview District teachers or observe District's proposed placement.

118. Dr. Davies' observations of Student were generally consistent with that of Dr. Boewe. Dr. Davies observed Student in her interviews and testing to be cheerful and friendly, and overall possessing an even temperament. She was engaged in the testing process, exhibited a sense of humor, a deep level of empathy and kindness, and was open with her mild frustration when faced with select academic writing or math subtests, and demonstrated a slower pace with these subjects. Consistent with her noted deficits in attention, she needed shortened testing sessions, frequent prompts, redirection and regular encouragement to continue with testing. When she appeared tired, Dr. Davies limited testing to un-timed, less attention-sensitive tasks. Dr. Davies also observed that Student labored on tasks requiring fine motor skills such as copying tasks.

119. Dr. Davies's observations at Summit View provided her with some opportunity to observe Student during ELA and math instruction. Dr. Davies observed Student in her ELA class where Student participated in a question and answer session involving a film and a related story in English class. She also observed Student in math

class during independent work, where shortly after starting work, she asked the teacher for guidance and to check her work. The teacher checked with her several times. Student was noted to play with silly putty while listening in class, and to look away from her work or respond to other pupils making comments. Student was observed walking between classes and at lunch and appeared to be engaged socially with a few other pupils. Similar to Dr. Boewe's observation of relative social skills of Student's classmates, Dr. Davies observed inappropriate comments being made by another pupil in Student's math class which was only tolerated momentarily by the teacher and stopped with redirection. Student was distracted by the other pupil's comments. Otherwise, unlike Dr. Boewe, Dr. Davies did not note that Student was socially more advanced than other pupils. Based upon her assessments, she concluded that Student's social skills were impaired due to pragmatic language challenges, and that she was more comfortable with pupils younger than her.

120. Dr. Davies' noted discussion with Student's math teacher was consistent with her well-documented history of inattention at the District, and observations provided by Student's Summit View teachers at hearing. Student's math teacher characterized Student as a diligent worker, but one who required frequent redirection to stay focused. Student worked at a slow pace, even after she was focused.

121. Dr. Davies' test administration, despite some conflicting scores, was consistent with Student's historical pattern of Student's strengths and weaknesses and unique needs as reflected in District's testing. Dr. Davies found tremendous variability in intellectual development with performance ranging from the impaired and borderline range on visual processing tasks, to the high average range on measures of verbal reasoning and expression.

122. Dr. Davies administered the Wechsler Intelligence Scale for Children, Fourth Edition (WISC-IV) a test of cognitive ability, from which she noted Student's general cognitive strengths in verbal reasoning, fluency and expression, short and long term

memory of verbal information and recognition of complex visual information. She pinpointed weaknesses in perceptual reasoning (visual concept formation and abstract visual reasoning), visual processing speed, psychomotor speed, attention (working memory, cognitive control, organization based upon visual cues, sustained attention), memory (learning and memory of visual information).

123. Dr. Davies acknowledged that the WISC-IV full scale IQ is “usually” the best estimate of overall intellectual functioning. The full scale WISC-IV is comprised of four composite scores, but Dr. Davies concluded since three of the four composites were significantly lower than Student’s verbal composite index score (VCI), the full scale IQ was not a true estimate of Student’s overall cognitive ability. Dr. Davies pointed to the wide variability between Student’s verbal reasoning and verbal expression abilities as measured in the VCI standard score of 108, and her significantly lower scores on nonverbal reasoning measures, including processing speed, one the processing speed index (PSI) (standard score, 70), working memory on the working memory index (WMI) (standard score 74), and perceptual reasoning on the perceptual reasoning index (PRI) (standard score 86) indices, which encompassed her impaired and borderline visual processing and fine motor speed scores. She noted that the three lower composite scores were sensitive to lapses in attention and to slower processing speed and therefore the VCI, which excludes the undue influence of slower visual and graphomotor performance speed in the calculation of her overall reasoning abilities. Dr. Davies also used other assessment measures to confirm Student’s average to very superior scores on verbal fluency tasks.

124. Dr. Davies’ testing of Student’s achievement using the WJ-III ACH confirmed that Student’s academic skills were grade-level, particularly when timing was not an issue. Student’s written language skills were measured overall to be grade-appropriate. Student did demonstrate significant discrepancy within her written language profile. Student’s untimed single word spelling skills was high, but measured against her verbal skills, her

speed of writing simple guided sentences was low. Student “somewhat’ struggled when tasks required speed, organization and graphomotor skills, such as planning, with the correct grammar sequence. Student could formulate solid sentences in the WJ-III writing samples, but she sometimes misunderstood the context or purpose of the content, demonstrating pragmatic challenges, and struggled where less structure was provided to guide content in writing assignments or essays.

125. Dr. Davies re-administered the WJ-III ACH, which unbeknownst to her at the time of her assessment, was administered by the Dr. Boewe a few months before, and should not have been administered. Although Dr. Davies conceded that it was not within the standard assessment practice to re-administer the same assessment within so short a time span, due to what is generally referred to as the “practice effect,’ since Student’s scores were lower the practice effect did not apply. Dr. Davies used aged-based norms, not grade based norms, like Dr. Boewes, thus the lower scores could be attributed to her utilization of different norms. In addition to the differing normative reference, Dr. Davies, unlike Dr. Boewe, did not record whether the lower scores were attributable to Student’s failure to complete all the tasks or errors.

126. Dr. Davies administered a wide variety of standardized tests and other measures which further confirmed Student’s attention, memory and processing deficits as identified in Dr. Boewe’s assessment. Her assessment went further than Dr. Boewe’s in articulating and distinguishing Student’s visual processing deficits from her attention challenges, and to test Student’s visual perceptual skills and visual motor integration. Dr. Davies used the WISC-IV subtests on block design, matrix reasoning and picture concepts. She used other standardized and otherwise valid measures to assess visual motor integration, motor perception, motor speed, visual tracking, and visual spatial organization. Student measured in the impaired range on the WISC-IV measures of Student’s visual processing speed, without fine motor demands and was further challenged where the task

also required graphomotor output, as demonstrated on a measure of copying small symbols from code.

127. Student's social emotional status was recorded in rating scales that yielded the same concerns as before from Parents and Student. Student struggled with self-esteem and self-concept, had a general sense of inadequacy, and "almost always" hated school. Student's English teacher confirmed abnormal degrees of behavior yielding a clinical elevation of "school problems" which encompassed considerable challenges with attention and emotion and anger control, and to a lesser, but still abnormal degree, challenges with adaptability and resiliency.

128 Dr. Davies concluded that Student had a discrepancy between her verbal cognitive abilities, as measured by the WISC-IV verbal comprehension index of 108 and the WJ-III ACH reading fluency subtest of 75. Dr. Davies disagreed with Dr. Boewe's use of the GIA, and her attribution of Student's reduced speed of processing solely to her difficulties sustaining attention. Dr. Davies noted that Student's visual processing challenges appeared in both cognitive and academic realms "although she performed approximately at grade level across non-fluency based academic tasks." Dr. Davies concluded that Student's specific learning disorder was not explained solely by her attention deficits, but by the degree of impairment observed across a variety of visually-based measures where Student demonstrated a pattern of lower performance, particularly where visually-based processing challenges were compounded by graphomotor difficulties.

129. Dr. Davies also reported a deficit in receptive pragmatic language (contextual inferences and interpreting intentions) which she calculated to be over two standard deviations below her measured WISC-IV verbal comprehension index. Dr. Davies reported that Student was three years delayed in functional communication which impacted difficulties with social interactions because of her reduced ability to interpret and respond to the intentions of others.

130. Dr. Davies did not administer or evaluate open-ended writing tasks as part of her assessment, but concluded from Parent and school reports that Student's executive and organizational deficits, functional language challenges and "mild dysgraphia noted on current exam" were consistent with challenges in structured and unstructured written expression.

131. In addition to ADHD (predominantly inattentive type), Dr. Davies diagnosed Student with a nonverbal learning disorder (NLD), which is a diagnosis set forth in the Diagnostic Statistical Manual, Fourth Edition, (DSM-(IV)), but admitted that this profile of strengths and weaknesses was not well understood or formally characterized, except for generally identifying three areas of deficits: motor skills, visual-spatial functioning, and perception of social cues. Dr. Davies reported that Student had learned to understand and interpret others' intentions and behaviors to an advanced degree based upon verbal cues, but could likely draw incorrect conclusions in more complex social situations leading to mood volatility.

132. Dr. Davies made extensive recommendations to address Student's deficits, many of which were made by Dr. Boewes: Dr. Davies recommended supports for Student's visual processing deficits including, verbalization strategies; utilization of multiple learning modalities and kinesthetic learning and ongoing practice in topics reliant on conceptual visualization (like geometry and chemistry). She recommended supports for Student's visual-motor challenges which, along with her attention deficits, impacted her writing speed, including a continuing emphasis on keyboarding for all forms of writing, and utilization of assistive technologies such as speech-to-text programs and other writing, outlining and organizational tools. Dr. Davies recommended continued accommodations in the form of extended time for tests and assignments, upwards of 150 percent of time, instead of 100 percent, particularly assignments with substantial writing and reading demands, breaks, use of a calculator, use of a laptop or other assistive writing/sketching

device and note-taking supports, guidance to assist with planning, organizing and prioritizing assignments, mastering study skills, and self-monitoring strategies. To build writing organization skills she recommended using specific planning, revising and editing strategies and programs. To compensate for Student's lack of efficiency or writing fluency she required keyboarding skills and regular access to a computer, or voice to text technology to minimize the visual aspects of writing. She recommended "customized" and multi-modal instruction for Student's deficits in a small class environment where curriculum accessible and where she can stay on task with frequent redirection. Multi-modal instruction is inclusive of visual and oral aids such as drawing, video/internet presentations, speaking, drawing or acting out concepts or ideas, especially in the form of narratives or stories. She recommended interactive, activity-based learning approaches to keep Student actively engaged in a series of short activities with supervision. She recommended small group or one-on-one support for learning new visual concepts and problem solving both inside and outside the classroom, with in-school support for upwards of 500 minutes per week.

133. On May 21, 2013, the IEP team met to review Dr. Davies' report. The IEP team present included Parents, their counsel, Dr. Davies (by telephone), Dr. Boewe, Ms. Rosen, a District general education teacher, Dr. Kris Vegas, special education coordinator, and Dr. Sara Wolverton. There is no evidence that District invited Summit View to attend the meeting. The IEP team meeting began at 1:13 p.m. and ended three hours later, at 4:12 p.m. There was extensive discussion among the participants, with District members questioning Dr. Davies about her report and findings, Student's counsel questioning District team members, and Father responding directly to inquiries about documents.

134. Dr. Davies went through each section of her report and discussed her assessments, methods, and opinions with District. Overall Dr. Davies noted that the results were similar to District's testing, but that District's reliance on the GIA of 92 masked the

difference between subtests and that her additional testing confirmed a visual processing deficit that was distinct from the attention deficits District attributed to Student's deficits, and more profound. Dr. Davies explained her rationale for choosing the WISC-IV, VCI composite score of 108 as the realistic measure of Student's overall cognitive functioning because it is least effected by Student's processing speed challenges. She explained that the VCI score was also consistent with most of Student's academic achievement scores, excepting her low score on reading fluency which has a visual tracking component, and later added from her observations of Student's impulsivity, an attention component. Dr. Davies noted that Student would have gotten a higher without her impulsivity issues. Dr. Davies attributed the lower writing fluency score to graphomotor, and attention-related deficits, in planning and sequencing. She considered Student's math performance pretty well compared with the perceptual reasoning index. Dr. Davies acknowledged that Student's attention related deficits impacted her processing scores, including the very low reading fluency score, but concluded that her second percentile scores on the PSI reflected a weakness in visual processing. Dr. Davies was particular concerned with the academic fluency composite score of 81 which was not consistent with Student's strong verbal processing, but consistent with a visual processing problem.

135. Dr. Boewe questioned Dr. Davies throughout her presentation. Where Dr. Davies identified low visual processing scores, Dr. Boewe inquired as to whether the scores were the result of Student going slowly, or making errors, as it was Dr. Boewe's experience when administering her assessments that Student did not make any errors. Dr. Boewe's discussed with Dr. Davies her re-administration of the WJ-III ACH. Dr. Davies explained that she was unaware that District previously administered the WJ-III ACH but still felt confident that the practice effect did not apply because the scores were lower. She did not know to what extent using aged-based norms affected the score.

136. Dr. Boewe's discussed with Dr. Davies her opinion that visual processing

deficits, not just attention deficits, were responsible for Student's educational challenges, and required remediation. Dr. Davies summarized her findings that showed that where tasks involved a visual element, like skipping lines, color word interference, and the scores are very low, visual processing deficits, not just attention deficits, are responsible. Dr. Davies noted that verbal and visual scores should not fluctuate as much as they solely because of attention deficits. On executive functioning tasks Student was almost two standard deviations lower on visual than verbal tasks. With regard to processing speed, Student is lower on tasks that have a motor element which can be explained by Student's visual processing deficits.

137. District special education coordinator, Kristopher C. Vegas, Ph.D., who previously, worked in the District as a school psychologist, was also an active participant at the IEP team meeting. He asked Dr. Davies whether items were skipped on tests of coding and symbol search which required vertical tracking. As there were no errors, Student's tracking issues slowed her down. Generally where measures of processing speed also involved a psychomotor element, Dr. Davies concluded that visual processing deficits were involved. Her opinion was confirmed by the NEPSY arrow subtest which required tracking to extrapolate where arrows were pointed because, although Student was attending and was not impulsive, she had problems, and really "bombed."

138. Dr. Davies also discussed her findings on language pragmatics which did not come up in District testing. She noted that Student's teacher reported that her skills were low. Testing showed that she had difficulty understanding social cues. Student appeared to hang out with younger pupils.

139. Dr. Davies' reference to the DSM-IV to determine eligibility was discussed. Dr. Davies repeated her reference to the DSM-IV nonverbal learning disorder, but also stated in response to Dr. Vegas' question that she did not look at IDEA eligibility criteria when making her recommendations. Dr. Davies nevertheless maintained that Student met

the criteria of a discrepancy between the highest cognitive score (108) and the lowest academic score in reading fluency (75), and from the perspective of discrepant verbal and visual abilities measured in various tests, including the TVPS visual processing score of 77 and the TAPS score of 98. Dr. Davies maintained that the discrepancy between cognitive scores in the verbal and visual domains was severe, 22 points, supported a severe learning disability.

140. The validity of Dr. Davies' scores instead of District's scores was discussed. Dr. Vegas questioned the validity of using Dr. Davies' scores instead of District's scores; particularly her lower scores, as opposed to District's scores four months before. Dr. Davies suggested that all scores since 2011 should be averaged together, including District's test, her tests, and Lindamood Bell tests.

141. Student's strabismus was discussed. Dr. Boewe maintained that she lacked knowledge about Student's visual issues until January 2013. Dr. Boewe knew about strabismus, but not the visual surgeries or visual issues until January 2013. The issues were fully set out in reports that were not disclosed to District.

142. Dr. Davies' report provided the IEP team with more discrete information about Student's unique visual processing needs. Dr. Boewe stated that the information about Student's visual issues shared at the previous IEP and incorporated in Dr. Davies' report "sheds light" on how Student processed information. She conceded that Dr. Davies had the benefit of information about the visual issues from the family or other reports that were not provided to her, that resulted in additional assessments and additional comparisons between verbal and visual information processing skills. Father confirmed that he had reports but thought they were shared. Referencing Dr. Davies' report, the only report that Dr. Davies possessed that was possibly never shared with District, was the UCLA psychological report which Dr. Davies noted had detailed Student's "significant" visual challenges, including strabismus, farsightedness, and depth perception.

143. Student's performance at District was discussed. District questioned Dr. Davies about whether she interviewed any teachers at District. Dr. Davies did not interview District teachers, but she reviewed Student's records and information she obtained from Parents.

144. Dr. Woolverton invited the IEP team to review Student's eligibility and services based upon Dr. Davies recent report and District maintained Student's eligibility as OHI. Dr. Boewe concluded that Dr. Davies recent report did not require District to change Student's eligibility to SLD as she did not see information in the report about Student's visual processing that would lead her to a different conclusion. Dr. Boewe and Parents agreed that having a visual impairment, other than blindness, did not support another eligibility. Student's counsel and Dr. Davies asked for clarification. Dr. Boewe stated that Student remained eligible for special education as OHI because she did not meet the criteria for SLD. Dr. Woolverton disputed Dr. Davies the application of the discrepancy formula to verbal versus visual skills. Student's counsel responded that the discrepancy is between the higher cognitive VCI score and the reading fluency score.

145. Dr. Boewe disagreed with the fluency score of 75 that Dr. Davies obtained as it conflicted with scores of reading fluency. In Dr. Boewe's assessment Student's reading performance was much more fluent, and not significantly discrepant from the obtained cognitive score. Dr. Boewe also disputed Dr. Davies' use of discrepancies between processes, instead of discrepancy between ability as a function of a processing deficit, and certain academic areas defined by law. Dr. Woolverton added that Dr. Davies one low reading fluency score did not appear to be representative of Student's other average reading fluency scores, and comparing the lowest subtest against the highest cognitive score was not consistent with all the data reviewed.

146. District responded to counsel's query about using alternative methods to determine SLD eligibility, which did not require a discrepancy analysis. District disputed the

application of this method for Student, because there was no indicator of academic delays from Student's records, interviews, assessments.

147. The IEP team devoted less time to Dr. Davies' recommendations, many of which were duplicative of District's accommodations, but did consider her recommended academic goals. District was unwilling to set new goals without further data which it needed to obtain from assessments and from Summit View. District declined a reading fluency goal until it confirmed Student's reading word per minute, which neither Dr. Davies or the District had available from their respective assessments, and until Dr. Boewe spoke with Summit View. District did not have reason from its history with Student to prepare a reading fluency goal and a standard score, by itself, did not establish the need for the goal. After it consulted with Summit View and administered further assessments, District agreed to explore developing a fluency goal. Parents' provided the required consent for District to speak with Summit View.

148. District invited Dr. Davies to recommend other goals, but rejected Dr. Davies' recommendation for a writing fluency goal based upon her relatively low score, as this deficit was addressed in Student's accommodations providing her with more time to complete tasks.

149. Parents' counsel suggested a writing goal, but District rejected the goal because Student's skills are average, and no baseline deficit was established. District agreed to obtain a baseline for Student's writing from Summit View. At the time of the IEP, District considered Student's accommodations such as graphic organizers and access to a word processor to adequately address her writing needs.

150. The IEP team reviewed District's January 2013 offer. District agreed to modify the accommodations page to clarify that multi-modal instruction will include allowing Student to talk out or verbalize what she has learned or seen.

151. District reviewed District's placement offer of a collaborative classroom team.

Father described the model he thought applied to the term, a class within a class where a special education teacher was also available to support pupils. District's collaborative model differed from Father's vision. Dr. Boewe and the general education teacher explained that the subject matter general education teachers remain in charge of instruction, but throughout the day an SAI teacher or an IA (inclusive of various staff members) would provide support.

152. District did not inquire about Dr. Davies' placement recommendation of a small classroom environment, but maintained that Student could be served in District's placement.

153. Student's historical progress at District and progress at Summit View was mentioned but not analyzed. Dr. Woolverton objected to using old data about Student when she was at District, which was already discussed at previous meetings. District IEP team members acknowledged that Student was performing well in Summit View's modified academic program, but did not consider that relevant to District's placement offer where they maintained she could perform competently. At the time of the IEP team meeting Student was earning mostly B's, one A-, and one C- at Summit View. District considered Student's issues at District and Summit View to be due to attention, not academics. Dr. Woolverton represented if Student came back to the District program they would monitor her progress and consider other interventions, if necessary.

154. Dr. Davies agreed to amend her report to address District's assessment and January 2013 IEP and left the meeting. Dr. Davies did amend her report but her findings did not change.

155. After the IEP, Dr. Boewe contacted Summit View to gather information about Student's reading fluency. Summit View informed her that it administered a commonly used and accepted reading fluency program which measured Student's words per minute based on Student's performance, and would not recommend a reading fluency goal or

intervention for reading fluency at Summit View. There was no evidence that Dr. Boewe inquired about a baseline for a writing goal.

156. Prior to the hearing, Dr. Davies briefly observed District's proposed placement. She observed a typical classroom with the teacher in front of about 35 pupils, arranged in five straight rows with six to seven pupils in a row. A TA or IA was in the room. Pupils were asked to take their journals out. One pupil did not, but the TA did not notice or reach him for a while. She observed the SAI study skills class which had three pupils, the SAI and an IA. They were reviewing study tips and expectations. She did not observe anything that changed her opinion that District did not offer what Student required, a small structured classroom throughout the day to implement her accommodations and goals.

157. Student enrolled in Summit View for the 2013-2014 school year and attended Summit View at the time of the hearing. Student continued to perform well academically and participated in the extracurricular theatre program, but continued to exhibit serious attention related challenges. Due to her ongoing challenges, Student must constantly be prodded to start work and then directed and redirected to continue work. Student's current Summit View math teacher, Vanessa Briones, who has taught classes of 30 pupils, credibly testified at trial, that it was difficult keeping Student focused in her small class, with a teacher and a full time aide. She did not think it was possible in a larger class, even if there was aide support in the classroom.

158. Parents spent \$30,090 dollars in tuition for the 2012-2013 school year. Parents transport Student by car 63.6 miles daily, (four trips daily of 15.9 miles each), so that Student could attend Summit View. Parent's total cost for the 2013-2014 school year is \$30,600 dollars, or \$3,060 dollars per month, beginning August 26, 2013.

DR. DAVIES EXPERT TESTIMONY

159. At the hearing, Dr. Davies further critiqued the validity of District's use of the severe discrepancy model in this situation, citing the WJ-III publisher's admonishment of the model when there is evidence, as here, of vastly discrepant abilities. Dr. Boewe used the results of the WJ-III COG and ACH batteries to determine whether Student was eligible for special education as a pupil with a SLD due to a severe discrepancy between ability and achievement.

160. Dr. Davies testimony was supported by the publisher. Where some variance exists between cognitive abilities, the WJ-III COG and ACH are valid and reliable measures to use to determine a severe discrepancy. The WJ-III COG and ACH batteries are co-normed to function together as they are based on data from the same population sample. As such, discrepancies which arise from a comparison between the WJ-III COG and ACH, provide a direct comparison of actual scores between measures, as opposed to estimates which would happen if scores were obtained from different batteries, i.e., tests not co-normed. The various tests that comprise the WJ-III COG are weighted to provide the best estimate of GIA. Tests that inform the GIA which are weighted highest include verbal comprehension and concept formation. In contrast, tests like the Wechsler Intelligence Scale for Children, Third Edition (WISC-III) scales weight all subtests equally, which may not provide the best estimate of general cognitive ability. Overall, the WJ-III COG correlates well with other valid assessments of global intelligence, including the WISC-III. Where there is a significant variance between abilities, the use of this method might result in an inaccurate contrast of Student's ability with her achievement, because the GIA encompasses scores that are affected by her disability.

161. Dr. Davies critique of Ms. Rosen's scoring of the written expression writing test was disputed at hearing, but the critique of Student's neuropsychological expert Mari S. Davies, Ph.D., was not supported by her own experience and training and, as such, was

not given weight. According to the test publisher, the WJ-III writing samples were scored using a modified holistic procedure that requires the use of judgment when scoring responses. General scoring criteria is provided "to assist the examiner in making judgments," but the test publisher admits that it is "impossible" to anticipate all potential written responses. At hearing, Dr. Davies considered Ms. Rosen's scores too high and suggested alternative and lower scores. Dr. Davies noted that her mentor would have given even lower scores than she, admitting that judgment does come into play, and her differing expert opinion does not mean that Ms. Rosen's scores were wrong.

162. After Dr. Davies reviewed Ms. Rosen's protocols for the WJ-III ACH writing assessment, (in September 2013), she conducted further testing of Student's academic abilities with the WIATT-III where she obtained low average standard scores for Student's math fluency (81), and written expression (85). With these scores she determined that there was a severe discrepancy between Student's WISC-IV VCI of 108 and Student's achievement in these areas.

163. At hearing, Dr. Davies presented a thoughtful analysis of Student's deficits, but while her critique of District's application of the WJ-III to the severe discrepancy method was persuasive, her own assessment was not. Dr. Davies' assessment was useful in further examining the contribution of Student's visual processing deficits to her educational challenges, but with the exception of eligibility, confirmed Dr. Boewe's findings about Student's processing deficits and expanded them to be more inclusive of her visual processing challenges.

164. Dr. Davies did not make a convincing showing that Student had a severe discrepancy for the purposes of determining whether she qualified as a pupil with SLD. As Dr. Boewe noted, Dr. Davies assessment report reflected her focus on the diagnostic tools used by psychologists, particularly the DSM-IV, not the IDEA. Dr. Boewe persuasively demonstrated that Dr. Davies' comparison of verbal and nonverbal deficits and selection of

subtests was not a valid method for determining severe discrepancy. Dr. Davies provided useful and important insights about possible processing impacts related to Student's strabismus, but her assessment did not advance Student's burden of persuasion that Dr. Boewe's assessment failed to identify Student's unique visual processing needs or deficits for the IEP team to determine the appropriate eligibility. Her own attempt at applying a severe discrepancy model by electing certain scores, and rejecting others, was not clearly grounded in generally accepted practice, especially given her suggestion at the IEP team meeting that all Student's scores, past and present, should be averaged, and her testimony that the severe discrepancy model should not be applied at all using the most accepted and well-normed tool, the WJ-III, where a pupil, like Student has such a variant cognitive profile. Consistent with the logic of Dr. Davies' opinion, the severe discrepancy model should not be used exclusively by the IEP team where pupils have significant variations in their cognitive sub-scores. As such, Dr. Davies thoughtful assessment and opinion was persuasive in determining the appropriateness of using the WJ-III GIA for the discrepancy analysis, and was carefully considered in determining whether District's offer was appropriate, but her testimony did not advance Student's burden of proof that Student was eligible for special education as SLD.

LEGAL CONCLUSIONS

1. As petitioning parties, District has the burden of proof on Issue One, and Student has the burden of proof on the remaining issues. (*Schaffer v. Weast* (2005) 546 U.S. 49, 56-62 [126 S.Ct. 528, 163 L.Ed.2d 387].)

DISTRICT ISSUE (1), STUDENT ISSUE (2)(G) AND (6) – APPROPRIATENESS OF DISTRICT'S JANUARY 2013 ASSESSMENT AND OBLIGATION TO FUND AN IEE

2. District contends that it met its threshold obligation to file for due process without unnecessary delay and it is under no obligation to fund an IEE on this basis.

District contends that its delay of two months was reasonable, especially given Student's subsequent filing for due process, request for continuance and consolidation, which it did not oppose. Student asserts that District's delay of approximately two months between Student's request and its filing was without justification and as such, unnecessary. For the reasons set forth below, District met its burden of proof on this issue.³

3. In addition to meeting its threshold obligation to timely file for due process without unreasonable delay, District contends that Dr. Boewe's psychoeducational assessment addressed all areas of suspected disability, and met all the legal requirements of a valid assessment, including the qualifications of its examiners, the use of a variety of valid assessment tools, review of all relevant records, interviews, observations and a report containing all the required contents.

4. Student disagrees and also contends that Dr. Boewe's psychoeducational assessment did not address all areas of suspected disability, particularly Student's SLD arising from visual processing deficits, and was inappropriate because Dr. Boewe failed to consider Student's medical diagnosis of strabismus, used the severe discrepancy model which was not an accurate measure to determine Student's SLD given her widely disparate cognitive profile, and inaccurately scored the written expression test. For the reasons set forth below, District met its burden of proof and Student did not meet her burden of proof on this issue.

Applicable Law

IEE

5. Under certain conditions a student is entitled to obtain an IEE at public

³ The operative statute requires District, not Student to prove that it filed without unnecessary delay.

expense. (20 U.S.C. § 1415(b)(1); 34 C.F.R. § 300.502 (a)(1)(2006)⁴; Ed. Code, § 56329, subd. (b) [incorporating 34 C.F.R. § 300.502 by reference]; Ed. Code, § 56506, subd. (c) [parent has the right to an IEE as set forth in Ed. Code, § 56329]; see also 20 U.S.C. § 1415(d)(2) [requiring procedural safeguards notice to parents to include information about obtaining an IEE].) “Independent educational assessment means an assessment conducted by a qualified examiner who is not employed by the public agency responsible for the education of the child in question.” (34 C.F.R. § 300.502(a)(3)(i).) To obtain an IEE, the student must disagree with an assessment obtained by the public agency and request an IEE. (34 C.F.R. § 300.502(b)(1), (b)(2).)

6. When a student requests an IEE, the public agency must, without unnecessary delay, either file a request for due process hearing to show that its assessment is appropriate or ensure that an IEE is provided at public expense. (34 C.F.R. § 300.502(b)(2); Ed. Code, § 56329, subd. (c).) (The district may ask for a parent’s reasons for disagreeing with an assessment, it may not require, and may not wait for, the statement of any reason by parents. 34 C.F.R. § 300.502(b)(4).) A district may not impose conditions or timelines on a request for an IEE. (34 C.F.R. § 300.502(e)(2).) There is no room in these provisions for a district to question, evaluate, or probe the motives behind Parents’ reasons for requesting an IEE. Parents are free to give no reason at all beyond their disagreement with the assessment.

7. Whether an LEA files a due process complaint without unnecessary delay is a fact-specific inquiry. In *Pajaro Valley Unified School Dist. v. J.S.* (N.D. Cal. Dec. 15, 2006, C06-0380) 47 IDELR 12, the court determined that the school district unnecessarily delayed filing its due process request. The school district first waited three weeks and then

⁴ All references to the Code of Federal Regulations are to the 2006 version, unless otherwise noted.

demanded that the parents reiterate their request within nine days, warning the parents that silence would be interpreted as withdrawal of the request, and that it was prepared to go to due process to defend its assessments. After the parents complied with the district's demands, the district then waited another eight weeks, without explanation, before filing its request. In total, the school district waited three months after the pupil first requested an IEE at public expense to file its request. The court held that the school district had thereby waived its right to contest the IEE. (See also, *Fremont Unified School Dist. v. Student* (2009) Cal.Offc.Admin.Hrngs. Case No. 2009040633 [unexplained two-month delay without negotiations held unnecessary]; *Student v. Los Angeles Unified School Dist.* (2007) Cal.Offc.Admin.Hrngs. Case No. 2006120420 [74-day delay held unnecessary].)

8. When a district can document good faith efforts to resolve a dispute over an IEE, some delay has been found reasonable. In *L.S. v. Abington School Dist.* (E.D. Pa. Sept. 30, 2007, No. 06-5172) 48 IDELR 244, the court held that a school district's 10-week delay in filing a due process request was not a per se violation of the IDEA. The court emphasized that there was evidence of ongoing efforts during that time to resolve the matter, including numerous emails and the holding of a resolution session, and that the district, within 27 days of the request, told parents orally that the request would be denied. Similarly, in *J.P. v. Ripon Unified School Dist.* (E.D. Cal. April 14, 2009, No. 2:07-cv-02084) 52 IDELR 125, the court found that a delay of over two months was not unreasonable, because the district was able to produce a series of letters showing its attempts to resolve the matter with parents, and because a final impasse was not reached until three weeks before the district filed for a due process hearing.

9. If an IEE is conducted at public expense, the criteria under which the assessment is obtained, including the location, limitations for the assessment, minimum qualifications of the examiner, cost limits, and use of approved instruments must be the same as the criteria that the public agency uses when it initiates an assessment, to the

extent those criteria are consistent with the parent's right to an IEE. (34 C.F.R. § 300.502(e)(1).)

Assessments

10. Assessments are required in order to determine eligibility, and what type, frequency and duration of specialized instruction and related services are required. An assessment of a pupil who is receiving special education and related services must occur at least once every three years unless the parent and the school district agree that such a reevaluation is unnecessary. (20 U.S.C. § 1414(a)(2); Ed. Code, § 56381, subd. (a)(2).)

11. Triennial assessments have the same basic requirements applicable to initial assessments. (20 U.S.C. § 1414(a)(2); 34 C.F.R. § 300.303 (2006); Ed. Code, § 56381, subd. (e).) A pupil must be assessed in all areas related to the suspected disability, prior to the development of an IEP. (Ed. Code, § 56320, subds. (f).) The assessment must be sufficiently comprehensive to identify all of the child's special education and related services needs, regardless of whether they are commonly linked to the child's disability category. (34 C.F.R. § 300.306.)

12. As part of triennial assessments, as with all reassessments, the IEP team and other qualified professionals must review existing assessment data on the child, including teacher and related service-providers' observations. (20 U.S.C. § 1414(c)(1)(A); 34 C.F.R. § 300.305 (2007); Ed. Code, § 56381, subd. (b)(1).) Based upon such review, the school district must identify any additional information that is needed by the IEP team to determine the present level of academic achievement and related developmental needs of the student, and to decide whether modifications or additions to the child's special education program are needed. (20 U.S.C. § 1414(c)(1)(B); Ed. Code, § 56381, subd. (b)(2).)

13. The assessment must be conducted in a way that: 1) uses a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information, including information provided by the parent; 2) does not use any

single measure or assessment as the sole criterion for determining whether a child is a child with a disability; and 3) uses technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors. The assessments used must be: 1) selected and administered so as not to be discriminatory on a racial or cultural basis; 2) provided in a language and form most likely to yield accurate information on what the child knows and can do academically, developmentally, and functionally; 3) used for purposes for which the assessments are valid and reliable; 4) administered by trained and knowledgeable personnel; and 5) administered in accordance with any instructions provided by the producer of such assessments. (20 U.S.C. §§ 1414(b) & (c)(5); Ed. Code, §§ 56320, subds. (a) & (b), 56381, subd. (h).) The determination of what tests are required is made based on information known at the time. (See *Vasheresse v. Laguna Salada Union School Dist.* (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].) No single measure, such as a single intelligence quotient, shall be used to determine eligibility or services. (Ed. Code, § 56320, subds. (c) & (e).)

14. The personnel who assess the student shall prepare a written report that shall include, without limitation, the following: 1) whether the student may need special education and related services; 2) the basis for making that determination; 3) the relevant behavior noted during observation of the student in an appropriate setting; 4) the relationship of that behavior to the student's academic and social functioning; 5) the educationally relevant health, development and medical findings, if any; 6) if appropriate, a determination of the effects of environmental, cultural, or economic disadvantage; and 7) consistent with superintendent guidelines for low incidence disabilities (those effecting less than one percent of the total statewide enrollment in grades K through 12), the need for specialized services, materials, and equipment. (Ed. Code, § 56327.) The report must be

provided to the parent at the IEP team meeting regarding the assessment. (Ed. Code, § 56329, subd. (a)(3).)

Eligibility

15. For purposes of special education eligibility under the IDEA, the term “child with a disability” means a child with visual impairments (including blindness), OHI, SLD, and who, by reason thereof, requires instruction, services, or both, which cannot be provided with modification of the regular school program. (20 U.S.C. § 1402(3)(A)(ii); 34 C.F.R. § 300.8(a).) Vision impairments may qualify a pupil for special education where, even with correction, it adversely affects pupils’ performance. (Cal. Code Regs., tit. 5, § 3030, subd. (d).)

16. Pupils meet OHI eligibility when they have limited strength, vitality, or alertness, due to chronic or acute health problems. (Cal. Code Regs., tit. 5, § 3030, subd. (f).) ADHD is not, by itself, a specified disability that qualifies a child for special education. However, children with ADHD can be eligible for special education if by reason of their diagnosis, they meet the criteria for OHI, emotional disturbance, or SLD. (Ed. Code § 56339, subd. (a).) Pupils may qualify for eligibility as OHI if they have ADHD, because their disability-related distractibility can cause them to have limited alertness with respect to their educational environment, which can then demonstrate a need for special education and related services. (34 C.F.R. §300.8(c)(9).)

17. Pupils meet the eligibility requirement for SLD if they have a disorder of one of the major psychological processes involved in the understanding and use of language, such as auditory processing, which may manifest itself in an impaired ability to listen or speak, and have a severe discrepancy between intellectual ability and achievement. “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).) SLD does not include a learning problem

primarily the result of other factors, including vision, hearing, motor disabilities, mental retardation, and emotional disturbance. (Ed. Code, § 56337, subd. (a); Cal. Code Regs., tit. 5, § 3030, subd. (j).)

18. The decision as to whether or not the assessment results demonstrate that the degree of the pupil's impairment requires special education shall be made by the IEP team, including assessment personnel. The IEP team shall take into account all the relevant material which is available on the pupil, and no single score or product of scores shall be used as the sole criterion for the decision of the IEP team as to the pupil's eligibility for special education. (Cal. Code Regs., tit. 5, § 3030.)

Methodology for Determining SLD

19. California law provides two alternative, but not mandatory, methods that a school district may use to determine whether a child requires special education due to an SLD. (Ed. Code, § 56337.) A school district may, but is not required to, "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" (the severe discrepancy approach). (Ed. Code, § 56337, subd. (b).) A school 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).)

20. The severe discrepancy approach is described in California Code of Regulations, title 5, section 3030, subdivision (j). To determine if a severe discrepancy exists between a pupil's intellectual ability and achievement, the law requires a comparison of the standard scores a child receives in cognitive testing and achievement testing. The raw scores are converted to common standard scores using a mean of 100 and a standard deviation of 1.5. Then the scores are compared using the standard criterion, which is the

product of 1.5 multiplied by the standard deviation. Using that mathematical formula, the standard criterion is 22.5 points. Therefore, if there is a 22.5 difference or more between the intellectual functioning score and the achievement score, adjusted by one standard error of measurement of not more than four points, then a severe discrepancy exists, when that severe 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).)

21. Where the 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. The report shall include a statement of the area, the degree, and the basis and method used in determining the discrepancy. The report shall contain information considered by the team which shall include, but not limited to: (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 education classroom obtained from observations, work samples, and group test scores; (5) consideration of the pupil’s age; and (6) any other relevant information. (Cal. Code Regs., tit. 5, § 3030, subd. (j) 4(C)). See also, 34 C.F.R. §300.309(a); *Letter to Prifitera*, Office of Special Education Programs (OSEP) 107 LRP 45656 (March 1, 2007)

22. If the public agency files a due process complaint notice to request a hearing, and the final decision is that the agency’s evaluation was appropriate, the parent still has the right to an IEE, but not at public expense. (34 C.F.R. § 300.502(b)(3).)

ANALYSIS OF DISTRICT’S ISSUE 1 AND STUDENT’S ISSUE 2(G) – UNNECESSARY DELAY

23. District met its burden of proving by the preponderance of the evidence that

it filed for due process without unnecessary delay. Two months elapsed between District's receipt of Student's written request on February 11, 2013, and its due process request filing on April 12, 2013. In the interim, District was not idle. It responded to Student's request with its PWN within 10 days. District also notified Parents that it would file mid-March, about one week after Friday, March 8, 2013, the deadline it set for Parents to notify District if they wished to withdraw their IEE request. After Parents failed to timely respond, there were no further negotiations or communications. One month later, on April 11, 2013, District filed. Under the facts of this case, where District sent out a PWN within a reasonable time after Parents requested an IEE, and District filed within two months of Parents' request, District's delay was not an "unnecessary" delay.

24. In sum, as set forth in Legal Conclusions 5-8, and Factual Findings 110-116, District met its burden of proving by the preponderance of the evidence that it filed for due process without unnecessary delay. In contrast, Student failed to meet her burden of proof that District's due process filing was unnecessarily delayed. Student is not entitled to an IEE at public expense and the reimbursement of the cost of Dr. Davies assessment in the amount of \$4,000 dollars on the ground that District's filing was unnecessarily delayed.

ANALYSIS OF DISTRICT'S ISSUE (1) AND STUDENT'S ISSUE (6) – APPROPRIATENESS OF ASSESSMENT

25. District proved by a preponderance of the evidence that Dr. Boewe's psychoeducational assessment and Ms. Rosens' academic assessment contained therein were appropriate and assessed Student in all areas of suspected disability. In contrast, Student failed to demonstrate by a preponderance of the evidence that Dr. Boewe's assessment was insufficient to identify all of Student's unique needs, or was inappropriate.

26. Overall, Dr. Boewe's assessment was thorough and met the requirements of the IDEA. Dr. Boewe was an experienced and capable school psychologist, she relied upon, and incorporated into her report, assessment results from other qualified and

knowledgeable assessors, including Ms. Rosen, Ms. Ernst, the OT, and the EHRMS assessor. Dr. Boewe's assessment included a review of the assessment data, which resulted in the use of additional measures to confirm Student's strengths and weaknesses. Likewise, Dr. Boewe used a wide variety of standardized and otherwise valid assessment tools, which measured and confirmed Student's processing strengths and weaknesses, including her visual processing deficits, as well as her academic performance.

27. Dr. Boewe's report generally satisfied all written report requirements, and where it did not, as when she omitted strabismus, she amended it. Her report included her recommendations for eligibility, and the basis of her recommendations. Her report explained how she reached her conclusion that Student's attention deficits were the primary reason that Student could not access her education. Dr. Boewe attributed Student's processing deficits in the area of processing speed and working memory to her ADHD. Dr. Boewe's assessment did not ignore Student's visual processing deficits, or her relatively low scores in reading and writing fluency. On the contrary, Dr. Boewe's report referred to a wide range of assessment measures for visual and visual motor processing, and an analysis of the results of the assessments. The report was available to Parents at the IEP team meeting, if not before. Most significantly, by determining that Student qualified for eligibility as a pupil with OHI, Dr. Boewe did not ignore Student's other deficits or fail to provide the IEP team with information about all her suspected disabilities and unique needs, including information upon which the IEP team could make determine Student's eligibility irrespective of Dr. Boewe's recommendations. Dr. Boewe provided the IEP team with valid assessments, which were administered and scored correctly, included the score reports for each test as addendums to her report so the IEP team could refer to them, the results of interviews from Parents, teachers and an extensive analysis of Student's unique needs. Dr. Boewe addressed Student's social-emotional status, and incorporated Ms. Ernst and the OT's assessment to measure her motor and visual skills.

28. With the exception of the written expression test of the WJ-III ACH, Student did not challenge District's administration of the wide variety of standardized assessments. Student claims that District's assessment was inappropriate and failed to identify all of Student's unique needs, primarily because in reliance upon the WJ-III COG GIA and ACH, Dr. Boewe applied a severe discrepancy methodology to determine Student's eligibility which was not valid given Student's profile, or misused the methodology by using the wrong cognitive measure, against over-inflated achievement scores. Student further argues that Dr. Boewe's assessment ignored Student's medical history of strabismus, and as a result failed to fully account for the long-term visual processing issues arising from her condition. As a result of the deficiencies in her report, Student contends that her unique needs were not identified, particularly in the areas of reading and writing fluency.

29. Student's challenges to Dr. Boewe's assessment were not persuasive. Student argues that Dr. Boewe's assessment suffers from her failure to include in her report and account for Student's medical diagnosis of strabismus which resulted in her failure to adequately assess Student's visual processing deficits. Dr. Boewe's failure to record Student's history of strabismus did not render her assessment inappropriate. Dr. Boewe found Student to have visual processing challenges from her own assessments but was not made aware of any other information that would have required her to conduct further in depth testing, as Dr. Davies' later did. Dr. Boewe first heard of Student's depth perception challenges at the January 2013 IEP team meeting and was not provided with confirming reports. Student did not display deficits in visual tracking deficits or depth perception in either Ms. Ernst or the OT's assessment. Most importantly, Dr. Boewe administered visual processing tests which showed that she had pronounced visual processing deficits and addressed them in her accommodations recommendations. Student's attention challenges were pronounced and endorsed by assessments, interviews, observations and Student's history. (Factual Findings 1-90, 96-97.)

30. Student's critique of Ms. Rosen's administration of the WJ-III ACH written expression test is not persuasive because the publisher presumes the assessor will rely on personal judgment. (Factual Finding 161.) Dr. Davies' later use of other measures demonstrated that Student's written expression was low average, but did not demonstrate that Ms. Rosen's administration was inaccurate. (Factual Findings 128, 130, 162.)

31. Student did produce credible expert opinion based upon the publisher's protocols, that Dr. Boewe's report erred in its application of a properly administered WJ-III to the discrepancy formula used to determine SLD. (Factual Findings 159-164.) Dr. Boewe's use of the GIA was not reconciled with her conclusion in her initial January 2011 assessment that Student's GIA was unreliable. (Factual Findings 11, 93.) As a witness, Dr. Boewe demonstrated that she was an accomplished professional, and approached her assessment of Student with thought and compassion. Given her conflicting opinions over time, Dr. Boewe's testimony on this point was given less weight than Dr. Davies' testimony. However, Student failed to demonstrate that this error rendered Dr. Boewe's entire assessment inappropriate, or established that Dr. Boewe failed to assess in all areas of disability.

32. Based on the comprehensiveness of Dr. Boewe's assessment, which incorporated Ms. Rosen's assessment, Student failed to prove by a preponderance of the evidence that Dr. Boewe's psychoeducational assessment failed to identify all of Student's unique needs. Dr. Boewe's use of an otherwise valid and properly administered assessment, the WJ-III COG and ACH, to support the severe discrepancy methodology, by itself, did not render her assessment inappropriate because Dr. Boewe did fully investigate Student's suspected disabilities, presented the IEP with a full complement of data from which it could determine SLD on alternative grounds, and identified Student's unique needs. Her recommendation that her unique needs qualified her as OHI, not SLD, was not inappropriate, as it was supported by a wide variety of assessment tools, interviews and

classroom information. As set forth in Legal Conclusion 18, the IEP team is responsible for determining eligibility, not Dr. Boewe. As District psychologist, and member of the IEP team, it was her obligation to assess Student in all areas of suspected disability and provide the IEP team pertinent information upon which it could determine Student's eligibility, unique needs, program and services. Dr. Boewe's assessment was comprehensive, relied upon multiple assessments from other qualified assessors, and presented the IEP team with a full profile of Student's strengths, weaknesses and unique needs. She provided her report to the IEP team for its determination of Student's eligibility. Notably, the fact that the severe discrepancy model was not appropriate for Student's profile, does not establish that other information provided to the IEP team in Dr. Boewe's assessment or available to it at the time of the IEP would compel a conclusion that Student was SLD, using another methodology, and, as a result, Student's unique needs were not addressed. Dr. Boewe may have used the WJ-III COG GIA to measure the mathematical discrepancy but she used many measures, not one, to assess Student's suspected disabilities, confirm the basis of her eligibility determination, and understand her unique needs.

33. For these reasons, Student failed to meet her burden of persuasion by a preponderance of the evidence that Dr. Boewe's assessment was inappropriate and failed to sufficiently identify all of Student's unique needs. (Factual Findings 1-15, 67-90, 92-98, 117-132, 134, 139-142, 145.)

STUDENT'S ISSUES 2(A)-(F), (H)-(I)

34. Student contends that District impeded Parents' participation rights which resulted in a denial of FAPE. Specifically, Student contends that District failed to: convene an IEP team meeting after the initial January 11, 2011 IEP, as of May 28, 2011 through January 2012, because of Student's lack of progress on the January 2011 IEP goals;

consider, at the January 2012, June 2012, and January 2013 IEP team meetings Student's strengths, academic, developmental, and functional needs, and parental concerns; timely provide Student's educational records; timely hold an IEP team meeting 60 days after Parent signed the assessment; consider the results of the written assessment report by Student's neuropsychologist at the May 2013 IEP team meeting; and include a special education teacher at the May 2013 IEP team meeting. For the reasons set forth below, Student met her burden of persuasion that District's failure to call an IEP team meeting before the January 2012 IEP, and failure to have Student's past or present special education teacher, (Issues 2(a) and 2(i)), significantly interfered with Parents' the right to participate in the IEP process, and denied Student a FAPE, but did not meet her burden of proof on the other claimed procedural violations.

Applicable Law

35. States must establish and maintain certain procedural safeguards to ensure that each student with a disability receives the FAPE to which the student is entitled, and that parents are involved in the formulation of the student's educational program. (*W.G., et al. v. Board of Trustees of Target Range School Dist., etc.* (9th Cir. 1992) 960 F.2d 1479, 1483 (*Target Range*)). Citing *Board of Educ. of the Hendrick Hudson Central School Dist. v. Rowley* (1982) 458 U.S. 176, 200 [102 S.Ct. 3034] (*Rowley*), the court also recognized the importance of adherence to the procedural requirements of the IDEA, but indicated that procedural flaws do not automatically require a finding of a denial of a FAPE. (*Id.* at 1484.)

36. A procedural violation constitutes a denial of FAPE if it 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 to the child, or caused a deprivation of educational benefits. (20 U.S.C. § 1415(f)(3)(E); Ed. Code, § 56505, subd. (f); see also, *Target Range* 960 F.2d 1479, 1483-1484.) If a procedural violation is found to have significantly impeded the parents' opportunity to participate in the IEP process, the

analysis does not include consideration of whether the student ultimately received a FAPE, but instead focuses on the remedy available to the parents. (*Amanda J. ex rel. Annette J. v. Clark County School Dist.* (9th Cir. 2001) 267 F.3d 877, 892-895 (*Amanda J.*) [school's failure to timely provide parents with assessment results indicating a suspicion of autism significantly impeded parents right to participate in the IEP process, resulting in compensatory education award]; *Target Range, supra*, 960 F.2d at pp.1485-1487 [when parent participation was limited by district's pre-formulated placement decision, parents were awarded reimbursement for private school tuition during time when no procedurally proper IEP was held].) A school district's failure to conduct appropriate assessments or to assess in all areas of suspected disability may constitute a procedural denial of a FAPE. (*Park v. Anaheim Union High School Dist., et al.* (9th Cir. 2006) 464 F.3d 1025, 1031-1033.)

37. Federal and state law require that parents of a child with a disability must be afforded an opportunity to participate in meetings with respect to the identification, assessment, educational placement, and provision of a FAPE to their child. (20 U.S.C. § 1414(d)(1)(B)(i); 34 C.F.R. § 300.322(a); Ed. Code, §§ 56304, 56341.5, subd. (a).) A district must ensure that the parent of a student who is eligible for special education and related services is a member of any group that makes decisions on the educational placement of the student. (20 U.S.C. § 1414(e); Ed. Code, § 56342.5.) Accordingly, at the IEP team meeting parents have the right to present information in person or through a representative. (Ed. Code, § 56341.1, subd.(f).) "Among the most important procedural safeguards are those that protect the parents' right to be involved in the development of their child's educational plan." (*Amanda J., supra*, 267 F.3d 877, 882.)

38. A school district is required to conduct, not just an IEP team meeting, but also a meaningful IEP team meeting. (*Target Range, supra*, 960 F.2d 1479, 1485; *Fuhrmann v. East Hanover Board of Education* (3d Cir. 1993) 993 F.2d 1031, 1036.) Parents have meaningfully participated in the development of an IEP when they are informed of their

child's problems, attend the IEP team meeting, express their disagreement with the IEP team's conclusions, and request revisions in the IEP. (*N.L. v. Knox County Schs.* (6th Cir. 2003) 315 F.3d 688, 693.)

39. An IEP is evaluated in light of information available at the time it was developed, not in hindsight. (*JG v. Douglas County School Dist.* (9th Cir. 2008) 552 F.3d 786,801; *Adams v. State of Oregon* (9 th Cir. 1999) 195 F.3d 1141, 1149). "An IEP is a snapshot, not a retrospective." The IEP must be evaluated in terms of what was objectively reasonable when it was developed. (*Ibid.*)

ANALYSIS OF STUDENT'S ISSUE 2(A): FAILURE TO CONVENE AN IEP MEETING AFTER MAY 28, 2011, THROUGH JANUARY 2012, BECAUSE OF STUDENT'S LACK OF PROGRESS ON THE JANUARY 2011 IEP GOALS

40. Student contends that given Student's struggles in her general education classroom, and lack of progress on her IEP goals District should have convened an IEP team meeting before the annual IEP of January 2012.

41. Legal Conclusions 1, 35-39, are incorporated herein by reference.

42. The IEP team shall review the pupil's IEP periodically, not less frequently than annually, to review the IEP to determine whether the annual goals are being achieved, to make any necessary revisions to address any lack of expected progress, and to consider new information about the student. (20 U.S.C. § 1414(d)(4)(A); 34 C.F.R. § 300.324(b)(1); Ed. Code, §§ 56380, subd. (a)(1) & 56343, subd. (d); *Anchorage School Dist. v. M.P.* (9th Cir. 2012) 689 F.3d 1047, 1055-56.)

43. Amendments to an existing IEP can be made without convening the whole IEP team, and without redrafting the entire document. (20 U.S.C. § 1414(d)(3)(D) & (F); 34 C.F.R. § 300.324(a)(4)(i) & (a)(6); Ed. Code, § 56380.1.) An amendment created in this manner must be reduced to written form and signed by the parent. The IEP and its amendment are viewed together as one document. (*Ibid.*)

44. Student met her burden of persuasion that District should have convened an IEP team meeting after the May 28, 2011 and before the annual IEP team meeting in January 2012, and that its failure to do so significantly interfered with Parents' right to participate in the IEP process. No data was taken on Student's progress on her IEP goals since the January 2011 IEP team meeting, but Student scored proficient in ELA on statewide assessments, including writing strategies, and by the end of that school year Student's grades had improved. Nevertheless, by the end of the 2010-2011 school year, Ms. Kleis noted that Student's attention challenges were severe. Once Student started the 2012-2013 school year, Student exhibited a noticeable decline. It was apparent that she was not making progress on her goals in the area of attention and work completion in general education even with the multitude of accommodations prescribed by the IEP. District was aware of Student's decline to the point of speculating that Student's medication was at fault. It was imperative for the IEP team to convene to discuss Student's academic struggles with Parents and Student's general education teachers, particularly those classes where she was failing or approaching failing, including science and ELA, review her IEP goals and accommodations, and consider further interventions, including more direct aide support, or other services and placement. District did not explore amending the IEP without the full team. Instead, District waited until the annual IEP. District's decision to recalculate Student's grades at the end of the semester did not remediate her attention difficulties, but confirmed that they needed to be addressed earlier by the team. As a result, Parents were deprived of their right to participate in decisions regarding Student's special education program during her first semester of the 2011-2012 school year. (Factual Findings 23-31.)

STUDENT'S ISSUES 2(B)-(D) – FAILURE TO CONSIDER STUDENT'S STRENGTHS, ACADEMIC, DEVELOPMENTAL AND FUNCTIONAL NEEDS, AND PARENTAL CONCERNS AT THE JANUARY AND JUNE 2012, AND JANUARY 2013 IEPs.

45. Student contends that District's failure to consider Student's strengths, academic, developmental and functional needs, and parental concerns at the January and June 2012, and January 2013 IEPs, impeded Parents' right to participate in the IEP process and resulted in a loss of educational benefits. District maintains that Student failed to provide any evidence that District deprived them in any way of their opportunity to participate in the IEP process.

46. Legal Conclusions 1, 35-39, are incorporated herein by this reference.

47. In developing an IEP, the team must consider the following factors: (1) the strengths of the child; (2) the concerns of the parents for enhancing the education of their child; (3) the results of the most recent evaluations of the child; and (4) the academic, developmental and functional needs of the child. (20 U.S.C. § 1414(d)(3); 34 C.F.R. § 300.324(a); Ed. Code, § 56341.1, subd. (a).) In the case of a child whose behavior impedes his or her learning or that of others, the IEP team must consider, when appropriate, "strategies, including positive behavioral interventions, strategies, and supports to address that behavior." (20 U.S.C. § 1414(d)(3)(B)(i); 34 C.F.R. § 300.324(a)(2)(i); Ed. Code, § 56341.1, subd. (b)(1).)

48. Student failed to meet her burden of persuasion that Parents were deprived of a meaningful opportunity to participate in the January 2012 IEP team meeting by the IEP team's failure to consider the required areas prior to developing the IEP. As set for the in Legal Conclusions 36-38, Parents' participation is measured by their opportunity to contribute their concerns, not deficiencies in District's IEP offer. As the record clearly demonstrates, Parents had the opportunity to discuss Student's progress and state their concerns about Student's grades directly to District administrators and teachers, who also

shared their observations of Student and responded to Parents' questions.

Notwithstanding any disputes over the sufficiency of District's offer, Parents participated as IEP team members, as required. Parents had an opportunity to review the IEP after the meetings and elected to sign it the next day. (Factual Findings 32-38.)

49. Student failed to meet her burden of persuasion that Parents were deprived of a meaningful opportunity to participate in the June 2012 IEP team meeting. By this time, Parents were frustrated with District's offered placement and services, and Father submitted a written summary of his concerns which was attached as an addendum to the IEP team report. Although the primary purpose of the IEP meeting was to memorialize Father's request for an NPS, the IEP team addressed Student's progress, goals and placement, and renewed its offer of January 2012. (Factual Findings 42-47.)

50. Student failed to prove by a preponderance of the evidence that Parents were deprived of a meaningful opportunity to participate in the January 2013 IEP. The IEP memorialized extensive discussions between Parents and District about Student's early triennial assessment, her progress on her goals at District as of June 2012, and her academic progress since she started Summit View. Father contributed information about Student's strabismus to the IEP team. Parents asked questions about District's assessment, expressed their concerns about Student's grades. Parents did not have a problem with the goals proposed, but were concerned with the absence of academic goals. Their counsel questioned the absence of goals for note taking and typing. Parents questioned the viability of District's renewed offer of the same public school program, with the minor addition of an hour of collaboration between the general education teacher and SAI. As set forth in Student's Issue 2(e) below, District's failure to produce complete grade reports earlier did not significantly impede Parents's participation. (Factual Findings 91-109.)

STUDENT'S ISSUE 2(E) – FAILURE TO TIMELY PROVIDE ALL OF STUDENT'S EDUCATIONAL RECORDS

51. Student contends that District's failure to timely provide Student's educational records, particularly her grade books, pursuant to Parents' July 12, 2012 request, significantly interfered with Parents' right to participate in the January 2013 IEP.

52. Legal Conclusions 1, 35-39, are incorporated herein by this reference.

53. To guarantee parents the ability to make informed decisions about their child's education, the IDEA grants parents of a child with a disability the right to examine all relevant records relating to their child's "identification, evaluation and educational placement." (20 U.S.C. §1415(b)(1).) Each participating agency must permit parents to inspect and review any education records relating to their children that are collected, maintained, or used by the agency under this part. The agency must comply with a request without unnecessary delay and before any meeting regarding an IEP, or any hearing, or resolution session. (See 34 C.F.R. §300.613(a)) The right to inspect and review education records under this section includes: (1) the right to a response from the participating agency to reasonable requests for explanations and interpretations of the records; (2) the right to request that the agency provide copies of the records containing the information if failure to provide those copies would effectively prevent the parent from exercising the right to inspect and review the records; and (3) the right to have a representative of the parent inspect and review the records. (See 34 C.F.R. §300.613(b).) Although federal regulations to implement the IDEA state that in no case shall educational records be provided more than 45 days after the request has been made, California law states parents have the right to receive copies of all school records within five business days after parents make a request. (34 C.F.R. § 300.613(a); Ed. Code, §56504.)

54. Student failed to prove by a preponderance of the evidence that District's delay in providing historical grade reports significantly interfered with Parents' right to

meaningfully participate in the January 2013 IEP. As memorialized in the January 2012 IEP, Parents were aware of Student's grade changes during the 2011-2012 school year and Student's progress as reflected in her grades. Parents knew that modifications were made. In fall 2011 Parents received notices of failing grades. At the January IEP, Student's grades were discussed. The June 2012 IEP notes recorded Ms. Kleis' representation to Parents that Ms. Yarber's failure to provide accommodations allowed her to modify the grades. At the January 2013 IEP, District's rationale for grading modifications was confusing, and did not provide a clear picture of how Student's academic performance was measured, particularly in view of the conflicting recollections of Ms. Kleis, Ms. Yarber and Student's science teacher, who modified the grade because Student worked hard. Nevertheless, despite District's failure to fully and clearly articulate its grading practices for Student, Parents knew her grades were changed, and more importantly, that Student was struggling, could not organize and complete her work, despite at least two hours a night of one-on-one assistance. The notes of the January 2013 IEP clearly establish that Parents were fully engaged in the meeting and discussions regarding Dr. Boewe's triennial assessments, Student's unique needs, annual goals and progress, understood Student's challenges at school, and were able to contribute their opinions. As such, District's failure to provide historical grade books until after the meeting did not significantly interfere with Parents' participation in the IEP process. (Factual Findings 33, 39, 44, 91-109.)

STUDENT'S ISSUE 2(F) – FAILURE TO TIMELY HOLD AN IEP TEAM MEETING AFTER PARENTS ' SIGNED THE ASSESSMENT PLAN

55. Student contends that District's failure to complete the early triennial assessment within 60 days of receipt of Parents' signed assessment plan was a procedural violation that impeded Parents' right to meaningfully participate in the IEP process. District contends, although it misplaced Parents' consent, that District diligently completed the assessment and scheduled an IEP team meeting as soon as it received it, such that Student

was not denied a FAPE.

56. Legal Conclusions 1, 35-39, are incorporated herein by this reference.

57. School districts must obtain informed parental consent prior to conducting an assessment or reassessment of a child with a disability. (34 C.F.R. § 300.300 (2008).) In order to start the process of obtaining parental consent for a reassessment, the school district must provide proper notice to pupils and their parents. (20 U.S.C. § 1414(b)(1); 20 U.S.C. § 1415(b)(3) & (c)(1); Ed. Code, §§ 56321, subd. (a), 56381, subd. (a).) The notice consists of the proposed assessment plan and a copy of parental procedural rights under the IDEA and companion state law. (U.S.C. §§ 1414(b)(1), 1415(c)(1); Ed. Code, § 56321, subd. (a).) The district must give the parents 15 days to review, sign and return the proposed assessment plan. (Ed. Code, § 56321, subd. (a).)

58. Once parent provides consent to the school district's assessment plan, the school district has 60 days to complete the assessment and hold an IEP meeting with certain exceptions for vacation and other circumstances, including parents' written agreement to extend the 60-day period. (Ed. Code, §§ 56043, 56344(a).)

59. Student failed to prove by a preponderance of the evidence that District's failure to follow the required timelines for assessment significantly deprived them of a meaningful opportunity to participate in the IEP process. The evidence established that Parents' timely delivered, but District misplaced, Parents' authorization. Based upon the date Parents' delivered their authorization, July 2, 2012, District was obligated to complete the assessment and hold an IEP team meeting on or before October 20, 2011. District reminded Parents on October 8, 2011, that it had not received the authorization. Two weeks later, on November 2, 2012, Parents delivered a copy of the signed assessment plan and a release for District to communicate directly to Summit View. On November 19, 2012, Dr. Boewe completed her psychoeducational assessment. District attempted to schedule an IEP team meeting for December 2012, but Parents could not attend until January 2013,

where Parents participated in the IEP. Based upon these facts, Student failed to show how District's delay impeded Parents participation in the IEP process and denied Student a FAPE. (Factual Findings 52-52, 56, 63-64, 66.)

STUDENT'S ISSUE 2(H) – FAILURE TO CONSIDER THE RESULTS OF THE WRITTEN ASSESSMENT REPORT BY STUDENT'S NEUROPSYCHOLOGIST, AT THE MAY 2013 IEP MEETING

60. Student contends that District failed to seriously consider Dr. Davies report at the May 2013 IEP team meeting as required. District maintains that it did carefully consider her report at the May 2013 IEP team meeting.

61. Legal Conclusions 1, 36-41, are incorporated herein by reference.

62. Where a parent obtains an IEE or an evaluation at private expense, the District must consider the results of the evaluation in any decision made with respect to the provision of FAPE to the pupil. (34 C.F.R. § 300.502(c)(1).)

63. Student failed to prove by a preponderance of the evidence that District did not consider Dr. Davies' assessment. District members reviewed Dr. Davies' assessment and engaged in a two hour discussion with Dr. Davies about her assessments and methodology. District's disagreement with Dr. Davies about her findings was reasonable given Dr. Davies reliance on the DSM-IV diagnosis, and relatively weak understanding of educationally-related criteria for SLD. In most respects, Dr. Davies recommendations were largely redundant of District's accommodations with the exception of placement. District did modify the accommodations page for multi-modal learning after reviewing Dr. Davies' report. As such, District's failure to adopt Dr. Davies' recommendation was not evidence of a procedural violation. (Factual Findings 132-154.)

STUDENT'S ISSUE (2)(i) – FAILURE TO HAVE A SPECIAL EDUCATION TEACHER IN ATTENDANCE AT THE MAY 2013 IEP TEAM MEETING

64. Student contends that District failed to have Student's special education teacher from Summit View at the IEP team meeting, and that the presence of a Summit View teacher was essential to discuss goals and services. District maintains that it conducted an appropriate IEP with all necessary members.

65. Legal Conclusions 1, 35-39, are incorporated herein by this reference.

66. School districts are required to include at least one special education teacher of the pupil at the IEP team meeting, or if appropriate, one special education provider of the pupil. (Ed. Code § 56341(b)(3).) The special education teacher team member must have taught the pupil, but is not required to be the pupil's current teacher. (*R.B. v. Napa Valley Unified School Dist.* (9th Cir. 2007) 496 F.3d 932, 940.)

67. Student proved by the preponderance of the evidence that District failed to include the required IEP team members. Ms. Kleis, Student's SAI, was not present. Ms. Rosen, was an experienced and credentialed special education resource specialist familiar with Student, and due to her administration of Student's assessments to determine Student's eligibility and unique need, was an important participant in the IEP team meeting which was primarily convened to discuss Dr. Davies' assessment. However, she had not taught Student, and was only familiar with her from her testing. (Factual Finding 74.) Alternatively, Summit View, Student's special education provider, should have been included. Summit View had previously stated that they do not attend IEP team meetings, but would be available for questions. There is no evidence that District attempted to include them or have them available by phone. Summit View's presence would have been useful because they had important information about Student's present levels of performance regarding three requested goals, reading and writing fluency, and written expression. Further, as described in Issue 8 below, District modified its placement offer of

January 2013, by offering what it referred to as a “collaborative” model where the Student would have a full day of a shared TA or IA in the room, but the general education teacher would still control the curriculum. Without either a District special education teacher that taught Student or her current service provider, Summit View, District did not have a full complement of team members to fully explore amendments to the January 2013 IEP team offer in the area of goals and placement. Notably, although Dr. Boewe did contact Summit View after the meeting, at the IEP meeting District did not set another IEP meeting to complete the discussion about academic goals and to include the required and necessary team members. As such, the exclusion of Student’s special education teacher deprived Parents’ of their right to participate in the IEP process, and denied Student a FAPE. (Factual Findings 133, 147, 149.)

STUDENT’S ISSUES (3)-(5), (7)-(8) – FAILURE TO OFFER FAPE IN JANUARY 2011, JANUARY 2012, JUNE 2012, JANUARY 2013 AND MAY 2013

68. Student contends that District failed to offer a FAPE beginning with its January 2011 initial IEP, and continuing through each successive IEP, by failing to offer appropriate goals to address Student’s needs; and an appropriate program and related services, including specialized academic instruction in an appropriate setting. At the June 2012 IEP Student also contends that District failed to offer FAPE by failing to change the previous IEP, including new goals, despite Student’s lack of progress. At the January 2013 IEP Student also contends District denied Student a FAPE by failing to find Student eligible as a pupil with a SLD, and failing to write any academic goals as a result of finding Student ineligible as a pupil with SLD. At the May 2013 IEP Student also contends that District failed to offer a FAPE by not adopting Dr. Davies’ recommendations for reading and writing fluency goals. District maintains that it provided Student appropriate goals which addressed her unique attention needs so that she could progress in the general education class in the LRE.

FAPE

69. California special education law and the Individuals with Disabilities Education Act (20 U.S.C. § 1400, et seq. (IDEA)) 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. § 1412(a)(1)(A); Ed. Code, §§ 56000, 56026.) FAPE means special education and related services that are available to the child at no charge to the parent or guardian, meet state educational standards, and conform to the child's IEP. (20 U.S.C. § 1401(9); Cal. Code Regs., tit. 5, § 3001, subd. (o).) "Special education" is instruction specially designed to meet the unique needs of a child with a disability. (20 U.S.C. § 1401(29).) "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); Ed. Code, § 56363, subd. (a) [In California, related services are called designated instruction and services].) A child's unique educational needs are to be broadly construed to include the child's academic, social, health, emotional, communicative, physical and vocational needs. (*Seattle Sch. Dist. No. 1 v. B.S.* (9th Cir. 1996) 82 F.3d 1493, 1500, citing H R. Rep. No. 410, 1983 U.S.C.C.A.N. 2088, 2106.)

70. In *Rowley* the United States Supreme Court addressed the level of instruction and services that must be provided to a student with disabilities to satisfy the requirement of the IDEA. Under *Rowley* and state and federal statutes, the standard for determining whether a district's provision of services substantively and procedurally provided a FAPE involves four factors: (1) the services must be designed to conform to meet the student's unique needs; (2) the services must be reasonably designed to provide some educational benefit; (3) the services must conform to the IEP as written; and (4) the program offered must be designed to provide the student with the foregoing in the least restrictive environment. While this requires a school district to provide a disabled child with

meaningful access to education, it does not mean that the school district is required to guarantee successful results. (20 U.S.C. § 1412(a)(5)(A); Ed. Code, § 56301; *Rowley, supra*, 458 U.S. at p. 198.) The Court stated that school districts are required to provide only a “basic floor of opportunity” that consists of the access to specialized instructional and related services, which are individually designed to provide educational benefit to the student. (*Id.* at p. 201.)

71. The Ninth Circuit Court of Appeals has held that despite legislative changes to special education laws since *Rowley*, to date, Congress has not changed the definition of a FAPE articulated by the Supreme Court in that case. (*J.L. v. Mercer Island School Dist.* (9th Cir. 2010) 592 F.3d 938, 950 [In enacting the IDEA 1997, Congress was presumed to be aware of the *Rowley* standard and could have expressly changed it if it desired to do so.].) Although sometimes described in Ninth Circuit cases as “educational benefit,” “some educational benefit” or “‘meaningful’ educational benefit,” all of these phrases mean the *Rowley* standard, which should be applied to determine whether an individual child was provided a FAPE. (*Id.* at p. 950, fn. 10.)

72. An IEP is a written statement for each individual with exceptional needs that include a statement of measurable annual goals, including academic and functional goals, designed to meet the student’s unique needs. (20 U.S.C. § 1414(d)(1)(A); 34 C.F.R. § 300.320(a)(2006); Ed. Code, § 56345, subd. (a).) The IEP must show a direct relationship between the present levels of performance, the goals, and the educational services to be provided. (Cal. Code Regs., tit. 5, § 3040, subd. (c).) There is no requirement that the district revise a student’s goals more frequently than annually absent special circumstances including the failure of the student to make expected progress, the availability of new assessment data, or information provided by the parent regarding anticipated needs of the student. (20 U.S.C. § 1414(d)(4); 34 C.F.R. § 300.324 (b)(1).)

73. As part of the IEP process, the IEP team must consider whether the child

needs assistive technology devices and services. (34 C.F.R. § 300.324(a)(2)(v).) The school district is required to provide assistive technology and devices or services to a pupil with a disability if the IEP team determines that the child needs the device or service in order to receive a FAPE. (*Letter to Anonymous*, 24 IDELR 854 (OSEP 1996). "Assistive technology devices' are defined in the IDEA as any item, piece of equipment, or product system, whether acquired commercially off the shelf, modified or customized, that is used to increase, maintain or improve the functional capabilities of a child with a disability. (34 C.F.R. § 300.5.) "Assistive technology services' are defined as any service that directly assists a child with a disability in the selection, acquisition or use of an assistive technology device. (34 C.F.R. § 300.6.)

74. In resolving the question of whether a school district has offered a FAPE, the focus is on the adequacy of the school district's proposed program. (See *Gregory K. v. Longview School District* (9th Cir. 1987) 811 F.2d 1307, 1314.) A school district is not required to place a student in a program preferred by a parent, even if that program will result in greater educational benefit to the student. (*Ibid.*) For a school district's offer of special education services to a disabled pupil to constitute a FAPE under the IDEA, a school district's offer of educational services and/or placement must be designed to meet the student's unique needs, comport with the student's IEP, and be reasonably calculated to provide the pupil with some educational benefit in the least restrictive environment. (*Ibid.*)

75. An IEP for a disabled child is measured at the time that it was created. (*Adams v. State of Oregon, supra*, 195 F.3d 1141, 1149; *Tracy N. v. Dept. of Educ., State of Hawaii* (D. Hawaii 2010) 715 F.Supp.2d 1093, 1112.)

Least Restrictive Environment

76. In determining the educational placement of a child with a disability a school district must ensure that: 1) the placement decision is made by a group of persons, including the parents, and other persons knowledgeable about the child, the meaning of

the evaluation data, and the placement options, and takes into account the requirement that children be educated in the LRE; 2) placement is determined annually, is based on the child's IEP and is as close as possible to the child's home; 3) unless the IEP specifies otherwise, the child attends the school that he or she would if non-disabled; 4) in selecting the LRE, consideration is given to any potential harmful effect on the child or on the quality of services that he or she needs; and 5) a child with a disability is not removed from education in age-appropriate regular classrooms solely because of needed modifications in the general education curriculum. (34 C.F.R. § 300.116.)

77. To provide the LRE, school districts must ensure, to the maximum extent appropriate: 1) that children with disabilities are educated with non-disabled peers; and 2) that special classes or separate schooling occur only if the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily. (20 U.S.C. § 1412(a)(5)(A); Ed. Code, § 56031; 34 C.F.R. 300.114 (a).) To determine whether a special education student could be satisfactorily educated in a regular education environment, the Ninth Circuit Court of Appeals has balanced the following factors: 1) "the educational benefits of placement full-time in a regular class"; 2) "the non-academic benefits of such placement"; 3) the effect [the student] had on the teacher and children in the regular class"; and 4) "the costs of mainstreaming [the student]." (*Sacramento City Unified School Dist. v. Rachel H.* (9th Cir. 1994) 14 F.3d 1398, 1404 (*Rachel H.*) [adopting factors identified in *Daniel R.R. v. State Board of Ed.* (5th Cir. 1989) 874 F.2d 1036, 1048-1050]; see also *Clyde K. v. Puyallup School Dist. No. 3* (9th Cir. 1994) 35 F.3d 1396, 1401-1402 [applying *Rachel H.* factors to determine that self-contained placement outside of a general education environment was the LRE for an aggressive and disruptive student with attention deficit hyperactivity disorder and Tourette's Syndrome].) If it is determined that a child cannot be educated in a general education environment, then the LRE analysis requires determining whether the child has

been mainstreamed to the maximum extent that is appropriate in light of the continuum of program options. (*Daniel R.R. v. State Board of Ed.*, *supra*, 874 F.2d at p. 1050.) The continuum of program options includes, but is not limited to: regular education; resource specialist programs; designated instruction and services; special classes; nonpublic, nonsectarian schools; state special schools; specially designed instruction in settings other than classrooms; itinerant instruction in settings other than classrooms; and instruction using telecommunication instruction in the home or instructions in hospitals or institutions. (Ed. Code, § 56361.)

Remedies

78. Federal law provides that a court that hears a civil action taken from a special education administrative due process hearing “shall grant such relief as the court deems appropriate.” (20 U.S.C. § 1415(i)(2)(C)(iii); 34 C.F.R. § 300.516(c)(3).) The United States Supreme Court has held that this authority “confers broad discretion on the court” to grant relief that is appropriate in light of the purpose of the IDEA. (*School Committee of the Town of Burlington, Massachusetts v. Department of Education* (1985) 471 U.S. 359, 369 [105 S.Ct. 1996, 85 L.Ed.2d 385].) The broad authority to grant relief extends to the administrative law judges and hearing officers who preside at administrative special education due process proceedings. (*Forest Grove School Dist. v. T.A.* (2009) 557 U.S. _____ [129 S.Ct. 2484, 2494, fn. 11; 174 L.Ed.2d 168].) The fashioning of equitable relief in IDEA cases requires a “fact-specific” analysis. (*Parents of Student W. v. Puyallup School Dist. No.* (9th Cir. 1994) 31 F.3d. 1489, 1497.)

79. School districts may be ordered to provide compensatory education or additional services to a student who has been denied a FAPE. (*Student W. v. Puyallup School Dist.*, *supra*, 31 F.3d 1489, 1496.) The conduct of both parties must be reviewed and considered to determine whether relief is appropriate. (*Id.* at p. 1496.) These are equitable remedies that courts may employ to craft “appropriate relief” for a party. An award of

compensatory education need not provide a "day-for-day compensation." (*Id.* at p. 1497.) An award to compensate for past violations must rely on an individualized assessment, just as an IEP focuses on the individual student's needs. (*Reid ex rel. Reid v. Dist. of Columbia* (D.D.C. Cir. 2005) 401 F.3d 516, 524.) The award must be "reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place." (*Ibid.*).

80. A parent may be entitled to reimbursement for placing a pupil in a private school without the agreement of the school district if the parents prove at a due process hearing that: 1) the school district had not made a FAPE available to the student prior to the placement; and 2) that the private school placement is appropriate. (20 U.S.C. § 1412(a)(10)(C)(ii); 34 C.F.R. § 300.148(c); see also *School Committee of Burlington v. Department of Ed., supra*, 471 U.S. at p. 369 (reimbursement for unilateral placement may be awarded under the IDEA where the school district's proposed placement does not provide a FAPE) and *Florence County School Dist. v. Carter* (1993) 510 U.S. 7, 16 [114 S.Ct. 361, 126 L.Ed.2d 284] (*Carter*) [for purposes of awarding reimbursement as equitable relief, parent's unilateral placement must be generally appropriate, but need not meet all standards of a FAPE].)

81. The private school placement need not meet the state standards that apply to public agencies in order to be appropriate. (34 C.F.R. § 300.148(c); *Carter, supra*, 510 U.S. at p. 14 [despite lacking state-credentialed instructors and not holding IEP team meetings, unilateral placement was found to be reimbursable where the unilateral placement had substantially complied with the IDEA by conducting quarterly evaluations of pupil, had a plan that permitted the pupil to progress from grade to grade, and where expert testimony showed that the pupil had made progress].) However, the cost of reimbursement may be reduced or denied if parents failed to inform the IEP team at the last meeting attended prior to removal of the child from the public school, that they were rejecting the placement

proposed by the public agency to provide FAPE to their child, including stating their concerns and their intent to enroll their child in a private school at public expense; or at least ten (10) business days (including any holidays that occur on a business day) prior to the removal of the child from the public school, the parents did not give written notice to the public agency of the information described in paragraph (d)(1)(i) of this section. (34 C.F.R. § 300.148.)

ANALYSIS OF STUDENT'S ISSUE 3 – FAILURE TO OFFER FAPE AT THE JANUARY 2011 IEP AS OF MAY 28, 2011

82. Student contends that the initial IEP of January 2011 failed to offer Student a FAPE within the two year statutory period which began on May 28, 2011, two years previous to Student's filing of her due process hearing request.

83. The statute of limitations for special education due process claims in California is two years from the date the party initiating the request knew or had reason to know of the facts underlying the basis for the request, consistent with federal law. (Ed. Code, § 56505, subd. (l); see also 20 U.S.C. § 1415(f)(3)(C).) The statute of limitations operates to bar claims based upon facts outside of the two year period. (*J.W. v. Fresno* (9th Cir. 2010) 626 F.3d 431, 444-445; *Breanne C. v. Southern York County School Dist.* (M.D. Pa. 2009) 665 F.Supp.2d 504, 511-512; *E.J. v. San Carlos Elementary School Dist.* (N.D.Cal. 2011) 803 F.Supp.2d 1024, 1026, fn. 1.) This rule does not apply if the parent was prevented from requesting a due process hearing: 1) because of specific misrepresentations by the local education agency that it had solved the problem forming the basis for the request, or 2) the local education agency withheld information from the parent that was required to be provided. (Ed. Code, § 56505, subd. (l)(1) & (2), 20 U.S.C. § 1415(f)(3)(D).)

84. While the adequacy of the IEP document is evaluated from the perspective of the IEP team at the time it was written, "the implementation of the educational program is an ongoing, dynamic activity, which obviously must be evaluated as such." (*O'Toole v.*

Olathe Unified School Dist. No. 233 (10th Cir. 1998) 144 F.3d 692, 702.) Incidents occurring within the statute of limitations regarding failure to implement an IEP as written, or of notice of the need to reassess or modify an IEP, will support a due process claim. However, a parent may not bring a due process claim challenging the appropriateness of an IEP that was created outside the statute of limitations in the absence of an implementation issue, although the IEP document was in effect within the statute of limitations, as special education law does not recognize the doctrine of continuing violations as an exception to the two year statute of limitations. (See *J.L. v. Ambridge Area School Dist.* (W.D.Pa. 2008) 622 F.Supp.2d 257, 268-269.)

85. Here, while Student is entitled to proceed on her claim that District should have convened an IEP team meeting due to Student's failure to progress within two years prior to the date Student filed, any claim that an IEP formed outside the statute of limitations failed to offer appropriate placement and services is barred by the statute of limitations. There is no evidence of an exception that would support an exception to the two-year time period. As such, Student's Issue 3 is barred by the statute of limitations and will not be considered.

ANALYSIS OF STUDENT'S ISSUE 4 – FAILURE TO OFFER FAPE IN THE JANUARY 2012 IEP

86. Legal Conclusions 1, 69-81, are incorporated herein by this reference.

87. Student proved by a preponderance of the evidence that the January 2012 IEP offer of placement and services was not an offer of a FAPE. Although Student scored proficient on her statewide exams at the end of the 2010-2011 school year, as Ms. Kleis reported, Student's attention deficits were severe. The evidence showed that District lowered both her attention and organization goals, without any data on her progress, and modified her grades, without using any consistent standard for doing so. There was evidence that an IA or TA was provided. But these services were not set forth in the IEP,

and the frequency or duration of these services were unknown. Student's teachers noted her deficits, and attempted to redirect her, but as Student capably reported, neither her teachers, nor the IA consistently provided the assistance she required in the large general education classes. Nor was there evidence that the SAI class was helping Student to get her work completed and organized. District offered no additional meaningful supports. Dr. Boewe's accommodations and suggestions for assistive technology, like word processing, were thoughtful and appropriate, but District did not ensure that Student was receiving accommodations, and did not provide Student any training so that she could access word processing as a way to compensate for her slow output.

88. District attempted to characterize the severity of Student's disability as temporary, but the evidence established that Student's attention deficits were ever present. At the time of the January 2012 IEP, District was aware that Student was having difficulty functioning in a large general education classroom and completing her work. Throughout this time Student required one-on-one assistance either from her Parents or from a tutor to access her classroom instruction, and even with the additional after school assistance, could not complete her work. Student may have been academically capable, but with her severe attention deficits she could not handle the volume or the large class size. As such, District did not provide Student an offer of FAPE.

89. Student argues that Student required other goals to make progress, including academic goals for reading or writing fluency, but failed to establish with any specificity how the academic goals would differ from her attention goals, or would address her unique attention or vision processing challenges, as of the January 2012 IEP. Although Student scored in the low average on standardized measures of reading and writing fluency, Student failed to provide sufficient evidence that goals were required for Student to make progress because her speed and slow deliberation were not academic but were better addressed by her existing goals, accommodations and program modifications, if

properly implemented in an appropriate setting. (Factual Findings 1-39.)

ANALYSIS OF STUDENT'S ISSUE 5 – FAILURE TO OFFER FAPE IN THE JUNE 2012 IEP

90. Legal Conclusions 1, 69-81, are incorporated herein by this reference.

91. Student contends that at the June 2012 IEP team meeting District failed to make any changes to the previous IEP despite Student's lack of progress and low grades, and failed to offer an appropriate program and related services, including specialized academic instruction in an appropriate setting. Student met her burden of proving by a preponderance of the evidence that District failed to make an offer of FAPE in the June 2012 IEP by failing to make any changes from the previous IEP. Parents requested the meeting mainly to share their concerns and inform District of their intent to place Student at an NPS and to request District to make the referral. At the time of the IEP team meeting Student was receiving an F in ELA and a D in Science. At the meeting Ms. Kleis acknowledged that Ms. Yarber was not implementing certain accommodations and that she would adjust Student's grade. District offered an additional goal to make sure that Student did not have to take orally presented quizzes and tests. District admitted its inability to properly coordinate with Student's general education teachers, and monitor her accommodations, and yet did not offer any additional assistance or programmatic options. In sum, instead of making modifications to Student's educational program by providing an appropriate placement so that she could progress, District changed her grades. (Factual Findings 39, 42-48.)

ANALYSIS OF STUDENT'S ISSUE 7 – FAILURE TO OFFER FAPE IN THE JANUARY 2013 IEP

92. Student contends that Student met the criteria for SLD in January 2013 and District's failure to designate Student as SLD in January 2013 denied her a FAPE by also depriving her of academic goals. In addition, Student contends that District failed to offer

Student a program and related services in an appropriate setting. District maintains that Student did not qualify as SLD, and regardless of Student's eligibility, District's offer addressed her unique needs and proposed an appropriate placement in the least restrictive environment.

93. Legal Conclusions 1, 26-34, 69-81, are incorporated herein by this reference.

94. Student failed to prove that the reason that District denied Student a FAPE was because she was not designated as a pupil with SLD. Student relies on Dr. Davies' assessment report and expert testimony to meet her burden of proof. As set forth in the analysis of District's Issue 1 and Student's Issue 6 above, Dr. Davies, whose testimony on her application of the WJ-III COG and ACH to the severe discrepancy model was persuasive, was not equally persuasive or credible when using her own assessment to determine special education eligibility. While Dr. Davies provided useful and important insights about visual processing deficits related to Student's strabismus, Dr. Davies' assessment did not advance Student's burden of persuasion that Dr. Boewe's assessment was inappropriate or that the IEP did not address Student's unique needs. Dr. Davies' opinion from the one low reading fluency score that Student had a SLD, was not verified by Student's performance, or corroborated by Parents preferred placement, Summit View, in its assessment where Student's reading fluency was average. Likewise, Dr. Davies failed to corroborate Student's written expression scores with classroom writing samples. At hearing, Mr. Legg testified that Student's written organization was challenging but he only reported attention challenges to Dr. Boewe. (Factual Findings 60, 115-145, 159-154.)

95. Student's contention that District's failure to designate Student as SLD resulted in her IEP containing inappropriate academic goals was not persuasive. Other than reading and writing fluency goals, Student did not recommend academic goals until the May 2013 meeting where counsel suggested a written expression goal. As set forth in Legal Conclusions 69-70, once made eligible as a pupil with special needs under any

eligibility category, Student's unique needs, not her eligibility designation, guide goals, services and placement. All teacher reports through the date of the January 2013 meeting, even reports from Summit View, say basically the same thing about Student: Student is academically capable but her attention deficits impede her access to education. Although her attention issues may be compounded by visual processing weaknesses, no evidence was introduced that the visual processing challenges required goals or accommodations that were materially different than that recommended by Dr. Boewe and included in District's IEP's.

96. Student met her burden of persuasion that District's offer of placement in general education with supports was not a FAPE. While general education is the least restrictive environment on the continuum of placements, it is not always appropriate under Rowley and Rachel H. Student's general education teachers were not implementing Student's IEP in their classrooms and there was no evidence they would be able to do so given the class size, the failure to collect data, and the ongoing discussions of these Student's unabated difficulties in the IEP team meetings. District's offer of more collaboration between the general education teachers and the SAI, might have been an improvement, and it might still have a TA or IA (which was not written into the IEP) but given the history of Student's public school placement with 30-35 other pupils, Student would be left unattended to start projects or to focus beyond her five minute attention limit. Student's inability to attend to a traditional lecture format for more than a few minutes was well documented. District's intention of keeping Student with her peers was laudable, but offering more collaboration was not sufficient. Student required assistance to get started, and to focus. At this point it was well documented that she would need modifications, such as shortened work assignments, instead of grade changes to remediate a work load that Student could not manage, and which required after school one-on-one assistance to complete. District's continued offer of assistive technology was also deficient

as it never provided any training for Student to use word processing to help her with writing fluency. There was no explanation for this and training could have been provided as part of her SAI class. Student performed better, albeit with continuing attention difficulties, in a small group setting, where she continued to struggle with her attention and organization but her needs could be addressed without undue delay by a teacher with aide support, and where her organization and attention challenges could be addressed as part of her class, not in a separate SAI class, and without requiring two hours of one-on-one assistance each night.

97. In sum, Student met her burden of proving that District failed to offer an appropriate program and services in its IEP offer of January 2013. However, this conclusion is not based on the failure to label Student as eligible under the SLD category, but instead resulted from the IEP's failure to address Student's unique needs, particularly in the area of attention. (Factual Finding 1-109,112.)

ANALYSIS OF STUDENT'S ISSUE 8 – FAILURE TO OFFER FAPE IN THE MAY 2013 IEP

98. Student contends that District failed to offer Student a FAPE at the May 2013 IEP due to its failure to adopt Dr. Davies' goals in reading and writing fluency goals, and to offer an appropriate program and related services.

99. Legal Conclusions 90-97 are incorporated herein.

100. As previously discussed in Issue 7, above, Student failed to show that Dr. Davies' reading and writing fluency goals were necessary for Student to receive a FAPE. However, for the same reasons as discussed regarding Issue 7, the offer of placement and services as of the May of 2013 IEP was not reasonably calculated to provide Student with some educational benefit, as it inadequately addressed her attention needs. At this time District offered Student what they referred to as a collaborative model where a TA or IA (various personnel) would be in attendance during all academic classes, but not assigned

to her. Student would still be part of a large 30-35 person general education classroom and the curriculum would be unmodified and directed by the general education teacher. Based upon Issue 2 (i), District did not have an appropriately constituted IEP team for Parents' to meaningfully participate and on that ground the offer denied Student FAPE. In addition, while District's May 2013 offer acknowledges and attempts to deal with the communication problems between the general education teacher, the Parents and the SAI, and provide consistent in-class support, the IEP offer was not an offer of FAPE. It did not address Student's attention needs in a large relatively unstructured class where she could not get started without help, or maintain focus for five minutes, and her inability to keep pace with the core curriculum as measured by her difficult progress on goals which were lowered over time, and her need for one-on-one after school support. There was no restriction as to the number of Student's served, so that Student will still be left unattended. Her workload would be high, but left to the general education teacher, not the SAI, to shorten or "chunk" the assignments, which was not effective in the past, resulted in arbitrary grade modifications, and required at least two hours one-on-one after school support or tutoring. (Factual Findings 132, 153, 156-157).

COMPENSATORY EDUCATION AND TUITION REIMBURSEMENT

101. Based upon the Factual Findings in this case and the Legal Conclusions above, an award of compensatory education and tuition reimbursement is reasonable. District's failure to provide a FAPE required Parents to retain a tutor during the statutory period in an amount of \$1,620. Although it is generally preferable for pupils, like Student, to be educated with their nondisabled peers on a general education campus, Parent's election to place Student in a more restrictive environment, Summit View, was proper, given the circumstances. Parents timely notified District of their private placement, and fully cooperated with District in all matters. Summit View was appropriate within the

meaning of *Carter* for purposes of reimbursement. Accordingly, because Student demonstrated she was denied a FAPE in Issues 2(a), 2(i), 4, 5, 7 and 8, reimbursement of Summit View tuition for the 2012-2013 school year and the 2013-2014 school year through the date of Decision is equitable. Parents spent \$30,090 dollars for Student's Summit View tuition for the 2012 – 2013 school year. Parents transported Student round trip by car 63.6 miles daily, (four trips daily of 15.9 miles each), so that Student could attend Summit View. Parent's total cost for the 2013-2014 school year is \$30,600 dollars, or 3,060 dollars per month, beginning August 26, 2013.

ORDER

1. District's January 2013 psychoeducational and academic assessment was appropriate and Student is not entitled to an IEE at public expense

2. District shall reimburse Parents for tutoring services in an amount not to exceed \$1,620 dollars, within 60 days of the date of this Decision;

3. District shall reimburse Parents for tuition at Summit View for the 2012-2013 school year in an amount not to exceed \$30,090 dollars, and the 2013-2014 school year, through the date of this Decision, in an amount not to exceed \$3,090 dollars per month, within 60 days of the date of this Decision;

4. District shall reimburse Parents for the cost of transporting Student by automobile to Summit View for no more than 63.6 miles daily, (four trips daily of 15.9 miles each) for the 2012-2013 school year, and for the 2013-2014 school year, from August 26, 2013 through the date of this Decision, at the authorized IRS rate, within 60 days of the date of this Decision.

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. District prevailed on District Issue 1, and Student's Issues 2 (b), 2 (c), 2 (d), 2 (e), 2(f) ,2 (g), 2 (h), 3 and 6. Student prevailed on Student's Issues 2 (a), 2 (i), 4, 5, 7, 8.

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 90 days of receipt of this Decision. (Ed. Code, § 56505, subd. (k).)

Dated: December 23, 2013

/s/

EILEEN M. COHN

Administrative Law Judge

Office of Administrative Hearings